DECISIONS AND ORDERS

OF THE

NATIONAL LABOR RELATIONS BOARD

VOLUME 283

FEBRUARY 24, 1987, THROUGH MAY 29, 1987

PUBLISHED BY THE BOARD

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1989

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

READEX FICHE best copy available

NATIONAL LABOR RELATIONS BOARD

Members of the Board

DONALD L. DOTSON, *Chairman*

WILFORD W. JOHANSEN — MARSHALL B. BABSON

JAMES M. STEPHENS — MARY MILLER CRACRAFT

Chief Counsels of Board Members

CHARLES M. WILLIAMSON

MICHAEL J. FOGERTY — ROSEMARY PYE

ELINOR H. STILLMAN — ANNE G. PURCELL

JOHN C. TRUESDALE, *Executive Secretary*

, *Solicitor*

MELVIN J. WELLES, *Chief Administrative Law Judge*

DAVID B. PARKER, *Director of Information*

Office of the General Counsel

ROSEMARY M. COLLYER, *General Counsel*

JOHN E. HIGGINS, JR., *Deputy General Counsel*

JOSEPH E. DESIO
Associate General Counsel
Division of Operations Management

ROBERT E. ALLEN
Associate General Counsel
Division of Enforcement Litigation

HAROLD J. DATZ
Associate General Counsel
Division of Advice

ERNEST RUSSELL
Director
Division of Administration

CONTENTS

Table of Cases..... VII
Cross-Reference..... XII
Decisions and Orders of the Board..... 1

This volume includes all important Decisions and Orders issued by the Board during the period February 24, 1987, through May 29, 1987.

Some Board Decisions granting routine motions for summary judgment contain nothing of precedential value and are not included in this volume. Copies of such Decisions can be obtained from the NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

The page numbers of Board Decisions that carry pamphlet numbers may be found by referring to the Cross-Reference which appears immediately after the Table of Cases.

NOTE: The Board Decisions cited herein which contain the volume and pamphlet number, rather than the volume and page number, may be located in the Table of Cases or the Cross-Reference table of the particular volume cited.

TABLE OF CASES

PAGE

A. J. Ross Logistics, 22–CA–14209 410
A.M.A. Leasing, 13–CA–24614, 13–CB–10794 1017
A. P. Whitaker & Sons, see Laborers Local 133 (Whitaker & Sons)
A.S.C. Constructors, see Buck Brown Contracting Co.
A T & T Information Services, see Communications Workers Local 11509 (A T & T)
Achilles Construction Co., 29–CA–12015 87
Acme Roofing Co., 36–CA–4402 139
Adair Standish Corp., 7–CA–25973 668
Allied Riggers, 9–CA–18903 ..... No. 5*
American Postal Workers (Postal Service), 6–CB–6862(P) 722
American Steel Warehousing, 14–CA–18332 293
American Thoro-Clean, 13–CA–21389 1107
American Thoro-Clean, 13–CA–22573 1120
ARA Services, 16–RC–8811 602
Armstrong Rubber Co., 26–CA–11586 625
Artcraft Ornamental Iron Co., 9–CA–19591 138
Asociacion Hospital del Maestro, 24–CA–5245 419
Asplundh Tree Expert Co., 9–RC–14834 1
Associated General Contractors of Massachusetts, see Laborers Local 22 (AGC of Massachusetts)
Atlanta Dairies Cooperative, 10–RC–13206 327
Auto Workers Local 128 (Hobart Corp.), 8–CB–5197 1175
Auto Workers Local 449 (National Metalcrafters), 33–CB–2043 182
Auto Workers Local 2017 (Federal Mogul), 7–CB–6509 799
B. R. III, Inc., see Custom Restaurant Corp.
Bailey Distributors, 2–CA–18022 647
Bates Nitewear Co., 11–CA–11785–1 1128
Batesville Casket Co., 25–UC–137 795
Baton Rouge Hospital, 15–CA–8016, 15–RC–6750 192
Benkiser Electric, 32–CA–8302 748
Bentley-Jost Electric Corp., 30–CA–9266 564
Besco Coating Inc., see Better Building Supply Corp.
Best Plumbing & Supply Co., 28–CA–5703–3 1167
Betances Health Unit, 2–CA–17628 369
Bethlehem Steel Corp., 5–CA–16582 254
Better Building Supply Corp., 19–CA–11908 93
Blount Bros. Corp., see Teamsters Local 328 (Blount Bros.)
BMD Sportswear Corp., 29–CA–11824–1, 29–RC–6390 142
Boise Cascade Corp., 18–CA–9290–1 462
Bowman Enterprises, see Dane County Dairy
Brinks, Inc. of Florida, 12–CA–10875 711
Broadcasting Employees NABET Local 11 (National Broadcasting), 1–CD–782 417
Buck Brown Contracting Co., 31–CA–10035 488
Burkart Foam, 14–CA–17995 351
C.S.E. Contract Cleaning, 1–CA–23800 641
Cablevision Industries, 3–CA–12830 22
Cal-Western Transport, 21–CA–24322 453
California Beverage Co., 20–RC–15989 328
California Nevada Golden Tours, 32–CA–5967, 32–CB–1637 58
California Portland Cement, see Calmat Co.
Calmat Co., 31–CA–15662 1103
Carpenters Local 283 (NISCO Nuclear), 10–CB–4740 877
Carpenters Local 316 (Thornhill Construction), 32–CC–335 81
Carpenters Local 720 (National Maintenance), 15–CB–3197 617
Cedar Rapids Building Trades Council (Siebke-Hoyt), 18–CC–1116 1155

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB. Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

Checker Taxi Co., see Production Workers Local 707 (Checker Taxi)
Chipman Freight Services, see Teamsters Local 70 (Chipman Freight)
Chuck White Buick, 13–CA–26360 ..... No. 81*
Commercial Contracting Co., 10–CA–21930 784
Communications Workers Local 11509 (A T & T), 21–CB–9693 957
Communications Workers Local 11509 (Pacific Bell), 21–CB–9703 1143
Consolidated Management Services, 29–CA–12584 ..... No. 94*
Constructive Sheet Metal, 7–CA–23493 1069
Continental Radiator Corp., 7–CA–23796 234
Cooper Industries, 26–CA–11690 323
Coors Distributing Co. of San Jose d/b/a, see California Beverage Co.
Coos-Bend, Inc. d/b/a, see Sawmill Restaurant
Country Boy Markets, 16–CA–12544 122
Country Boy Mr. "D" Corp. d/b/a, see Country Boy Markets
Cranberry Mall Shop 'N Save, see Food & Commercial Workers Local 23 (Cranberry Mall)
Crest Mark Packing Co., 13–CA–22541 999
Culmtech, Ltd., 4–CA–15595 163
Custodis-Cottrell, Inc., 10–CA–21199 585
Custom Restaurant Corp., 6–CA–18604 ..... No. 14*
Daily Heating, Inc., 7–CA–26393 ..... No. 115*
Dane County Dairy, 30–CA–8309 ..... No. 36*
Daniel's Pallet Service, 7–CA–24270(1) 34
David Wolcott Kendall Memorial School a/k/a, see Kendall School of Design
Davlan Engineering, 14–CA–16116, 14–RC–9383 803
Decor Noel, Inc., 26–CA–11307 911
Delta Gas, 15–CA–9809, 15–RC–7190 391
Dickinson-Iron Agency, 30–CA–9222 1029
Dingy Corp. d/b/a, see F/V Comet
Duane Bowman Jr. & Associates, see Dane County Dairy
Eagle Fiber Fuels Mfg., see Dickinson-Iron Agency
Eatontown Senior Care Center, 22–CA–14799 ..... No. 157*
Electrical Workers IBEW Local 113 (Pride Electric), 27–CB–2284 39
Electronic Technicians Local 1553 (Hughes Aircraft), 31–CD–295 1089
Evergreen Roofing, see Better Building Supply Corp.
F. E. Wray, Inc. d/b/a, see Roto Rooter
F/V Comet, 1–CA–24311 ..... No. 131*
Federal Mogul Corp., see Auto Workers Local 2017 (Federal Mogul)
Fibreboard Corp., 32–CA–6848, 32–RD–608 1093
Food & Commercial Workers Local 23 (Cranberry Mall), 6–CP–421 116
Frank Chervan, Inc., 5–CA–17608 752
General Engineering Co., 20–CA–20793 ..... No. 150*
General Portland Inc., 16–CA–11785 826
Glenwood Inc. d/b/a, see Country Boy Markets
Glover Bottled Gas Corp., 29–CA–12585 656
Goodie Brand Packing Corp., 2–CA–18205 673
Gould Trust d/b/a Gould Center, see Carpenters Local 316 (Thornhill Construction)
Grace Fashions, 22–CA–14035 842
Gracinda Fashions a/k/a, see Grace Fashions
Gray Line Scenic Tours d/b/a, see California Nevada Golden Tours
Great Lake, Inc., see Continental Radiator Corp.
Great Lakes Oriental Products, 13–CA–25165 99
Greenwood Trucking, 17–CA–12976 789
Hahn Motors, 4–CA–13275 901
Handleman Co., 20–CA–19388 451
Hap Michener, 6–CA–17717 ..... No. 49*

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

Harry's Cafe, 18–CA–9885 ..... No. 121*
Health Care Housekeeping Systems, see Eatontown Senior Care Center
Hill-Rom Co., see Batesville Casket Co.
Hobart Corp., see Auto Workers Local 128 (Hobart Corp)
Hohn Industries, 3–CA–13209 71
Hudson Valley Hotels, see Quality Inn Albany
Hughes Aircraft Co., see Electronic Technicians Local 1553 (Hughes Aircraft)
Imperial Transportation Corp., see Hap Michener
Interstate Food Processing, 1–CA–22743 303
Intersystems Design Corp., 15–CA–8730 ..... No. 109*
Jenkins Index Corp., 21–CA–21994 457
Jewish Day School of Greater Washington, 5–RC–11219 757
Jhirmack Enterprises, 20–CA–16935 609
JMC Transport, 9–CA–17694 554
Johnson Bros. Wholesale Liquor Co., see Teamsters Local 792 (Johnson Bros.)
Joseph De Rario, DMD, P.A. 22–CA–14083 592
K & M Electronics, 1–CA–23014 279
Kargard Industries, 30–CA–9366 331
Ken Hash Construction, 19–CA–15705 822
Kendall School of Design, 7–CA–17837 ..... No. 44*
L.C.L. Transit Co., see Teamsters Local 579 (L.C.L. Transit)
L. E. McGraw Construction, 32–CBD–98 598
Laborers Local 22 (AGC of Massachusetts), 1–CD–759–1 605
Laborers Local 133 (Whitaker & Sons), 1–CP–348 918
LDM Roofing d/b/a, see Acme Roofing Co.
Lear Siegler, Inc. d/b/a, see Safelite Glass
Leeward Auto Wreckers, 37–CA–1969(E) 574
Lemco Construction, 10–RC–13029 459
Lenape Products, 22–CA–13631 178
Letter Carriers (Postal Service), 10–CB–4823(P) 644
Lexington Oil Corp., see American Steel Warehousing
Litton Systems, 18–CA–7323 973
Lo-Pri Plumbing, 5–CA–8242 1076
Long Stretch Youth Home, 5–CA–16242 781
Longshoremen ILA Local 1426 (Waterfront Services), 11–CB–1407 1042
Louisiana Energy & Development Corp., see Delta Gas
Louisiana-Pacific Corp., 20–CA–19070 1079
Louisiana-Pacific Corp., see Fibreboard Corp.
M. A. Mortenson Co., 12–CA–1239 ..... No. 164*
MacDonald Miller Co., 19–CA–16489(E) 676
Machinists District 94 (McDonnell Douglas), 31–CB–4259 881
MAJAJ Bowman, Inc., see Dane County Dairy
Marico Enterprises, 2–CA–21619 726
Martin Marietta Energy, 10–CA–21503 173
Martin of Mississippi, 26–CA–10324 258
McDonnell Douglas Co., 28–CA–8428 707
McDonnell Douglas Corp., see Machinists District 94 (McDonnell Douglas)
MCI Mining Corp., 9–CA–23052–1 698
Micro-Chart Co., 9–CA–23251–1 1064
Middle Earth Graphics, 7–CA–24013(1) 1049
Mission Industries, 31–RD–1032 1027
Mo's West, 36–RD–1097 130
Mutual Redevelopment Houses, 2–CA–21851 ..... No. 173*
National Broadcasting Co., see Broadcast Employees NABET Local 11 (National Broadcasting)
National Maintenance Corp., see Carpenters Local 720 (National Maintenance)

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

National Metalcrafters, see Auto Workers Local 449 (National Metalcrafters)
Natkin & Co., see Plumbers Local 162 (Natkin & Co.)
Nazareth Regional High School, 29–CA–9978 763
New Horizons for the Retarded, 3–CA–12852 1173
New Rendezvous Restaurant, 32–CA–8208 ..... No. 32*
New York Post Corp., 2–CA–17905 430
News Group Publications, see New York Post Corp.
Nick-Monroe, Inc., see Custom Restaurant Corp.
NISCO Nuclear Installation Services, see Carpenters Local 283 (NISCO Nuclear)
Northern Air Freight, see Teamsters Local 851 (Northern Air)
Northern Star Realty Co., 29–RC–6731 1159
Oil Workers Local 1–591 (Texaco Refining), 19–CB–5822 2
Oil Workers Local 1–591 (Texaco Refining), 19–CB–5952 5
Omni International Hotel, 7–RC–17825 475
OPC Holdings, see Jenkins Index Corp.
Operating Engineers (Stone & Webster), 39–CB–597–1 734
Osborn Co., see Carpenters Local 316 (Thornhill Construction)
Otis Elevator Co., 22–CA–8507 223
P. Alexander & Son Construction, 2–CA–21915 ..... No. 174*
P.I.E. Nationwide, 7–CA–25346 965
Pacific Bell, see Communications Workers Local 11509 (Pacific Bell)
Pacific Southwest Container, 32–RC–1829 79
Park-Ohio Industries, 8–CA–12702 571
Peerless Publications, 4–CA–6985 334
Pence Electric Co., 9–CA–23489 ..... No. 172*
Perini Corp., see Laborers Local 22 (AGC of Massachusetts)
Plumbers Local 162 (Natkin & Co.), 9–CB–6470–4 1160
Pony Express Courier Corp., 4–CA–15151 868
Postal Service, 27–CA–9168–P 8
Postal Service, see American Postal Workers (Postal Service)
Postal Service, see Letter Carriers (Postal Service)
Pottstown Mercury, see Peerless Publications
Pottsville Bleaching Co., 4–CA–15420 359
Preferred Solid Waste Systems, see Vulcan Trailer Mfg. Co.
Pride Electric, see Electrical Workers IBEW Local 113 (Pride Electric)
Prince Trucking Co., 9–CA–23189 806
Production Workers Local 707 (Checker Taxi), 13–CC–1159 340
Quality Inn Albany, 3–CA–12955 1146
R-B Rentals, see JMC Transport
Reliable Janitorial, 27–CA–9558 ..... No. 26*
Rich-Morrow Insurance Agency, see Artcraft Ornamental Iron Co.
Robert's Tours, 37–CA–1889 13
Roebling Wire Products, 4–CA–16057 ..... No. 27*
Roto Rooter, 32–CA–6880 771
Safelite Glass, 32–CA–6566 929
Salisbury Hotel, 2–CA–17955 685
Sawmill Restaurant, 36–CA–4857 537
Schurpack, Inc., 17–CA–12854 188
Setterlin Co., 9–CA–20915–1(E) 810
Siebke-Hoyt & Co., see Cedar Rapids Building Trades Council (Siebke-Hoyt)
Sixpence Inns of America, 21–CA–25000 ..... No. 63*
Southwest Gas Corp., 28–CA–8446 543
Southwest Insulation, 28–CA–8651 ..... No. 166*
Sparkling Laundry, 29–CA–12669 ..... No. 105*
St. Barnabas Hospital, 2–RD–1147 472

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

Starlite Fashions, see Grace Fashions
State Bank of India, 2–CA–19329 266
Stone & Webster Engineering Corp., see Operating Engineers (Stone & Webster)
Stor-Rite Metal Products, 25–CA–17234 856
Super Valu Stores, 27–UC–89 134
Sussex Properties, 10–CA–21425 896
Suzan Knitwear Corp., see BMD Sportswear Corp.
Sweet William Restaurant, see Custom Restaurant Corp.
Synergy Gas Corp. a/k/a, see Glover Bottled Gas Corp.
System Electric Co., 21–CA–21572 650
Systems Engineering Corp., 5–CA–18206 263
Teamsters Local 70 (Chipman Freight), 32–CC–1025 343
Teamsters Local 328 (Blount Bros.), 30–CB–2126 779
Teamsters Local 579 (L.C.L. Transit), 30–CB–2403 548
Teamsters Local 792 (Johnson Bros.), 18–CB–1590 111
Teamsters Local 851 (Northern Air), 29–CB–6277 922
Tero-Technology, see Carpenters Local 720 (National Maintenance)
Terpening Trucking Co., 3–CA–11101, 3–CB–4081 444
Texaco Refining & Marketing, see Oil Workers Local 1–591 (Texaco Refining)
Thornhill Construction, see Carpenters Local 316 (Thornhill Construction)
Tibbetts Mechanical Contractors, see Plumbers Local 162 (Natkin & Co.)
Tocco Division, see Park-Ohio Industries
Trico Industries, 6–CA–18816 848
Triple A Maintenance Corp., 29–CA–11100 44
Twistex, Inc., 1–CA–23472 660
UARCO Inc., 21–CA–24219 298
Unico, Ltd., see American Thoro-Clean
United Steel Erectors, 16–CA–12440 314
United Supermarkets, 16–CA–8650 814
United Technologies, see Otis Elevator Co.
Universal Paper Goods Co., see Jenkins Index Corp.
Upstate Coca Cola, 3–CA–13133, 3–CB–4858 532
Vic's Markets d/b/a Cranberry Mall Shop 'N Save, see Food & Commercial Workers Local 23 (Cranberry Mall)
Vulcan Trailer Mfg. Co., 10–CA–21706 480
W. B. Skinner, Inc., 32–CA–5053 989
W. G. Diehl Distributing Co., 8–CA–17626–1 524
Wagner Division, see Cooper Industries
Waterfront Services, see Longshoremen ILA Local 1426 (Waterfront Services)
Western County Restaurant Management, see Custom Restaurant Corp.
Wisconsin Bell, 30–RD–858 1165
Yellow Cab Co., see Production Workers Local 707 (Checker Taxi)
Yusuf Mohamad Excavation, 12–CA–12053 961

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

CROSS-REFERENCE

Advance Sheet Numbers and Volume Page Numbers

No.	Page	No.	Page	No.	Page	No.	Page
1	8	47	314	93	617	139	896
2	13	48	298	94	*	140	877
3	22	49	*	95	641	141	901
4	142	50	323	96	644	142	911
5	*	51	327	97	647	143	881
6	34	52	328	98	676	144	973
7	1	53	331	99	650	145	922
8	39	54	334	100	656	146	957
9	44	55	359	101	685	147	961
10	2	56	340	102	660	148	965
11	5	57	343	103	673	149	989
12	58	58	351	104	668	150	*
13	71	59	369	105	*	151	999
14	*	60	430	106	757	152	1017
15	79	61	444	107	698	153	1042
16	81	62	391	108	707	154	1027
17	87	63	*	109	*	155	1076
18	93	64	410	110	711	156	1049
19	99	65	451	111	722	157	*
20	111	66	453	112	726	158	1064
21	116	67	457	113	748	159	1069
22	122	68	459	114	734	160	1029
23	130	69	462	115	*	161	1079
24	134	70	417	116	763	162	1089
25	163	71	419	117	771	163	1143
26	*	72	472	118	795	164	*
27	*	73	475	119	779	165	1146
28	138	74	480	120	781	166	*
29	139	75	488	121	*	167	1093
30	182	76	524	122	799	168	1103
31	173	77	532	123	856	169	1107
32	*	78	537	124	803	170	1120
33	178	79	543	125	752	171	1175
34	234	80	548	126	784	172	*
35	188	81	*	127	789	173	*
36	*	82	571	128	806	174	*
37	192	83	554	129	810	175	1155
38	254	84	564	130	814	176	1159
39	263	85	574	131	*	177	1128
40	223	86	592	132	822	178	1160
41	266	87	598	133	826	179	1165
42	258	88	585	134	842	180	1167
43	279	89	602	135	848	181	1173
44	*	90	605	136	929		
45	293	91	609	137	868		
46	303	92	625	138	918		

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

Asplundh Tree Expert Co. *and* Teamsters Union Local No. 957, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 9–RC–14834

DECISION AND DIRECTION OF SECOND ELECTION

23 February 1987

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 16 January 1986[1] and the hearing officer's report recommending disposition of them.[2] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 73 for and 93 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations, and finds that the election must be set aside and a second election held.

In adopting the hearing officer's recommendation that the election be set aside, we agree with the conclusion that a material or prejudicial breach of the election stipulation occurred, preventing the holding of a fair election. The stipulation provided that "Each party hereto will be allowed to station an equal number of authorized observers . . . at the polling places during the election . . . ." At no time prior to the day of the election was the Petitioner informed that the Employer would be stationing more than one election observer at any of the three polling places used in the election.[3] The Petitioner first learned of the Employer's intention to use two observers at one of the polling places when its business representative arrived at the site in question, and discovered 15 to 30 minutes before the polls opened that the Employer had two observers at that location.[4] When the business representative protested the fact that the Employer had stationed a second observer at this site, the Board agent merely stated that the Board agent in charge of the election was at another polling site and that the Petitioner could file an objection if he objected to the extra observer.

On this evidence, we find that the Petitioner was not "allowed to station an equal number of authorized observers . . . at the polling places during the election," as provided in the stipulation, and that this breach was sufficiently material or prejudicial to require the setting aside of the election.[5]

We find the instant case distinguishable from *Best Products Co.*, 269 NLRB 578 (1984), affd. 765 F.2d 903 (9th Cir. 1985), in that the objecting party there was informed approximately 15 to 30 minutes prior to the opening of the polls that it could select an additional observer but declined to do so. Although here, too, the Petitioner's business representative learned some 15 to 30 minutes before the election that the Employer would use a second observer at one of the sites, he was only offered the recourse of filing an objection. He was not offered the option of seeking to obtain a second observer for the Petitioner, and he could reasonably have believed that the only course of action mentioned to him—filing an objection—was all that was afforded to him under the circumstances.[6] Accordingly, we shall order that the election be set aside and a new election conducted.

[Direction of Second Election omitted from publication.]

[1] All dates refer to 1986.

[2] On 18 July this three-member panel issued an unpublished Decision and Order, adopting the Regional Director's 6 February recommendation that Objections 1, 3, and 4 be overruled in the absence of exceptions and remanding the case to the Regional Director for a hearing on Objection 2.

[3] The Board's Regional Office had sent to the parties a cover letter attached to copies of the stipulation, indicating that each party was permitted one observer per polling place.

[4] The Petitioner's agents earlier had arrived late for the preelection conference, which was held at another facility and polling site. There is no evidence that the Board agent remaining at this site informed them that more than one observer would be used at any of the polling places.

[5] See *Sonicraft, Inc.*, 276 NLRB 407 (1985). In reaching this conclusion, we do not find that the imbalance in the number of observers itself, independent of a material or prejudicial breach of the election stipulation, prevented the holding of a fair election.

[6] See generally *Westinghouse Electric Corp.*, 182 NLRB 481 (1970).

Oil, Chemical and Atomic Workers International Union, AFL–CIO and Oil, Chemical and Atomic Workers International Union, Local 1–591, AFL–CIO (Texaco Refining and Marketing, Inc.) *and* Michael Davenport. Case 19–CB–5822

DECISION AND ORDER

23 February 1987

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

Upon a charge filed by Michael Davenport, an individual, on 1 May 1986 and amended charges filed on 16 and 23 May 1986, the General Counsel of the National Labor Relations Board issued a complaint on 20 May 1986 against the Respondents, which, as amended on 5 June 1986, alleges that the Respondents have violated Section 8(b)(1)(A) of the National Labor Relations Act.

The amended complaint alleges, and the Respondents in their answer admit, that at all times material the Respondents have maintained a constitutional provision restricting resignations.[1]

> Any member may resign his or her membership provided all indebtedness is satisfied and no charges are pending against such member and further provided that notice of such resignation is submitted in writing by such member to the President of the Local Union of which he or she is a member within ten days preceding contract expiration date.

Notwithstanding their admission of the above allegation, the Respondents deny that they have committed the unfair labor practice alleged in the complaint, i.e., that by maintaining the constitutional restriction on their members' right to resign from the Respondents, the Respondents have violated Section 8(b)(1)(A) of the Act.

On 23 July 1986 the General Counsel filed with the Board a Motion for Summary Judgment, with exhibits attached, asserting that the Respondents' answer to the amended complaint raises no genuine or material issues of fact which require an evidentiary hearing and urging that the Board issue a Decision and Order against the Respondents containing findings of fact and conclusions of law in accordance with allegations in the complaint. On 28 July 1986 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. The Respondents filed a response to the Notice to Show Cause in the form of a Cross-Motion for Summary Judgment, with exhibits attached, and a brief in support of its motion and in opposition to the General Counsel's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motions for Summary Judgment

The Respondents' admissions to all the factual allegations in the complaint establish that they maintained constitutional restrictions on their members' right to resign from the Union. The General Counsel cites *Engineers & Scientists Guild (Lockheed-California)*, 268 NLRB 311 (1983), in support of the contention that maintenance alone of unlawful restrictions on resignation restrains and coerces employees who may be unaware of the constitutional provision's unenforceability and thus violates Section 8(b)(1)(A) of the Act. The Respondents contend, after admitting the facts as alleged, that summary judgment should be granted in their favor and the complaint dismissed because (1) unlike some previous cases finding 8(b)(1)(A) violations, the constitutional restrictions at issue do not specifically refer to a member's right to resign during a strike or work stoppage or to possible discipline for exercising Section 7 rights associated with such activities; (2) it is not alleged, nor would any evidence show, that the Respondents have attempted any disciplinary action against any former member pursuant to a resignation proscribed by the restriction; and (3) an expunction remedy has not previously been ordered by the Board unless the union had attempted to enforce an unlawful restriction.

With respect to a union's authority in this area, the Board has found that a union may not place restrictions on the right of its members to resign from membership. *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984). In *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), the Supreme Court essentially affirmed that principle. Although both *Neufeld Porsche-Audi* and *Pattern Makers League* concerned restrictions on resignations during or immediately prior to strikes, the reasoning of both the Board and the Court was sufficiently broad that restrictions not linked to strikes would also be deemed unlawful. Thus, after considering the significance of the proviso to Section 8(b)(1)(A), the Court, quoting *Neufeld Porsche-Audi* (270 NLRB at 1333), observed that "allowing unions to 'extend an employee's membership obligation through restrictions on resignation' would 'expan[d] the definition of internal action' beyond the contours envisioned by the Taft-Hartley Congress." *Pattern Makers League*, 473 U.S. at 103. The Court further stated, in relating the Board's

[1] Art. I, sec. 6, of the Respondent International's constitution and art. III, sec. 2, of the Respondent Local's constitution provides:

holding on resignation restrictions to the policies underlying Section 8(a)(3) of the Act (id. at 107):

> Congress in 1947 sought to eliminate completely *any* requirement that the employee maintain full union membership. Therefore, the Board was justified in concluding that by restricting the right of employees to resign, League Law 13 impairs the policy of voluntary unionism [emphasis added].

Consistent with those principles, in *Sheet Metal Workers Local 16 (Salem Heating)*, 274 NLRB 41 (1985), the Board found unlawful a constitutional restriction on resignation that was not related to strikes or strike activity. Further, in *Salem Heating*, even where no enforcement or attempted enforcement by the union was alleged, the Board ruled that maintenance of a restriction on resignation is a violation of Section 8(b)(1)(A) and that expunction is the appropriate remedy.

Because the Respondents have admitted all the facts material to the resolution of the unfair labor practices issue raised by the complaint, we shall grant the General Counsel's Motion for Summary Judgment in the absence of any material facts in dispute or any authority to the contrary having been shown by the Respondents. Accordingly, we shall also deny the Respondents' cross-motion.

On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, Texaco Refining and Marketing, Inc., is a corporation engaged in the business of refining and marketing petroleum worldwide and in the State of Washington. During the 12 months preceding issuance of the complaint, a representative period, the Employer had gross sales of goods and services valued in excess of $500,000. In addition, the Employer during that period sold and shipped goods or provided services from its facilities within the State of Washington to customers outside that State or to customers within the State of Washington, which customers were themselves engaged in interstate commerce by other than indirect means of a total value in excess of $50,000. Further, the Employer during the past 12 months purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of $50,000 directly from sources outside the State or from suppliers within the State which in turn obtained the goods and materials directly from sources outside the State of Washington. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Respondents admit, and we find, that they are labor organizations within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICE

The Respondents have maintained constitutional provisions restricting union resignations. By such conduct we find that the Respondents have violated Section 8(b)(1)(A) of the Act. *Pattern Makers League v. NLRB*, supra; *Machinists Local 1414 (Neufeld Porsche-Audi)*, supra; *Sheet Metal Workers Local 16 (Salem Heating)*, supra.

CONCLUSIONS OF LAW

1. Texaco Refining and Marketing, Inc., Anacortes, Washington, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondents are labor organizations within the meaning of Section 2(5) of the Act.
3. By maintaining constitutional provisions restricting their members' right to resign from the Respondents, the Respondents violated Section 8(b)(1)(A) of the Act.
4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents engaged in an unfair labor practice in violation of Section 8(b)(1)(A) of the Act, we shall order that they cease and desist and take certain affirmative action necessary to effectuate the policies of the Act.[2] Specifically, we shall order the Respondents to cease and desist from maintaining the restriction on resignations found invalid and to expunge the provisions from their governing documents. *Engineers & Scientists Guild (Lockheed-California)*, 268 NLRB 311 (1983).

ORDER

The National Labor Relations Board orders that the Respondents, Oil, Chemical and Atomic Workers International Union, AFL–CIO and Oil, Chemical and Atomic Workers International Union, Local 1–591, AFL–CIO, their officers, agents, and representatives, shall

1. Cease and desist from

[2] As part of the remedy the General Counsel seeks an order which will include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondents under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the order. We have concluded that under the circumstances of this case such a clause is not warranted.

(a) Maintaining in their governing documents the constitutional provision reading:

> Any member may resign his or her membership provided all indebtedness is satisfied and no charges are pending against such member and further provided that notice of such resignation is submitted in writing by such member to the President of the Local Union of which he or she is a member within ten days preceding contract expiration date.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from their governing documents those portions of article I, section 6, of the Respondent International's constitution and of article III, section 2, of the Respondent Local's constitution set forth above.

(b) Post at their business offices and meeting halls copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Texaco Refining and Marketing, Inc., if willing, at all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in our governing documents those portions of article I, section 6, of the International's constitution and of article III, section 2, of the Local's constitution reading:

> Any member may resign his or her membership provided all indebtedness is satisfied and no charges are pending against such member and further provided that notice of such resignation is submitted in writing by such member to the President of the Local Union of which he or she is a member within ten days preceding contract expiration date.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our governing documents those portions of our constitutions set forth above.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO AND OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 1-591, AFL–CIO

Oil, Chemical and Atomic Workers International Union, Local 1-591, AFL-CIO (Texaco Refining and Marketing, Inc.) *and* Michael Davenport. Case 19-CB-5952

23 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

Upon a charge filed by Michael Davenport, an individual, on 15 September 1986, the General Counsel of the National Labor Relations Board issued a complaint on 22 October 1986 against the Respondent alleging that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act.

The Respondent denies that it has committed the specific unfair labor practice alleged in the complaint, i.e., that by refusing to accept or give immediate effect to a resignation from union membership tendered by the Charging Party, the Respondent has violated Section 8(b)(1)(A) of the Act.

On 24 November 1986 the General Counsel filed with the Board a Motion for Summary Judgment, with exhibits attached, and a motion to consolidate this case with Case 19-CB-5822. In the latter case the Board has considered the General Counsel's Motion for Summary Judgment on a complaint allegation that the Respondent, as well as its parent International, has violated Section 8(b)(1)(A) by maintaining constitutional provisions restricting resignations from union membership. The General Counsel asserts in the instant proceeding that the Respondent's answer to the complaint, read in light of her Exhibit 2,[1] raises no material issues of fact which require an evidentiary hearing and urges that the Board issue a Decision and Order against the Respondent in accordance with the allegations in the complaint. The Respondent filed a response to the General Counsel's motions in the form of objections to a motion to consolidate cases and its own Motion for Summary Judgment with exhibits attached including its brief to the Board in Case 19-CB-5822.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion to Consolidate Cases and Motion for Summary Judgment

The Board has decided Case 19-CB-5822 and found that the Respondent has violated Section 8(b)(1)(A) of the Act by maintaining a constitutional restriction on its members' right to resign from the Union. The Board also has ordered that the offending provision of the Respondent's constitution, article III, section 2, be expunged. *Oil Workers Local 1-591 (Texaco Refining)*, 283 NLRB 2,[2] issued today.

The Respondent does not deny that its financial secretary, on union letterhead, sent the Charging Party the letter summarized in footnote 1, above. The Respondent first contends, reiterating its argument made in Case 19-CB-5822, that the provision is lawful. The Respondent therefore argues that it did not violate the Act in refusing to give effect to Davenport's resignation until such time as it met the timeliness condition set forth in article III, section 2, of its constitution. Because the Board has found the maintenance of this provision unlawful in Case 19-CB-5822, it follows that its enforcement is likewise violative of Section 8(b)(1)(A) of the Act. *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984); *Hearst Corp.*, 281 NLRB 764 (1986).[3] Because there are no material facts in dispute,[4] we grant the General Counsel's Motion for Summary Judgment and, correspondingly, we deny the Respondent's Cross-Motion for Summary Judgment.

On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, Texaco Refining and Marketing, Inc., is a corporation engaged in the business of refining and marketing petroleum worldwide and in the State of Washington. During the 12 months preceding insuance of the complaint, a representative period, the Employer had gross sales of goods and services valued in excess of $500,000. In addition, the Employer during that period sold and shipped goods or provided services from its facilities within the State of Washington to customers outside the State or to customers within the State of Washington, which customers were themselves

[1] Exh. 2 is a letter dated 22 August 1986 from the Respondent's financial secretary to the Charging Party. The letter acknowledges receipt of Davenport's 9 July 1986 request to resign his union membership. The letter further states that the request does not comply as to timeliness with the constitutional restriction on resignation, the same provision at issue in Case 19-CB-5822. The letter concludes by stating that the resignation could not be accepted and would not be processed until the date provided for by the constitution, namely, 10 days preceding the contract expiration date.

[2] In issuing this case on this date, we also deny the General Counsel's motion to consolidate Cases 19-CB-5822 and 19-CB-5952. Further, given our expunction order in Case 19-CB-5822 it is not necessary to repeat that order here.

[3] Indeed, as held in the cited cases, any restrictions placed by a union on the right to resign membership would be unlawful. See *Pattern Makers v. NLRB*, 473 U.S. 95 (1985).

[4] We find no merit in the Respondent's denial that its own financial secretary is its agent.

engaged in interstate commerce by other than indirect means, of a total value in excess of $50,000. Further, the Employer during the past 12 months purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of $50,000 directly from sources outside the State or from suppliers within the State which, in turn, obtained the goods and materials directly from sources outside the State of Washington. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Respondent admits, and we find, that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

The Respondent has refused to accept or give effect to a resignation from union membership and has also given effect to a constitutional provision restricting union resignations. By such conduct we find that Respondent has violated Section 8(b)(1)(A) of the Act. *Machinists Local 1414 (Neufeld Porsche-Audi)*, supra; *Hearst Corp.*, supra.

CONCLUSIONS OF LAW

1. Texaco Refining and Marketing, Inc., Anacortes, Washington, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to accept or give immediate effect to Michael Davenport's resignation from union membership and by giving effect to a constitutional provision restricting its members' rights to resign from Respondent, the Respondent violated Section 8(b)(1)(A) of the Act.

4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, we shall order that it cease and desist and take certain affirmative action necessary to effectuate the policies of the Act.[5] Specifically, we shall order the Respondent to cease and desist from refusing to accept or give immediate effect to resignations from union membership. Further, we shall order the Respondent to notify Michael Davenport that his resignation was effective and to make him whole, with interest,[6] for any losses he may have suffered by reason of the Respondent's unlawful enforcement of its restriction on resignation.

ORDER

The National Labor Relations Board orders that the Respondent Oil, Chemical and Atomic Workers International Union, Local 1-591, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to accept or give immediate effect to resignations from union membership of employees of Texaco Refining and Marketing, Inc.

(b) Giving effect to article III, section 2, of its constitution which restricts a member's right to resign from the Union.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify Michael Davenport that his resignation from union membership was effective.

(b) Make whole Michael Davenport for any losses he may have suffered by reason of the Respondent's enforcement of its restriction on resignations as set forth in the remedy section of this Decision and Order.

(c) Post at its business and meeting halls copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Texaco Refining and Marketing, Inc., if willing, at all places where notices to employees are customarily posted.

---

[5] As part of the remedy, the General Counsel seeks an order that will include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the order. We have concluded that under the circumstances of this case such a clause is not warranted.

[6] See *Florida Steel Corp.*, 231 NLRB 651 (1977).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the National Labor Relations Act, by refusing to accept or give immediate effect to your resignations from union membership.

WE WILL NOT give effect to article III, section 2, of our constitution which restricts the right of our members to resign from the Union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify Michael Davenport that his resignation was effective.

WE WILL make whole Michael Davenport for any losses he may have suffered as a result of our refusal to accept his resignation, with interest.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 1-591, AFL-CIO

U.S. Postal Service *and* Thomas Lott. Case 27–CA–9168–P

26 February 1987

DECISION AND ORDER

BY MEMBERS BABSON, STEPHENS, AND CRACRAFT

On 30 October 1986 Administrative Law Judge Joan Wieder issued the attached decision. The Charging Party filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find totally without merit the Charging Party's allegations of bias and prejudice on the part of the judge. On our full consideration of the record and the decision, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Charging Party in her analysis or discussion of the evidence.

Member Babson, based on the particular facts here, adopts the judge's finding that employee Lott was not shown to have had a reasonable expectation that his 18 March 1985 interview with Supervisor Martinez might have resulted in disciplinary action against him. In so doing, Member Babson considers it unnecessary to pass on the Board's holding in *Postal Service*, 256 NLRB 78 (1981), enf. denied in relevant part 689 F.2d 835 (9th Cir. 1982), that the employee there had a reasonable belief that discipline might result from the interview because he finds that case is factually distinguishable from the present case.

Barbara E. Young, Esq., for the General Counsel.
Jesse L. Butler, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried in Denver, Colorado, on 19 and 20 August 1986. The charge was filed on 18 March 1985 by Thomas Lott. The complaint, which issued 24 May 1985[1] and was amended at trial, alleges that the U.S. Postal Service (Respondent) violated Section 8(a)(1) and (4) of the National Labor Relations Act. Specifically, the complaint alleges Respondent, acting through admitted Supervisor Ernest Martinez, called Lott a "cheap nigger lawyer"; threatened Lott with discharge, and denied Lott's request for union representation at a "disciplinary-investigatory" interview because Lott filed charges or gave testimony under the Act. Respondent filed an answer to the complaint denying the commission of the alleged unfair labor practices.[2]

On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

Preliminary Matters

Respondent argues that the Board is barred from considering the allegations contained in the complaint for some of the same matters were considered by a complaints examiner appointed by the Equal Employment Opportunity Commission. Respondent has an established equal opportunity complaint procedure that is directed to the informal adjustment of charges. If attempts at informal adjustment fail, the matter is referred to the Equal Employment Opportunity Commission which holds a hearing. The hearing is conducted, as indicated above, by a complaints examiner. The complaints examiner recommends a disposition to the Postal Service. The Respondent is free to accept or reject the complaints examiner's recommendation. If the Respondent denies the complaint, the employee can appeal the decision to the Equal Employment Opportunity Commission.

The complaints examiner rendered a bench decision finding that Lott failed to bear his burden of proving his allegations that "because of his race, and color (black) because of prior EEO activity" he was disciplined by: the issuance of a letter of warning on 21 August 1984; a 7-day suspension about 13 September 1984; and other retaliation allegedly visited on him for his activities in filing or pursuing EEO charges during October through December 1984. Respondent adopted the complaint examiner's decision. Lott has appealed this adverse decision. There is no indication when the appeal will be considered by the Equal Employment Opportunity Commission. The Postal Service's action of adopting the decision has not been shown to constitute a final decision. However, even assuming arguendo that the complaints examiner was acting in a judicial capacity and that the parties had an adequate opportunity to litigate the issues and resolve the issues before it,[3] the Board is not collaterally estopped from considering the allegation of the complaint issued in the instant proceeding.

I find that the criteria of *Montana v. U.S.*, 440 U.S. 147, 153–154 (1979), have not been met. The instant complaint alleges that the violations occurred on 18 March 1985, a time period not considered by the complaints examiner; he did not consider the events of that day in reaching his decision. Although many of the mat-

[1] All dates are in 1985, unless otherwise indicated.

[2] Respondent admits in its answer that it meets one of the Board's applicable jurisdictional standards and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Respondent also admits in its answer that the American Postal Workers Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] See *Lightsey v. Harding, Dahm & Co.*, 623 F.2d 1219 (7th Cir. 1980), cert. denied 449 U.S. 1077 (1981).

ters considered in the EEO proceeding were raised in the instant case as background evidence, the key to resolution of this dispute, as admitted by the parties in their respective briefs, are the credibility determinations of what occurred on 18 March; an event not considered in the EEO proceeding. Further, the operative law in the EEO proceeding was not shown to involve the same definitions, policies, and purposes as the NLRA. Accordingly, I conclude that collateral estoppel is not appropriate in these circumstances. See *United Technologies Corp.*, 706 F.2d 1254 (2d Cir. 1983), and *Plumbers Local 198 v. NLRB*, 747 F.2d 326 (5th Cir. 1985). The record of the proceedings before the complaints examiner has been considered but it is not found to be dispositive of the issues herein.

Respondent also argues that Lott's entry into a written resolution of EEO charges he filed regarding the events of 18 March preclude consideration of some if not all the allegations in the instant complaint. This position is found to be without merit. The agreement specifically and exclusively referred to Lott's pre-EEO complaint, not the charge filed with the Board.

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

Lott has worked for Respondent for more than 8 years as a janitor in the building services section. At the time here pertinent, he worked a tour or shift that ran from 7 a.m. to 3:30 p.m. Lott's supervisor on tour 2 was Ernest Martinez. Another supervisor on this tour is Dan Servantez. These supervisors were assisted by line employees who act as temporary supervisors and are called 204(b) supervisors by Respondent. The 204(b) supervisors, as here pertinent, were Guinn Webb and Paul Mefford. Martinez' supervisors are Plant Manager Al Apuzzo and Superintendent Donna Mulkin.

Lott worked under Martinez for approximately 5 years. The record in this proceeding indicates that commencing in late 1983, Lott commenced filing a series of EEO charges, grievances, and unfair labor practice charges against Respondent, and Respondent imposed a variety of disciplines against Lott. The General Counsel asserts that as a result of all the charges and complaints filed by Lott, Martinez became upset with him and in a meeting held on 18 March, Martinez called Lott a "cheap nigger lawyer," threatened him with discharge for his filing of the various charges and grievances, and denied his request for a union representative at a "disciplinary-investigatory" interview. Respondent denies Martinez made any racial slurs, threatened discharge, or that the meeting of 18 March was an investigatory interview. I find that the General Counsel has failed to show by a preponderance of the credible evidence that the alleged violations occurred.

As indicated above, Lott filed a series of charges, grievances, and complaints. The initial filing mentioned in this case is Lott's filing of an EEO charge alleging that Martinez failed to take action against the employee that struck him. The EEO complaint or charge was not placed in evidence. The nature of the action taken against the employee who assertedly struck Lott was not placed in evidence. The progressive disciplinary procedure used by Respondent requires Martinez to recommend discipline. The recommendation is then reviewed by Martinez' supervisor, Mulkin, who then refers it to Apuzzo. Mulkin and Apuzzo have the authority to decide if the recommended discipline is to go forward, needs additional basis, or is not imposed. This review procedure could have been the basis for the delay, if any, in the imposition of any discipline in the incident. The record fails to establish that any delay in disciplining the wrongdoer was caused by improper animus and/or motive.

Lott received a letter of warning in January 1984 apparently for poor work performance. Lott filed an EEO complaint and it is undisputed that the resolution of the complaint resulted in the removal of the letter from his file. In March 1984 Lott received another warning letter for poor work performance and he again responded by filing an EEO complaint, which resulted in the removal of the disciplinary letter from his file. I find these EEO charges and the resolutions of removal from Lott's personnel file are not facts probative of wrongful motive. The basis for the decisions to remove the disciplinary letters was not placed in evidence and such action, standing alone, fails to establish by probative evidence that the warning letters were unlawfully based or would lead to later action which was violative of the Act. The resolution of the EEO complaints may have included accommodations that were indicative of good cause for the issuance of the disciplines.

Lott testified that he was denied a light-duty assignment after heart surgery that included a triple bypass, while a white employee, who broke his ankle on a golf course, was given a desk job. The General Counsel did not refute Respondent's evidence that its injury compensation office found Lott a light-duty assignment that comported with the limitations imposed by Lott's physician. The assignment was checked by a union steward at Lott's request and was found to meet these medical limitations.

On 29 August 1984 another letter of warning for poor work performance was issued to Lott. The incident leading to the issuance of the letter was that Lott had left a pile of rubbish in the middle of the floor in the area where he was assigned to work on 21 August. The area supervisor called Martinez to complain about what she considered to be a safety hazard. Martinez and Servantez went to investigate the complaint, consonant with established practice. Initially, they could not find Lott, but when he appeared, Martinez asked him where he had been. Lott asserts that "Mr. Martinez said he didn't give a damn about no nigger like me or a nigger investigator. He was going to give me a letter of warning and a 14 day suspension and, sooner or later, he was going to get something to stick in my file."

This uncorroborated assertion is not credited based principally on Lott's demeanor. Lott did not appear to be trying to be candid and helpful during the proceeding. On the contrary, he had to be repeatedly instructed to respond to questions and not to volunteer information. Often Lott engaged in hyperbole and attempted to tailor

his testimony to place his claims in a light most favorable to his cause rather than attempting to be forthright. At times, he exhibited reticence in responding to questions that apparently were perceived as harmful to his case. This tendency to tailor testimony was demonstrated in Lott's preparation of a memorandum that he had two coworkers sign. The missive, dated 22 August 1984, states: "I witness Thomas Lott-Pl-3 sweeping the 3rd floor T.A. from 07:00-to 3:30 PM-8-22-84 EXC for lunch. I witness Martinez E. call Lott T. a nigger also say nigger inspector."

The two witnesses to the missive, David Herrera and Roscoe Dyle, testified convincingly that when they signed the document, the second sentence alleging the use of racial epithets was not on the document, it was added after they signed. Herrera and Dyle testified credibly and convincingly; they were direct and appeared forthright.

Martinez denied making these alleged racial slurs, and his testimony was corroborated by Servantez. This corroborated testimony is credited. Martinez testified that when he tried to talk to Lott, Lott turned his back to the supervisors and walked away. According to Martinez' unrefuted testimony, Lott often failed to respond to him by turning his back and walking away. As Lott was walking away, Martinez informed him, as Lott admitted, that he would be disciplined for the incident. Lott filed another EEO complaint and a grievance over the incident. The resolution of the matter was the issuance of a letter of warning rather than the suspension recommended by Martinez.

On 6 September, Webb, an acting supervisor, gave Lott a 5-day suspension for poor work performance. The notice of disciplinary action stated:

> On September 6, 1984, you were assigned to clean Special Delivery and Finance from 0715-1515. At approximately 0955 and 1300 I gave you specific instructions on performance of your assignment. However, at 1500, when I went back to check on your progress I noticed that the floors you were assigned to do were either in the same condition as earlier noticed or not completed. When questioned about the above, you stated you could not read my mind on what I wanted you to do.

Lott did not deny the accuracy of Webb's charge, rather he asserted that Webb told him that if Martinez could not get him, Webb would. Lott filed a grievance, an EEO charge, and a charge with the Board over the matter. It appears the discipline was imposed. The Board did not issue a complaint on this charge. The General Counsel failed to prove that Martinez knew Lott filed this charge.

On 14 January Lott was again informed that he would be suspended for 14 days because of poor work performance. Lott again filed a grievance and an EEO charge which resulted in the reduction of the discipline to a 7-day suspension.

A notice of disciplinary action was issued to Lott on 11 March 1985. A 14-day suspension was imposed for not responding to a page while assigned duties to sweep a floor, when Martinez searched for Lott, he found him in a breakroom drinking milk at a time other than than Lott's authorized breaktime. When questioned, Lott refused to reply until exiting the room when Lott said he was on medication. On the same day, 22 February, Lott was observed smoking while working in clear sight of a no smoking sign, which Lott claimed he did not see. On 25 February Lott was again cited for smoking in a no smoking area. Lott denied knowledge that it was a no smoking area.

In response to this discipline, Lott filed a grievance, an EEO charge, and a charge with the Board. The discipline was reduced to a warning letter.

Lott claims he was again discriminated against on 18 March 1985. This claim is unsupported by the record. It appears that on 18 March, after commencing work, Lott asked Paul Mefford, an asserted acting supervisor, for 2 hours annual leave to go to the EEO office as well as the Board's Regional Office. Lott claims that Mefford gave him permission. The record failed to clearly establish that Mefford was an acting supervisor on 18 March. On his return, Lott asserts:

> Martinez told me—he had an official discussion with me. He asked Mefford to leave the office. . . . At this time, Martinez told me, 'I'm getting sick and tired of you running around here to these different organizations. You act like a cheap nigger lawyer. You're going to the EEO Commission. You're going to the union. You're going to [Congresswoman] Schroeder. You're going to all these different damn people. So, you ain't going to nobody else. The post office hired you to work and, goddamnit, I'm going to see that you work.' So I told him I didn't have to listen to this kind of crap. I wanted a union representative or somebody in the office with me to hear this kind of stuff. He [Martinez] said 'You ain't seeing nobody from here on out. You are not seeing no representative. Nobody. We've got you here to work and you're going to work and I'm going to see that you work or I'm going to see that you get fired.

Lott subsequently testified that Martinez said, "I was acting like a cheap nigger lawyer. He was sick of me going to the APWU [American Postal Workers Union], the Equal Employment [Opportunity] Commission, and the National Labor Relations Board. . . . You think your [sic] the smartest one in the Janitor's department. . . . I'm going to see that we get rid of you."

Lott returned to work and later filed a grievance. In addition to filing grievances in his disputes with Respondent, Lott filed charges with the Board, the Postal Service's EEO office, and contacted the National Association for the Advancement of Colored People, Congresswoman Schroeder, Congressman Schafter, Senator Gary Hart, and the Division of Human Resources.

Mefford testified that Lott informed him on 18 March that he had an appointment at the EEO office. Lott did not seek nor get his permission to take annual leave. Mefford completed a leave form but did not indicate that the leave was approved. To ensure the propriety of the

leavetaking, Mefford checked with Martinez. Martinez said he had not been informed of the leavetaking. Lott was paid for the 2 hours he was absent and was not disciplined for his failure to request leave in a timely manner by informing supervisors before they made the daily assignments that he planned to take 2 hours' leave. Employees are expected to give notice when taking leave as soon as possible to permit supervisors to take that fact into consideration when making the daily work assignments. Mefford refuted Lott's testimony that he spoke with him on his return to work. Martinez' testimony that he had no knowledge Lott went to the Board's Regional Office to file a charge in credited based principally on demeanor. Martinez testified in a manner bespeaking candor and appeared to be trying to testify accurately.

Martinez denied Lott's allegations of wrongdoing. Martinez claims, credibly, that he observed Lott at the elevator on his return to work and asked him where he had been. Lott did not reply so Martinez directed Lott to follow him to the office. Lott initially refused to follow Martinez until he got representation. Martinez then informed Lott that he was going to conduct an official discussion that does not require witnesses. Article 16, section 2 of the applicable collective-bargaining agreement provides for private discussions on minor offenses between management and unit members.[4] Martinez also told Lott that no disciplinary action would result from the meeting. Martinez then informed Lott that in order to meet his responsibilities in cleaning the building, he had to know when employees were going to be absent to permit the making of assignments in a manner that permits him to meet this charge. Lott did not reply other than to inquire if the discussion was finished and could he go.

On 28 March Lott submitted an EEO complaint over the meeting that was settled on 11 April by the entry into the previously referenced agreement. The agreement provides for withdrawal of the EEO complaint by Lott, and Martinez agreed to make a written note every time he has an official discussion with Lott and to permit Lott to have representation during any other type of discussion. The agreement further provides that Lott and Martinez agree that harassment and racial slurs are not to be tolerated. The record does not demonstrate that this agreement admits wrongdoing or requires Martinez to curtail his supervision of Lott or any other employee.

[4] Specifically, this section provides:

> For minor offenses by an employee, management has responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder. While such discussions may not be cited as an element for prior adverse action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.

Analysis and Conclusions

I find that the General Counsel has not proved by a preponderance of the credible evidence that Respondent violated the Act in any regard and conclude that the complaint should be dismissed in its entirety.

The allegation that Martinez called Lott a "cheap nigger lawyer" or used other racial epithets is clearly and convincingly disputed by Respondent's witnesses. Lott was the only witness that claimed the slurs were cast. Lott, as found above, was not a credible witness. The evidence also fails to prove that Martinez threatened Lott with discharge for filing charges and grievances with the National Labor Relations Board, the American Postal Workers Union, and the Postal Service's Equal Employment Opportunity office.

The evidence also fails to establish that Respondent denied Lott's request for union representation at a "disciplinary-investigatory" interview. It is undisputed that Lott requested a union representative and Lott admitted that, in response to this request, Martinez informed him that they were going to have a discussion. Martinez' testimony that he told Lott it would be an official discussion under the collective-bargaining agreement that would not result in discipline was unrefuted. The necessary elements of proving a violation of the Act, as set forth in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), is that the employee must request a union representative at an employer's investigatory interview, which the employee reasonably believes might result in disciplinary action against him. Lott was not shown to have held a reasonable expectation that the interview might have resulted in disciplinary action against him.[5]

As indicated above, I find that the General Counsel has failed to demonstrate with a preponderance of the credible evidence that Respondent threatened to discipline Lott because he filed charges, grievances, and/or complaints with the Board, the Union, and Respondent's Equal Employment Opportunity office. Although Lott grieved and filed charges over the various disciplines imposed on him, as described above, he did not clearly and convincingly refute the validity of their imposition. He did leave a pile of trash on the floor and did not respond to his supervisors when questioned about the incident, rather, he turned his back and walked away. This insubordination was not shown to have been excused by any mitigating factors. On the contrary, such insubordination was a clear and established pattern of conduct engaged in by Lott.

The General Counsel has failed to show by a preponderance of the credible evidence that Martinez or the other supervisors here involved knew that Lott filed a charge with the Board until after 18 March. There is no reasonable basis to conclude that any threat of discipline or other act was taken against Lott in response to his filing a charge with the Board or because he engaged in

[5] Based on this finding that Lott did not hold a reasonable expectation that the interview would result in discipline, I find it unnecessary to discuss the possibility that the Union's agreement to the holding of such discussions without the right to a union representative constituted a waiver of the employee's *Weingarten* rights. *Postal Service*, 256 NLRB 78 (1981), enf. granted in part and denied in part 689 F.2d 835 (9th Cir. 1982).

any other conduct protected by Section 8(a)(4) and (1) of the Act.

In sum, the total lack of corroboration of Lott, who is found to be not credible, contrasted to the credible denials of Respondent's witnesses, lead me to find that the General Counsel has failed to meet her burden of proving by a preponderance of credible evidence that the alleged violations have occurred and the complaint should be dismissed.

CONCLUSIONS OF LAW

1. Respondent United States Postal Service is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. American Postal Workers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to show by a preponderance of the credible evidence that Respondent committed any violation of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

It having been found and concluded the Respondent, U.S. Postal Service, has not engaged in unfair labor practices, the complaint is dismissed in its entirety.

---

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Robert's Tours & Transportation, Inc. ***and*** **David Speelman** ***and*** **Bella Gouveia.** Cases 37–CA–1889 and 37–CA–1918

26 February 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 11 January 1984 Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Robert's Tours & Transportation, Inc., Honolulu, Hawaii, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, withhold driving assignments from, or otherwise discriminate against our employees because of their activities protected by the Act.

WE WILL NOT threaten employees with job loss or other adverse action should they engage in activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL offer to David Speelman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges and We will make him whole for any loss of earnings or benefits suffered by reason of his unlawful discharge, with interest on lost earnings.

WE WILL restore Bella Gouveia to her job duties as they existed before we began unlawfully withholding tour-bus assignments from her about January 8, 1982; and We will make her whole for any loss of earnings (including tips) or benefits suffered by reason of that unlawful withholding, with interest on lost earnings.

ROBERT'S TOURS & TRANSPORTATION, INC.

Thomas W. Cestare, Esq., for the General Counsel.
Jared H. Jossem, Esq., of Honolulu, Hawaii, for the Respondent.
Isabella Gouveia, for herself.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried in Kahului, Maui, Hawaii, on March 1, 1983. The charge in Case 37–CA–1889 was filed on April 12, 1982, and amended on July 20, by David Speelman. The charge in Case 37–CA–1918 was filed on July 2, 1982, by Isabella Gouveia. The complaint issued on July 26, 1982, and alleges that Robert's Tours & Transportation, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act) in each of these respects:[1]

1. Since November 1981, by promulgating and maintaining an impermissibly broad no-solicitation rule.

[1] Sec. 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Sec. 7 gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . also . . . the right to refrain from any or all such activities . . . ."

2. On January 7, 1982, by discharging Speelman and adversely changing Gouveia's terms and conditions of employment because of their engagement in activities protected by the Act.

3. On January 7 and 8, 1982, acting through Gerald Hayashi, an admitted supervisor and agent, by interrogating employees concerning their engagement in protected activities and threatening them with discharge for same.

II. JURISDICTION

Respondent, incorporated in Hawaii, provides tour bus and other transportation services in that State. Its annual revenues exceed $500,000, of which over $50,000 derives from services for firms situated in other States and countries. It is undisputed that Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

II. BACKGROUND

Respondent operates on five of the Hawaiian Islands—in order of business volume, Oahu, Kauai, Hawaii, Maui, and Molokai. Its overall manager is Robert Iwamoto Jr. (Robert), who is headquartered in Honolulu, Oahu. His son Scott is the nominal manager of the Maui operation, having been elevated to that position in late December 1981. Scott was 21 at the time of trial. "Overseeing everything I did," Scott testified, was Gerald Hayashi, manager on the Island of Hawaii.

Except for the allegedly unlawful no-solicitation rule, which has been of systemwide application, this case concerns Maui.

III. THE ALLEGED MISCONDUCT

A. *The No-Solicitation Rule*

1. Facts

The parties stipulated that Respondent promulgated this rule on May 15, 1981:

> *Solicitation*: RHT drivers are prohibited from allowing themselves to be solicited while on duty, since any time thusly involved would be an unauthorized use of company time. Furthermore, it is prohibited for RHT drivers who are on duty to solicit other RHT drivers regardless of whether the latter are on-duty or off-duty. Failure to comply with the preceding will be regarded as cause for the company to take disciplinary action.

Hayashi testified that the rule appears in a handbook of rules and regulations which, until the supply was exhausted, was given to each of Respondent's drivers. The rule was in effect "all during 1981 and 1982," he added, and "would still be the policy" had Respondent not "run out of those handbooks."

Concerning the reasons for the rule, Hayashi testified:

> The company is afraid of the solicitation of drivers or the drivers soliciting other drivers or people in regards to keeping their attention to what they're supposed to be doing. And we didn't want our drivers selling or promoting puka shells or Kona liquor, or to be solicited by vendors or concessions that might offer them kickbacks or some form of gratuity for stopping at these stops.

Hayashi continued that, "in the past," there had been "specific problems with respect to [Respondent's] drivers in terms of soliciting or kickbacks or selling and buying things while drivers were on duty." He elaborated:

> In the 1974, 1972 to 1974 area, where puka shells were a big craze around the islands, the drivers would sell puka shells to Japanese tourists. Buy them cheap and sell them for a marked-up price. That created some difficulty with our company where the agents that brought these people in didn't want us soliciting them. So somehow our company had to cut it out.

Hayashi further elaborated that "the type of solicitation that our drivers would be subject to" were "concessions that would solicit [them] and say, 'If you bring your people here, we'll give you $2 for each person that walks through our door.'" Asked by Respondent's counsel if he knew of any instance in which the rule had "ever been applied to actions taken by people during their own time, including breaks and mealtime," Hayashi testified: "No."

2. Conclusion

In *Our Way, Inc.*, 268 NLRB 394 (1983), the Board announced that rules against solicitation during "working time," as distinguished from "working hours," are presumptively valid. So doing, it revived the distinction made in *Essex International*, 211 NLRB 749 (1974), overruling the case on which the General Counsel places principal reliance herein—*T.R.W. Bearings*, 257 NLRB 442 (1981).

It is concluded that a rule, such as Respondent's, against soliciting or being solicited while "on duty" is the functional equivalent of the presumptively valid one in *Our Way* against soliciting during working time.[2] It is further concluded, therefore, there being no evidence to defeat the presumption, that Respondent's rule does not violate Section 8(a)(1) as alleged.

---

[2] The equivalency of while "on duty" and during "working time" is suggested by *Medical Center of Beaver County*, 266 NLRB 429 (1983). An issue in that case was the legality of a ban against the wearing of insignia "while on duty." The administrative law judge concluded that the ban was impermissibly broad because it failed to "contain a clear statement as to its nonapplication (1) during break periods, meal periods, and other similar periods, and (2) in nonpatient areas." Id. at 430. A three-member Board panel affirmed the administrative law judge's ultimate conclusion. Two of the three took the position, however, that the ban was overly broad only "because it does not apply solely to patient care areas," and that they "would find it valid in terms of time since it states that employees are only restricted 'while on duty.'" Id. at 429 fn. 1. The two seemingly reached that position not by distinguishing between "on duty" and "working time," but in disagreement with *T.R.W. Bearings*. Ibid.

B. *The Alleged Violations of January 7–8, 1982*

1. Evidence

Speelman was a driver for Respondent from September 1976 until discharged January 7, 1982. The discharge was effected by Hayashi, acting on Robert's orders.

The morning of January 5—2 days before the discharge—Speelman's tour bus was involved in an accident. It struck a branch overhanging a narrow road into Maui's Iao Valley. The branch thrust through the windshield, necessitating that the tour be completed with a replacement bus. No one was injured. Speelman testified that, the road being partially in shadow, he was unable to see the branch in time to stop before impact, although "going real slow;[3] and that he was prevented from otherwise avoiding it by an oncoming vehicle. By his reckoning, "the accident was unavoidable."

Scott accompanied the replacement bus to the scene. Once there, he questioned Speelman about the accident and took some pictures. Speelman finished the tour.

That afternoon, on Speelman's return to Respondent's "base" at the Kahului airport, Scott pressed him for "more details" about the accident; and the two of them returned to the accident site, taking with them Bobby (Wipa) Purdy, described by Scott as Respondent's fleet safety examiner and driver trainer on Maui.[4] Scott took more pictures and assertedly concluded that there was "no reason why [the branch] should have been hit."

That night, returning to the base from his last assignment for the day, Speelman had yet another encounter with Scott. Scott declared that the accident called for "some kind of disciplinary action," elaborating that Respondent was "trying to clean up" its Maui operation and that, this being his first such situation as Maui manager, his handling of it "was going to set an example." Scott added that, should he let Speelman off "easy, then everybody . . . was going to take advantage of [him]." He continued that he did not "feel that just the accident alone was sufficient for . . . termination," and, noting that Speelman had only recently suffered a 1-week suspension because of a baggage oversight,[5] asked him what he thought would be a "fair" penalty. Speelman proposed a 2-week suspension. Scott responded, "Fine, you've got it." Scott appended that Speelman need not "worry about this accident"; that he would "talk to" his father, Robert, and they would "work it out."[6]

During the same conversation, Scott asked that Speelman name Respondent's best Maui drivers, of whom there were three working full time and seven or eight working part-time. Speelman offered that Gouveia was "number one," and that Purdy conducted "fantastic tours." Scott responded that he was "going to get rid of Bella Gouveia the first time she calls Honolulu"—an allusion to her sometimes enlisting the intervention of Scott's father and grandfather with regard to problems of employee concern on Maui;[7] and that he was "going to fire" another driver, Kimo Gapero, "the first time" he complained about an assignment. Scott also chided Speelman for exaggerating the size of King Kamehameha and native Hawaiians in general in his tour narrations. Speelman denied exaggerating, arguing that the Hawaiians "were large people" and that, with "a Hawaiian-Tahitian mix, you've got a tall mix of people."

The morning of the next day, January 6, Speelman made two visits to the base. On the first, he asked Scott for something in writing to reflect the suspension just meted out. Scott obliged with this memorandum:

> Memo To: David Speelman
> Date: January 06, 1982
> From: Scott Iwamoto
> Subject: 2 Weeks Suspension
>
> Effective Wednesday, January 6, 1982 through January 19, 1982. The reason for this suspension is due to the accident you had involving the tree branch at Iao Valley and your motorcoach.

Also on January 6, Speelman testified, apparently during his first visit, he had a clandestine—"where nobody could see us"—conversation with Gouveia, apprising her of Scott's intention to terminate her and Gapero. Gouveia's response, as related by Speelman, was, "We've got to go union for job protection."[8]

Leaving the base for a time, Speelman reported the accident to the police and accompanied an officer to the scene; called on an office of the Hawaii Department of Labor, where he complained about his suspension, and was told that the Department was powerless to look into the matter; and went to the hall of the Longshoremen's Union, speaking to an official there about the suspension and how Respondent's drivers might obtain representation.[9]

Back on the base later in the morning of January 6, Speelman broached his suspension to Gouveia in the drivers' lounge, then pursued the subject with her in her parked bus. They presently were joined in the bus by Purdy, Gapero, and Stanley Sato, who runs Respondent's Japanese-language tours on Maui.[10] Gouveia testified that gatherings of this sort are "an everyday routine—every morning we get into the bus and listen to the radio while we're cooling off ourselves." But in this instance Speelman complained about his suspension, and there were complaints, as well, about dispatching procedures that were depriving the "oldtimers" of assignments in favor of "the new drivers" absorbed from a tour company that recently had gone out of business.

Gouveia recalled Speelman's advocating, when the State Department of Labor declined to intervene con-

---

[3] Speelman estimated his speed as between 5 and 10 miles per hour.

[4] Also going to the scene was one Herman Naole.

[5] As a consequence of neglecting to offload several pieces of luggage after driving a tour group from its hotel to the airport on October 31, 1981, Speelman was suspended from November 4 through 10. The suspension was administered by Scott's predecessor, Albert Fukutomi.

[6] This rendition of the exchange between Scott and Speelman is extracted from an amalgam of their essentially nonconflicting testimony.

[7] Speelman testified: "If we couldn't talk to management, we talked to [Gouveia] and she'd call Honolulu [headquarters] and they'd come in for a meeting and hash it out, settle it out."

[8] Gouveia did not address this conversation in her testimony.

[9] Speelman's uncontradicted testimony that he engaged in these activities is credited.

[10] There is neither contention nor evidence that Sato is a statutory supervisor.

cerning his suspension, it was "about time" the drivers "see what the union can do for us." Gouveia recounted that Sato, hearing this, "stomped out of the bus" while proclaiming that the drivers and narrators did not "need a union." To like effect, Speelman testified that Sato "walked out of the bus . . . as soon a I said 'union.'" Speelman, however, assigned no parting rhetoric to Sato, averring that disapproval was apparent from "the way his face was."

Speelman testified that with the exception of Sato it was agreed during this gathering that the employees had "to go union . . . for job protection"; and that he should call Hayashi "to have an emergency drivers' meeting . . . to discuss what had happened to" him. Hayashi had told the Maui drivers, in a meeting at the time Scott became manager, that they were free to "contact" him concerning "problems" that could not be resolved locally. Gouveia testified, on the other hand, that those in the bus after Sato's departure agreed with Purdy's suggestion that, while the union was "a good idea," they "should give" Scott "another month . . . [to] . . . see how dispatching would be" before deciding "to do anything else"; and that she proposed to Speelman, after the gathering had broken up, that he call Hayashi to see if he "could help" with regard to the suspension.

In the immediate aftermath of the gathering in the bus, Gouveia testified, she confronted Scott, telling him that she had been "on that road, too, that morning"—i.e., the Iao Valley road, the morning of the accident—and that she thought Speelman's suspension was "stiff," especially as he had been suspended shortly before. Scott countered, according to Gouveia, "If my drivers think they're good drivers, they have to observe everything that's on the highway," whereupon she uttered Scott's name, as if in dismay, and broke off the conversation. Scott in essence denied that this conversation took place, testifying that Gouveia never spoke to him about Speelman's suspension.

Whether pursuant to a consensus reached in the bus or to a subsequent suggestion from Gouveia, Speelman called Hayashi's office in Hawaii about noon on January 6. Hayashi's secretary answered, saying he was out, and offering to take a message. Speelman assertedly left word that the Maui drivers felt the accident was not his fault and that they sought "an emergency drivers' meeting" with Hayashi to "discuss" the matter. Hayashi testified that his first knowledge of the accident and the suspension came with receipt of the secretary's message.

Scott testified that he tried, unsuccessfully, to reach Hayashi between the time of the accident and the next day's issuance of the suspension memorandum. Scott continued that, sometime after issuing the memorandum, he informed his father, by telephone, of the accident and the suspension. Scott avowedly was "not sure" who initiated this call, nor "of the exact day" it was made. He ventured at one point that it was "the day after" the accident; at another, that "it was either the day of or the day after"; and, at yet another, that "it was either one or two days after." Robert, less tentative, testified that Scott called him, "probably in the morning" of January 6, having been unable to "get ahold of" Robert on January 5.

Regarding the content of his conversation with Robert, Scott testified that after he had related what had happened, Robert remarked that buses "are not supposed to be going so fast" in the area of the accident, and asked if any other tour drivers had been in the Iao Valley the day it happened. Scott replied, so he testified, that Nelson Waikiki of Grayline Tours had, prompting Robert to direct that he "contact" Waikiki "as soon as possible," ascertaining if he had seen the branch and was able to avoid it, and then "get back to" Robert.

Robert's version of the conversation was, after Scott told him about the accident and the suspension, he said he wanted "more back-up information" to determine "if it was a true accident or . . . an avoidable accident," and instructed Scott to "check further if there was any other tour companies up in that area when the accident occurred or before Speelman had his accident." Robert concededly had in mind overriding the suspension with a "more extreme" sanction; and assertedly counseled Scott that, Speelman having been with Respondent "for a number of years," it would be "unfair to jump to conclusions" and take that "kind of action [without] more back-up information."

Following this conversation, Scott testified, he located Waikiki having lunch in Lahaina; was told that Waikiki had seen the branch and had gone "into the left lane not to hit it;[11] and promptly called Robert—"I think it was from Lahaina"—to report that Waikiki "saw the tree and he didn't hit it." Robert's only response was an "okay," according to Scott, and the conversation was over.[12] Robert testified that Scott did not report back until the morning of the next day, January 7, when he told Robert he had spoken with a driver for another company who had "avoided the branch."

Robert testified that the morning of January 7, before Scott's return call, he called Lora Warren, vice president of Grand Circle Travel Western (Grand Circle) in Long Beach, California. Grand Circle accounts for about 5 percent of Respondent's tour business in Maui.[13] Warren previously had complained "about baggage mishaps" involving Speelman and Gouveia, according to Robert;[14] and the purpose of this call, "prompted" by Scott's revelations about the accident, was to ask Warren "to reconfirm the complaint and put it in writing."[15]"She told

[11] Waikiki testified that he saw the tree "sticking out at least about two feet," and "had to go on the left side of the road to avoid the branches." "About two days after that incident," Waikiki added, later amending that "it was the same day," Scott asked him if he had seen the tree, and he said he had and "just avoid[ed] it and continue[d] on [the] tour."

[12] Ostensibly seeking to impart plausibility to Robert's telephonic brevity, as depicted by Scott, Respondent's counsel asked Scott if Robert was "a busy man" and if his telephone conversations often were "abrupt." Scott answered both questions in the affirmative.

[13] Hayashi testified that Respondent had 60 to 65 tour groups on Maui in January 1982, of which three were from Grand Circle.

[14] The baggage oversight leading to Speelman's suspension in November 1981 involved a Grand Circle group. Gouveia also had neglected to offload a bag involving Grand Circle about that time. She paid $27 from her own pocket to enable the bag to catch up with its owner, on Molokai, the next day.

[15] Robert testified that although his call to Warren was prompted by word of Speelman's accident, "sometime during that month I would have

Continued

me," Robert stated in description of the call, "that she definitely did not want both of these drivers on any more of her tours," and he asked her "to put something in writing" to that effect. Explaining why he wanted something in writing, Robert admitted that he was "thinking in terms of discharge or at least the possibility of discharge." He expanded:

> [I]f I got any more back-up regarding [Speelman's] accident, I wanted things in writing, more definite things with, I guess, more proof for my discharging him if Scott came back with an answer like he did.

Following this conversation, Robert dispatched this memorandum to the Maui base:

> I have just received a call from Grand Circle Travel (Laura [sic] Warren) who operates NRTA/AARP complaining about Speelman and Bella. The complaint is that, recently, these drivers have forgotten bags on their bus and in the past she complained to me about them [Speelman & Bella] compared to the other drivers on the rest of the islands. She has requested that they no longer be assigned to her tours.
>
> Therefore, effective immediately, both of these drivers will not handle any Grand Circle tours. I will send you a copy of the complaint letter when I receive it.[16]

After calling Warren and then receiving Scott's report the morning of January 7, Robert testified, he called Hayashi in Hawaii, directing that he go to Maui "as soon as possible, preferably that day, and terminate Speelman." Robert explained, so he related, that Speelman had "had an accident a couple days before," that he "apparently . . . just ran into the branch and could have injured our passengers," that another driver had "avoided hitting the branch," and that "it was an accident that our driver could have avoided." Robert also adverted, as he recalled, to Speelman's November suspension over the baggage matter. Hayashi replied, according to Robert, that he would go to Maui immediately, and mentioned in passing that he had just received a complaint call from Speelman that the latest suspension was "harsh and unfair" and that Speelman wanted a meeting about it.[17]

Hayashi's version of Robert's call was that Robert cited "a combination of three factors" in support of the discharge decision—Respondent "had a problem in Maui and . . . [Robert] wanted to clean up the operation," Speelman "had a serious avoidable accident," and "the complaint letter from Grand Circle Tours."[18]

Robert averred that he called on Hayashi to effect the discharge, rather than Scott, because of Scott's "age and inexperience . . . [and] . . . to relieve him of the burden and, I guess, not having him be the bad guy." Hayashi admitted that he "thought it was pretty funny that Robert would be calling [him] a couple hours after [Hayashi's secretary had] received [the] call from Speelman."

Hayashi flew to Maui the afternoon of January 7. On arrival, he obtained Speelman's and Gouveia's personnel files and telephone numbers from Scott, then called Speelman, arranging for them to meet later in the day. Scott testified that his first knowledge of the impending discharge came when Hayashi told him he had been "sent" to "swing his ax" on Speelman and to talk to Gouveia about the matters raised in Robert's memorandum of the Warren telephone conversation.[19] Scott's immediate reaction to this disclosure, he testified, was to shake his head and walk away. Asked why he did this, Scott testified, "I felt like the bad guy, you know." Scott recalled that he shortly asked Hayashi, "How can you guys come over here, after I suspend somebody, and fire him?" Hayashi's answer, as related by Scott, was that "it was out of his hands."

Hayashi and Speelman met in the late afternoon of January 7. As remembered by Speelman, Hayashi showed him the memorandum of Robert's conversation with Warren, along with a 1979 letter, never before seen by Speelman, attributing a baggage mixup to Speelman.[20] Speelman assertedly defended: "Well, what about my record? Where is all the over a hundred letters, complimentary letters that I had from tour groups, agents, people on the bus?"[21] Whether Hayashi acknowledged this query was not disclosed in Speelman's account. Speelman went on that Hayashi, citing the accident and Warren's reported request that he no longer be assigned to Grand Circle groups, declared, "We cannot work around you, and you are terminated this night."

Speelman's version proceeded that, seeing Gouveia's name as well as his own in Robert's memorandum of the Warren conversation, he asked what was going to happen to her; and that Hayashi said she was to be discharged "tomorrow morning."[22] Speelman also re-

---

had to call her back . . . because she had already told me that she wanted an answer from me as to what actions we were going to take to better our services on . . . Maui."

[16] Accommodating Robert's request for "something in writing," Warren sent him a letter, dated January 8, in which she stated:

> We are again receiving many complaints about your drivers David Spellman [sic] and Bella on the island of Maui. I had spoken to you before about this matter and we had decided to wait until we received some more complaints. Which we have and I now feel that I must request that our groups do not get these drivers anymore, effective immediately. Thank you for your help in this matter and do hope my request doesn't cause you too many problems.

[17] Robert testified that Hayashi, although saying that Speelman wanted a meeting, did not say Speelman wanted a drivers' meeting. Hayashi testified that the message relayed by his secretary was that Speelman wanted his suspension reconsidered; and that he knew nothing about Speelman's wanting a drivers' meeting.

[18] As earlier noted, the letter solicited from Warren was dated January 8.

[19] Scott to the contrary, Hayashi testified that his only purpose in going to Maui was to terminate Speelman.

[20] This letter is not in evidence, nor is there any evidence of the alleged underlying incident.

[21] Speelman testified that letters complimenting the drivers are posted in the drivers' lounge "for three or four days, then they take these letters down and they're supposed to put [them] in the driver's file." None is in evidence.

[22] It will be remembered that Speelman testified, elsewhere, that Scott told him, January 5, that he intended to "get rid of" Gouveia the first time she called Honolulu. Arguing in its brief that Speelman is generally

Continued

marked, so he recounted: "[Y]our drivers are the ones who told me to call you up to have an emergency meeting. What about our meeting?" Hayashi answered, per Speelman: "You're not with Robert's anymore and you can't hold a meeting. There will be no meeting."

Hayashi's account of the meeting was that he invited Speelman, "at the beginning," to tell him "about his situation regarding the accident"; and that Speelman "raised some unhappiness toward the two weeks' suspension, feeling it was severe." Hayashi related that he then showed Speelman a complaint letter and Robert's memorandum of the Warren conversation, in addition citing "specific examples" of which he was aware of complaints about Speelman from Grand Circle ("in particular the statement about King Kamehameha's height and his weight"), after which he announced that Speelman had "no future with the company as a result of a complaint and of the accident." With that, Hayashi continued, Speelman raised the prospect of causing a work stoppage—"the context was that he was going to have the drivers walk out." Hayashi denied that Speelman said anything about Hayashi's having a meeting with the drivers.

The next day, January 8, Speelman returned to the base, "insisting," as Hayashi put it, "on a letter of termination." Hayashi acceded, himself typing this letter:

> Dear David,
>
> You have been employed with Roberts [sic] since Sept, 1976. On 8/14/79 Maui office received a letter of complaint concerning handling of passengers and baggage by you at the airport on 8/14/79 at 0800.
>
> On 11/4/81, you were suspended 7 days for failure to drop off baggage on a Grand Circle group. At that time you were warned about further repercussion from the mainland agent that further dissiplinary [sic] action will be taken.
>
> On 1/5/82 you had an accident involving a tree at Iao Valley where the front windshield was hit and cracked, and luckily no one was injured.
>
> On 1/7/82, Roberts [sic] Hawaii Honolulu office received a complaint from Grand Circle Travel, one of our most valued accounts. The complaint was in regards to service rendered by David Speelman on Maui. Mentioned was a specific incident in Oct. 1981, when bags were forgotten on a bus, and your inability to compare with the rest of the islands [sic] drivers. The complaint went on, and requested that we no longer use David on their tours.
>
> As a result of the above, inconvenience to our passengers and agents, willful disreguard [sic] for company equiptment [sic] and safety of passengers, and the problems created for scheduling, your employment with Roberts [sic] Tours is terminated effective Jan. 5, 1982.
>
> Regretfully,
> /s/ Gerald Hayashi

It is undisputed that the second and fourth paragraphs of the letter refer to the same incident.

On January 8, as well, Hayashi met with Gouveia, having called her the previous evening to request it. The meeting began, Gouveia testified, with Hayashi's asking if she knew why she had been called in. She answered in the negative, as she recalled, and Hayashi asked if she knew about Speelman's discharge. She assertedly replied that she did not, that she had "heard" only that he had been suspended. Hayashi rejoined, according to Gouveia, that Speelman had "wanted to call a drivers' meeting" and was terminated. Hayashi expanded, as told by Gouveia:

> We don't call no meeting for no David Speelman, a special drivers' meeting. Do you know that Robert's don't like to have union in the company? Do you know that was a threatening thing when David says that he will call the drivers together and do not move the equipment?

Gouveia testified that Hayashi then "mentioned about" Speelman's accident and Robert's memorandum of the Warren conversation, with its reference to Gouveia, and stated that she "couldn't handle those groups anymore because of" Warren's request.

Hayashi's version of his meeting with Gouveia was that he "made Bella aware that Speelman was terminated, and . . . brought it to her attention that she had received a complaint similar to the complaint that David Speelman had received"—that she "was mentioned on the very same inter-office memo" from Robert. Hayashi professedly then asked why Warren did not want Gouveia on Grand Circle tours and why Respondent was not "getting what [it] expect[ed] out of [its] senior drivers." Gouveia answered, Hayashi continued, that she was "trying her best," thought she was "doing a good job," "enjoyed her job," and "was willing to do anything in terms of work to keep her job—to accept transfers, Japanese tours, whatever was available." Transfers are shuttles between the airport and various hotels, as opposed to tours. Gouveia "understood," according to Hayashi, that she no longer would be assigned to Grand Circle groups.

Hayashi testified that he could not remember mentioning Speelman's "remarks about pulling out the drivers," and that he did not say "anything . . . that related to the union . . . [or] . . . regarding Robert's attitude toward unionization."

Scott testified that he had a conversation with Gouveia "a day or two" after Speelman's discharge in which she said she was "willing to do anything"; that, citing "as an example" Grayline's use of "lady bus drivers" to drive transfers, she was willing to "come in early and do transfers."

The parties stipulated that Gouveia's "opportunity for work in conducting tours was reduced" as of this time.

---

unworthy of belief, Respondent notes that he answered "yes" when asked if Hayashi's January 7 remark about Gouveia's imminent dismissal was "the first time that any management person told [him] that Bella's job was in jeopardy." Respondent fails to mention Speelman's answer to the very next question—whether Hayashi's remark was "the first time that any management person told [him] that Bella *was going to lose her job.*" (Emphasis added.) He not only answered in the negative, but mentioned Scott's January 5 comment.

Gouveia testified that she since has been assigned no tours, instead being used solely as a transfer driver. This apparently has not affected her base pay, but, as she put it, "the difference is tip-wise." She has driven for Respondent since 1969.

Robert testified that, because of Scott's report that others had avoided the branch, he "determined that [Speelman] willfully disregarded the safety of passengers" at the time of the accident. He added, "I probably feel [that Speelman] purposely put the lives of those passengers in danger." Similarly, Hayashi professed to believe, from "the speed of [Speelman's] bus" and from "the conditions that he described," that Speelman "had willful disregard for the safety of his passengers." Scott disagreed, testifying that, while the accident resulted from "the driver's negligence," Speelman did not "purposely disregard the safety of the passengers." Scott further testified, echoing his comment to Speelman the evening of January 5, that he did not think the accident warranted discharge, and that he did not feel the 2-week suspension amounted to letting Speelman "off easy."

Hayashi acknowledged that Respondent's drivers "do occasionally get involved in accidents." In fact, its Maui drivers had 19 accidents in 1982, counting Speelman's; and, except for Speelman, there is no evidence that discharge followed. In 1976 and again in 1978, Hayashi terminated drivers on Hawaii, in part because of their accident records. The termination letter concerning the 1976 action cited three accidents in less than 1 month, plus two instances of insubordination,[23] and that relating to the 1978 action referred to three accidents in a 4-month span, together with one complaint about tour quality. There is no evidence of other accident-related discharges, nor is there convincing evidence that Speelman was in other than the one accident.[24]

Robert testified that Respondent's main problem on Maui around the time of the events in question was "customer complaints because of the quality of drivers. "I would guess we had about two or three complaints a week," he enlarged, "not only on Speelman, but a number of drivers." He continued that tour groups had lodged "a number of complaints" about Speelman, "about his service," but that he had no verifying documentation. Hayashi averred that he "personally" had received "a lot of complaints about" Speelman, particularizing that he had received two of "a verbal nature"; and that they "led us to believe" that Speelman's tour narrations betrayed a weakness in his knowledge of "Hawaiiana." Hayashi admittedly did nothing to document such complaints, nor did he mention them to Speelman before the meeting in which Speelman's discharge was announced. Scott's testimony concerning complaints about Speelman was ambiguous, if not contradictory, it finally becoming evident that the only predischarge complaint of which he had heard was that leading to the suspension in November 1981.

Robert denied that he knew about "any union activity or interest" by Speelman, or that Speelman was seeking a drivers' meeting, before he made the discharge decision. Hayashi and Scott made similar disclaimers.

2. Conclusions

Speelman. It is concluded that Speelman's discharge violated Section 8(a)(1) as alleged.

The bases for this conclusion are:

1. Speelman had driven for Respondent for over 4 years, which indicates that his overall performance was satisfactory.

2. The day before the discharge, and after Speelman had been suspended over the accident, he was the focal point of the gathering in the bus in which he and other employees discussed not only the suspension, but their anxieties about dispatching procedures and job security, and the feasibility of their consequently seeking union representation.[25] This plainly was protected activity, both because it dealt with matters of shared employee concern in the context of the workplace and because union representation was considered as a recourse.

3. Also discussed, either during the postsuspension gathering in the bus, or just after between Speelman and Gouveia, was the desirability of a meeting with Hayashi, after which Speelman left word with Hayashi's office that the drivers felt the accident was not his fault and that a meeting was wanted.[26] Speelman's call to the office likewise was protected, flowing as it did from the protected activity on the bus and because it sought a meeting with Hayashi about at least one matter of common employee concern—Respondent's treatment of him following the accident.

4. That Respondent somehow had learned about these protected activities and was motivated by them to discharge Speelman is indicated by: (a) Hayashi's testimony that he "thought it was pretty funny" that Robert would call him to take the action only "a couple hours after" Speelman's call to Hayashi's office, and (b) Hayashi's January 8 remarks to Gouveia, while telling her about the discharge, that Speelman had "wanted to call a drivers' meeting," and that Respondent "don't like to have union in the company."[27]

5. That the accident was a pretext rather than a true reason for the discharge is revealed, most graphically, by Respondent's already having imposed discipline—the 2-week suspension—for it. The testimony of management witnesses—Scott, Robert, and Hayashi—was unpersuasive that Scott alone knew about the accident until after the suspension was handed out. It is altogether improbable that Scott, little more than a cypher in the management of the Maui operation, would have dealt with such

[23] A passenger suffered a broken collarbone in one of the accidents leading to the 1976 discharge.

[24] Scott's testimony that he knew of Speelman's being in "a couple accidents" before that on January 5 was devoid of particulars and unpersuasive.

[25] Speelman and Gouveia are credited that the discussion in the bus embraced the named subjects.

[26] Speelman is credited that this was the substance of his message. Hayashi's secretary did not testify.

[27] Hayashi's denials notwithstanding, Gouveia is credited that Hayashi made the remarks attributed to him. Gouveia had the more convincing demeanor.

a situation and taken such action independently.[28] Moreover, Scott's testimony about the timing of his first postaccident conversation with Robert, while so laced with equivocation as to suggest historical revisionism, at one point allowed that it could have been "the day of" the accident; and Nelson Waikiki, supposedly interviewed by Scott after that first conversation, testified that the interview was "the same day" as the accident.

6. Other compelling indicia that the accident was a pretext are: (a) Robert's perceived need to dredge up other of Speelman's misfortunes, as witness his solicitation of Warren to submit a complaint against Speelman, the avowed purpose being to build a case in aid of Robert's predisposition to terminate Speelman,[29] (b) the rank absurdity of Robert's professed belief that Speelman "purposely put the lives of those passengers in danger," and of Hayashi's stated opinion that Speelman "had willful disregard for the safety of his passengers," (c) Scott's testimony that he did not think the accident warranted discharge and that, by imposing the 2-week suspension, he did not feel he was letting Speelman "off easy," and (d) Scott's reaction of shaking his head and walking away when he learned from Hayashi that discharge was forthcoming, and Hayashi's nonresponse that it was "out of his hands" when challenged by Scott how Speelman could be fired after already having been suspended for the same offense,[30] which betrayed the visceral feeling of both that discharge was disproportionate to any accident-related misconduct.

7. The accident as pretext is additionally shown by: (a) the considerable incidence, otherwise, of accidents involving Respondent's Maui drivers, without discharge resulting, (b) the absence of convincing evidence that Speelman was in other than the one accident, and (c) the fact that the only other accident-related discharges of which there is evidence were in response to circumstances far more aggravated—three accidents in less than a month in one instance, and three accidents within 4 months in the other.

8. That the other reason prominently advanced for the discharge—Warren's complaint—likewise was pretextuous is revealed by: (a) Robert's having solicited it, admittedly preparatory to discharging Speelman,[31] (b) the speciousness of Hayashi's statement to Speelman, when effecting the discharge, that Respondent could not "work around" him in making assignments in view of Warren's request that he no longer be assigned to Grand Circle groups, when Grand Circle represented only about 5 percent of Respondent's Maui business, (c) Respondent's customary failure, apparently, to discharge or otherwise penalize its Maui drivers despite its receipt, as Robert testified, of two or three complaints a week against "a number of" the drivers, and (d) the fact that the testimony of the management witnesses about complaints against Speelman, other than the one solicited from Warren, was so devoid of substantiating detail as to indicate testimonial bad faith.

Gouveia. It is concluded that the denial to Gouveia of tour-group assignments, roughly coincident with Speelman's discharge, also violated Section 8(a)(1) as alleged.

This conclusion is grounded on these factors:

1. Gouveia had driven for Respondent since 1969—a powerful indication that her performance was generally acceptable.

2. She participated in the same January 6 protected activities in the bus as did Speelman, after and as a manifest outgrowth of which she confronted Scott about the harshness of Speelman's suspension.[32]

3. As earlier observed, Respondent revealed its knowledge of and hostility to the protected activities, in part, by Hayashi's January 8 remarks to Gouveia.

4. The inference is unavoidable that the action against Gouveia was prompted by the same improper motivation that underlay Speelman's discharge. Beyond coinciding in time with the discharge, its purported justification was the same complaint-soliciting call from Robert. Common motive is inferable, as well, from Hayashi's having gone to Maui for the express purpose, stated to Scott, of dealing with both Speelman and Gouveia;[33] and from Hayashi's prefacing his January 8 disclosure to Gouveia of her reduced status with a pointed discussion of Speelman's discharge, Speelman's having "wanted to call a drivers' meeting," and Respondent's not wanting "to have union in the company."

The allegedly unlawful threats and interrogation. Crediting Gouveia, Hayashi asked her, on January 8, if she had heard about Speelman's discharge, and exclaimed, later in the same encounter:

> Do you know that Robert's don't like to have union in the company? Do you know that was a threatening thing when David says that he will call the drivers together and do not move the equipment?

The two comments just set forth, while in question form, obviously were designed less to interrogate than to impart information. Uttered in the context of Speelman's discharge, they necessarily conveyed the message that employees promoting union representation or a concerted work stoppage to protest conditions of employment would be placing themselves at risk of Speelman's fate. That the message was not lost on Gouveia is revealed by her ensuing verbal genuflections to Hayashi and to Scott that she was "willing to do anything" to keep her job.

It is concluded that Hayashi, by thus threatening Gouveia with regard to protected activity, violated Section 8(a)(1) substantially as alleged.

---

[28] Scott's being manager in name but not much more was demonstrated by his admission that Hayashi oversaw "everything" he did; by Hayashi's bald invitation to the Maui drivers, when Scott was named manager, to take their problems to him if they could not be settled locally; and by the cavalier circumvention of Scott to effect Speelman's discharge.

[29] Robert's self-serving testimony is not credited that he would have called Warren "sometime during that month" in any event.

[30] Scott, not contradicted, is credited with respect to this exchange with Hayashi.

[31] Robert having solicited Warren's complaint with a specific purpose in mind, an inference is in order that her subsequent letter was written as an accommodation and not from conviction.

[32] Gouveia, her demeanor more convincing than Scott's, is credited that this confrontation occurred and was as described by her.

[33] Scott is credited that Hayashi said he was on Maui for the dual purpose.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) of the Act, as found herein, by:

1. Discharging David Speelman on January 7, 1982.
2. Denying group-tour assignments to Bella Gouveia beginning about January 8, 1982.
3. Threatening Gouveia with job loss or other adverse action should she engage in certain activities protected by the Act.

Respondent did not otherwise violate the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

Respondent, Robert's Tours & Transportation, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, withholding driving assignments from, or otherwise discriminating against its employees because of their activities protected by the Act.

(b) Threatening employees with job loss or other adverse action should they engage in activities protected by the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in their exercise of rights under the Act.

2. Take the affirmative action necessary to effective the purposes of the Act.

(a) Offer to David Speelman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges; and make him whole for any loss of earnings or benefits suffered by reason of his unlawful discharge, with interest on lost earnings.[35]

(b) Restore Bella Gouveia to her job duties as they existed before we began unlawfully withholding tour-bus assignments from her on about January 8, 1982; and make her whole for any loss of earnings (including tips) or benefits suffered by reason of that unlawful withholding, with interest on lost earnings.[36]

(c) Preserve and make available, on request, to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amounts of backpay and benefits owing under the terms of this Order.

(d) Post at its place of business on Maui, Hawaii, the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the allegation concluded to be without merit is dismissed.

---

[34] All outstanding motions inconsistent with this recommended Order are denied. In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[35] Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[36] See fn. 35, supra.

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Cablevision Industries, Finger Lakes Division *and* Communication Workers of America. Cases 3–CA–12830 and 3–CA–13080

26 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 30 October 1986 Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cablevision Industries, Finger Lakes Division, Geneva, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Michael Cooperman, Esq., for the General Counsel.
Sheldon Rosenberg, Esq. (Rosenberg & Ufberg, Esqs.), of Scranton, Pennsylvania, for the Respondent.
Stuart M. Pohl, Esq. (Lipsitz, Green, Fahringer, Roll, Schuller & James, Esqs.), of Buffalo, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was heard by me on 14 and 15 May 1986 at Geneva, New York. The consolidated amended complaint, which issued on 2 July 1986, alleges that Cablevision Industries, Finger Lakes Division (Respondent, the Company, or Cablevision) failed and refused to execute a written contract embodying an agreement arrived at with the Communication Workers of America (the Union or CWA) as certified bargaining agent for an appropriate unit of its employees, and thereafter unilaterally granted pay increases not in conformity with the agreement and new clothing and shoe benefits, in violation of Section 8(a)(5) and (1) of the Act. The consolidated amended complaint also alleges that Respondent threatened employees with the loss of profit-sharing plan benefits because they chose to be represented by the Union for purposes of collective bargaining, through specific language in its profit-sharing plan coerced employees in their activities on behalf of the Union by conditioning participation in the plan or being unrepresented by any union, and told union employees they would be granted wage increases less than they would have received if they had not selected the Union to represent them, in violation of Section 8(a)(1) of the Act.

In an answer filed 10 March 1986, Respondent denied the conclusionary allegations of the consolidated amended complaint. The parties were each represented by counsel at the hearing and were provided full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, to make opening and closing statements, and to file briefs with me. The parties have filed timely briefs which have been carefully considered.

On my observation of the witnesses, the entire record in this proceeding, and the briefs filed herein, I make the following

FINDINGS OF FACT

I. JURISDICTIONAL FACTS

At all material times, Respondent, a New York State corporation with an office and place of business in Geneva, New York (Respondent's facility), has been engaged in the business of providing cable television services to the Finger Lakes Region of New York. Annually, Respondent, in the course and conduct of its business operations, receives gross revenues in excess of $100,000 and purchases services valued in excess of $50,000 which are furnished to Respondent at its Geneva, New York facility directly from points outside the State of New York. Respondent admits, and I find, that at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent concedes, and I find, that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent's Refusal to Execute a Written Contract Embodying an Alleged Collective-Bargaining Agreement and its Subsequent Unilateral Grants of Benefits*

A Stipulation for Certification Upon Consent Election having been executed by the parties on 30 July 1984, a representation election was conducted among Respondent's employees on 5 September 1984 in a unit consisting of all regular full-time installers, technicians, converter control employees, construction employees, and dispatchers. The Union won the election by a vote of 14 to

13 and, on 13 September 1984, was certified by the Regional Director as exclusive collective-bargaining representative of the employees in the unit described.

Collective-bargaining negotiations commenced in October 1984, and continued at the rate of approximately one meeting a month until June 1985. The union-negotiating team included CWA Representatives Tim Dailor and Ron Woods and employees Jeff Stowell and Tom Deane, with Dailor at first and then Woods, who missed some of the earlier meetings, serving as chief spokesman. The Cablevision negotiating team consisted of Attorney Sheldon Rosenberg and Director of Personnel Brain Connors, with Rosenberg acting as chief spokesman. In response to inquiries about his authority posed by Woods, Rosenberg explained that he was the chief negotiator and the person with the authority to reach tentative agreement.

According to the uncontradicted testimony of Woods, from time to time during the negotiations, Rosenberg made it clear that the only person he had to answer to at Cablevision was Alan Gerry, its president. On occasion, when the Union made specific proposals, Rosenberg responded that he would discuss the demand with Gerry, and when Rosenberg rejected union demands he noted that he had a discussion with Gerry on the matter.

Gerry was the sole incorporator of the Respondent corporation in 1974, and at all times material to this proceeding has been the sole shareholder, director, and chief executive officer of the Respondent primarily responsible for all the operations of the Company. Until removed by Gerry, by resolution he adopted on 13 March 1986 as sole shareholder, the other two directors of the Respondent corporation were Bette Nichols, his personal secretary and the corporate secretary, and John O'Neill, the Respondent's treasurer and chief financial officer. On 28 February 1985 Gerry arranged by resolution for the creation of the office of chairman and chief executive officer, which would excercise all powers formally exercised by the president. Gerry, previously president, was not elected to the new post, and Roger Turner was elected president. Another individual, Rodney Cornelius, was elected executive vice president.

During the course of negotiations, various proposals and counterproposals were exchanged. A union proposal submitted on 26 February 1985 included a provision for retention by employees of all existing benefits by providing for continuation of all rights and privileges now existing and not specifically altered, amended, or deleted by this agreement. This provision was not accepted by Respondent. The Company did propose to continue the present health, hospital, dental, and life insurance coverage or their equivalent.

According to Woods, the Cablevision negotiators were insisting on inclusion of their language in any contract to which they would agree. Rosenberg had also stated he was going to put all the Company's proposals together in one package. By the meeting held in April 1985, when Rosenberg advised that he would not be available during May, at Woods' insistence, Rosenberg agreed to submit a package to the Union through the mail.

A ninth negotiation session was held on 2 May 1985, attended by the persons previously described, as well as Federal Mediator Robert Bowling. According to Connors' typewritten notes of this session, the Union, through Bowling, asked for a complete contract by the following day. When Rosenberg advised this was not possible, Bowling advised that the Union was prepared to accept from the Respondent a final offer. A verbatim transcript of the notes at this point follows:

> Mr. Rosenberg advised the mediator that we would, in fact do this, and we therefore cancelled the meeting scheduled for 5/3/85. Mr. Rosenberg stated he would return to his office and prepare this document. *He also advised the mediator that he would have to meet with the representatives from Cablevision to see if this particular package was satisfactory to them.* A tentative meeting is set for Monday, 5/6/85 at 1:30 p.m. *Assuming that the drafted copy is available at this time and is approved by the Cablevision representatives, the item will be mailed to the union and federal mediator on Tuesday.* Subsequent to their receiving this document, another date will then be set for a negotiation session. Mr. Rosenberg will be out of the country during the next month, however, his partner, Mr. Ufsberg, [sic] will be available to come to this session. *The mediator was advised that if this is to be our final offer, we will not change any items in the document which is to be prepared.* [Emphasis added.]

Rosenberg had the document prepared and submitted it to the Union on 7 May 1985. It is entitled "Final Offer." In a letter dated 7 May 1985, which accompanied the submission, Rosenberg, after stating that he was enclosing the Company's final offer in accordance with the Federal mediator's statement to him on 2 May that the Union wanted a complete and final offer to take to the employees, goes on to note that the offer is for a 3-year contract and contains a large increase in the first year. That increase was described by Woods as being at least two times the industry average and by Connors as 3-1/2 times larger than general wage increases in the country at that time. The proposal's average increase was between 16 and 17 percent in the first year and 1-1/2 percent in each of the next 2 years. Connors described this offer as being high to buy the working clauses of the Company's proposal. The management-rights clause in particular, among others, appears to have been very broad and comprehensive. In another clause, the Company retained the right to contract out all or part of the work performed by bargaining unit employees. Neither did the final offer contain a union-security or dues-checkoff clause. Paragraph 29 entitled "Duration" provides, in part: "This Agreement shall go into full force and effect when it is ratified by the Union and the Company."

The next bargaining session was held on 20 June 1985. Woods, Dailor, and Stowell attended for the Union, Rosenberg and Connors attended for the Company, and Mediator Bowling was also present. The parties were in separate rooms. According to Woods' uncontradicted testimony, through the mediator Woods inquired of the company team if there was any room for continued ne-

gotiations or if they felt as though this was it. Bowling and Rosenberg came into the Union's room. Rosenberg said this was a final offer, and as far as he was concerned, as the chief spokesman for the Company, negotiations were concluded. Woods then signed the final offer document and said, "[It] looks like we have agreed and that we are prepared to put that into effect." Rosenberg asked what he meant by that. Woods replied, "[W]ell as far as we were concerned, you're not going to go any further, we're willing to accept this agreement." Rosenberg then asked if in fact the membership was going to have this ratified. After first disputing Rosenberg's right to that information, the necessity of membership approval and its relevance, Woods did inform Rosenberg that it was the Union's policy to take the agreement to the membership for ratification. Rosenberg said fine, got up, and started out of the room. Woods asked "[W]here are you going?" Rosenberg said, "[C]all me when you get it ratified." Woods said, "[L]ook you've given the Union a final offer. I signed that final offer. I'm not leaving here without your signature on here as a final offer or a joint signed stipulation as to what this agreement represents."

Rosenberg then agreed to sign the document. He wrote "Tentative agreement subject to ratification by Union membership & Co B of D" and signed his name below. Again Rosenberg got up to leave. Woods said "[W]ait a minute, what does this mean?" Rosenberg said, "[I]t means exactly what it says." Woods then said, "[W]ell, as far as I'm concerned, this is news. You've told us all through these negotiations that you were empowered to sign and reach tentative agreement for the Company and now you're saying it has to be ratified by the Board of Directors?" Rosenberg said, "[T]hat is Alan." Woods asked, "Alan meaning Alan Gerry, President of the Company?" Rosenberg said,"[Y]es." Woods asked, "[W]ell, but why? You told me that prior to putting this package together that it was your intent to meet with Mr. Gerry before you gave it to us. It's no different. Why are you taking it back to Mr. Gerry." Rosenberg said, "[D]on't worry. That's a mere formality. I'm going to recommend it and as far as I am concerned, that's all that's necessary." And with that, the meeting concluded.

Woods then explained his comment about Rosenberg having previously mentioned taking the package to Alan Gerry. Prior to Rosenberg sending him the final offer, when Rosenberg said he was going to put it together, he said he would then show it to Alan Gerry first before he sent it to the Union to get Gerry's okay on it as a collective document. Rosenberg said that most of the items he had discussed with President Gerry in the past, but Gerry wanted to see them as a collective document.

According to Woods, the meeting of 20 June 1985 was the first time that either Rosenberg or Connors had ever mentioned the board of directors. Although Woods was aware of paragraph 29 of the final offer, which referred, inter alia, to ratification by the Company as a condition precedent to its going into full force and effect, it was his understanding based on Rosenberg's statements during negotiations that the reference was to Gerry's approval, and that such approval or ratification was already completed prior to submission of the final offer to the Union.

Rosenberg did not testify at the hearing. Woods impressed me as a thorough and thoughtful person who made every effort to be as careful and accurate as he could be in the presentation of his narrative and in his responses on cross-examination. I credit his attribution of comments to Rosenberg on 20 June and earlier meetings that Rosenberg had or would discuss the Company's proposals, in particular the Company's final offer, with Alan Gerry. To a large extent, Connors' notes of the 2 May negotiation session corroborate that Rosenberg planned to obtain preliminary approval of that offer from the responsible company representatives. I infer that the key representative whose approval was necessary was Gerry and that, in conformity with Woods' testimony, Rosenberg did clear the proposal with Gerry.

A few days after the 20 June meeting the employees in the bargaining unit met and voted to reject the agreement which Woods and Rosenberg had signed. Woods telephoned Connors to inform him of the rejection. Connors stated he was very disappointed, he wanted to get the negotiations over with, and he asked what could be done specifically to get the negotiations completed. Woods told him about the two items which had led to the rejection. One was the Company's proposal on subcontracting of their work and the second was the absence of a payroll deduction of dues for those employees who chose to be members of the Union. Connors asked what was the next move. Woods said to get back to the bargaining table. Connors said, "[L]et's do that as quickly as we can, let's get a meeting and get this contract completed."

Mediator Bowling set up another meeting for 27 June. At this meeting, attended by the same parties as on 20 June, Woods and the other union people were in a separate room. Woods asked the mediator to take the two items he had previously discussed with Connors to the management team. Rosenberg and Connors then came back and Rosenberg said, "I've got the message from the Mediator and the answer is no. A final offer is a final offer, because once I give you my final offer. I don't change my final offer." Woods replied that he understood that but "there's been a rejection and what we're proposing is something that we feel will get the contract ratified and accepted." Rosenberg said, "I repeat, I never change my final offer; that's not the way I negotiate." Woods said, "[N]ever is a long time," and Rosenberg said, "[O]h well, if there's been a prolonged strike, then I may, but under these circumstances I never change my final offer." Woods then said, "[L]ook, this is a first contract, there's been this rejection, what we're trying to do is get it completed. From the Union's standpoint, this language, this contract is totally one-sided anyway, it's all of your proposals, the record reflects this with very minor exceptions, and, as far as this Union is concerned, you got the language you wanted and we should put this into effect with these minor changes. And I'm very seriously requesting that you do that." Connors interrupted and asked for a company caucus and the two left.

They shortly returned and Rosenberg said, "[O]kay, we'll take your two items back to Alan to see what he says and then we will get back to you." Woods said, "[W]ell, look, why don't you call Alan on the phone and talk to him about it so that we can get this wrapped up." Rosenberg said, "Alan is in Florida, and he's out of telephone contact." However, he would be back by the following Monday, 1 July, and they would meet with him and Rosenberg agreed to give a call as to what the Company's response was. Woods said that the Union had a meeting scheduled for 2 July when they intended to put the results of this meeting up to another ratification vote and they would really appreciate his answer before then. Rosenberg said, "[D]on't worry, I'll get back to you Monday."

Woods did not hear from Rosenberg on either Monday, 1 July, or Tuesday, 2 July. He was in Buffalo on negotiations and was unsuccessful in reaching Rosenberg and Connors. Woods did learn on 2 July from President Robert Flavin of Local 1170, CWA, who had received a phone call from Connors just prior to the ratification meeting, that the Company had rejected the two items and was also unilaterally going to put the wage portion of its proposal into effect and would only be available to continue negotiations on other items in their final offer.

At the union meeting on 2 July, the Union ratified the Company's final offer. The next day Woods called Connors to tell him that the contract was ratified. Woods contacted Connors because in his experience Connors was easier to reach then Rosenberg, who was away from his office a lot. Connors responded, "[G]ood, that means its over, it's completed, we can put this to bed." Connors asked, "[W]hat was the next step." Woods said, "[J]ust send me two signed copies of the complete document, by Alan, Sheldon, or yourself, whoever is going to sign for the Company. I will sign both and return one to you." Connors asked Woods to call Sheldon (Rosenberg) for those kind of details. Woods suggested they both call Rosenberg and Connors agreed. When Woods was unsuccessful in reaching Rosenberg by telephone he sent a letter. In the letter, dated 8 July 1985 and addressed to Connors, Woods confirmed their telephone conversation of 3 July and the fact of membership ratification of the tentative agreement on 2 July, advising that the effective date should be 1 July, and requesting that two signed copies of the agreement, to be executed by Respondent, be returned to Woods.

Woods had no further conversations with either Connors or Rosenberg. About 14 July 1985, Woods received a letter dated 12 July with an attachment from Rosenberg informing him that Rosenberg had received a communication from Cablevision's board of directors advising him that they had rejected and would not ratify the Company's final offer made on 7 May 1985 until the following changes (set forth in the attachment) to the final offer were made and agreed upon and ratified by the union membership and company board of directors. In the letter Rosenberg asked Woods to let him know if and when the membership ratifies the amended final offer. He also advised of the Company's availability for continued negotiations and to explain the board of directors' resolution. Attached to the letter were 2-1/3 pages of changes to be made to the final offer. Among them were changes removing the clause permitting contracting out of all bargaining unit work from the grievance and arbitration procedure; restricting job classification seniority for purposes, among others, of layoff and recall to only one of the three locations encompassed by the certified bargaining unit, i.e., wherever the employee works as a regular full-time employee; adding a right to make all transfers of employees to other jobs and locations, now including permanent transfers, irrespective of seniority; severely restricting the jurisdiction of the arbitrator to review company disciplinary actions; and adding a fourth year to the agreement during which wages would increase only minimally.

No further meetings were held and, ultimately, the Union filed its initial unfair labor charge in Case 3–CA–12830 on 6 August 1985 alleging a refusal to bargain in good faith by the foregoing conduct.

Respondent's sole witness was Personnel Director Connors. Attorney Rosenberg did not testify. Neither did Alan Gerry. Connors, initially called as a witness by the General Counsel, acknowledged that, on occasion during the course of negotiations, he reported back to Alan Gerry what was going on at negotiations. Connors also noted that at the beginning of negotiations a meeting was held, attended by Ed Whalen, at the time Cablevision vice president and the company official to whom he reported,[1] Gerry, Rosenberg, and himself, to review the Company's position. Asked twice whether the Company's proposals were formulated and discussed at this meeting or drafted based on the outcome of the meeting, Connors was evasive, first responding that "there was a meeting to discuss how we would proceed" (Tr. 178) and then responding that "Mr. Rosenberg subsequently drafted some proposals." (Tr. 179.)

It was Connors' testimony that Gerry was informed as to the status of negotiations not only by himself, but he assumed Gerry was kept apprised by his superiors, Fred Schulte and Roger Turner, president since 28 February 1985, including about the wage package in the Company's 7 May final offer, because "that's what they normally do." (Tr. 220.) But also according to Connors, Turner probably was aware of the contents of the Company's final offer but "not necessarily" Gerry. Connors also agreed, after reviewing his notes of the negotiation meeting of 27 June 1985, that he met with Gerry on 30 June to discuss, inter alia, the state of contract negotiations.

During his telephone conversation with Ron Woods on 3 July, when Woods told him the Company's final offer had been ratified, Connors made no reference to that proposal having been withdrawn. Connors also agreed that the Company's wage package, which was unilaterally put into effect on 2 July, had to be approved by Gerry before it was implemented.

On his examination by Respondent's counsel, Connors testified that during April, May, June, and July 1985, Gerry was involved in negotiations for the purchase by

[1] At the time of the hearing, Connors reported to Fred Schulte, director of operations, Whalen having left the Company in the interim.

Respondent of cable systems located in Florida, Maryland, and Michigan, and more recently systems in Pennsylvania and Tennessee. Those involved in the negotiations for the Company have been Gerry and Rodney Cornelius, executive vice president.

Although Connors at first claimed on redirect examination by the General Counsel that at the very first negotiation session, in October 1984 when the parties made their ground rules for negotiations, the Company mentioned that any agreement reached was subject to ratification by a board of directors (Tr. 257), later on recross-examination by Respondent's counsel, Connors, in contradiction of his earlier claim, said that the understanding reached at the first meeting was that "anything we decided between us was tentative pending ratification by the Company and by the employees." (Tr. 267.) This was similar to the language which was later incorporated as article 29 into the Company's final offer.

Respondent's minutes related to company rejection of its own proposal following union ratification disclose the following: At a special meeting of the board of directors held at the Company's headquarters in Liberty, New York, on 8 July 1985 at 10 a.m. with Gerry, O'Neill, Cornelius, and Nichols in attendance, a resolution was adopted that, for matters pertaining to the operational activities of the Company and, in particular, any matters involving the negotiations being conducted in regard to the C.W.A. and Finger Lakes Division of the Company, Roger Turner, president, and Fred Schulte, director of operations, shall sit as members of the board of directors. Then, at another special meeting of the board of directors held later in the day, on motion made by Turner and seconded by Schulte, a resolution was unanimously passed rejecting the Company's final offer because a union official offered Dave Johnson, an employee, a $5000 bribe to vote for ratification of the final offer at the Union's meeting on 2 July 1985, and because the Company's negotiating team went beyond their authority. The resolution then went on to list those changes, previously described, which would be required to be made, agreed upon, and ratified by the union membership before the board of directors would ratify the final offer.

Among "facts" given the board of directors, recited early in the resolution, was one reporting that the Company's negotiating team did not report regularly and in detail about the offers and counteroffers made by them and the Union in contract negotiations. Another recited that on 1 July 1985 after the board of directors met for the purpose of examining the final offer, only discussing the wage and fringe benefits parts of the offer, it agreed that because there was no disagreement on the wage and fringe benefits items, the board would unilaterally implement those elements, but would reserve the right to examine and ratify, or not ratify, the remaining details of the final offer. A third recited that both members of the Company's team, Rosenberg and Connors, strongly recommended that every detail of the final offer of 7 May 1985 be ratified by the board.

Other conduct on the part of Respondent alleged as violative of its bargaining duty includes certain unilateral changes in wages and terms and conditions of employment which followed the Company's refusal to execute the final offer.

According to employees Stowell and Deane, some of the unit employees, approximately half of them, received a wage increase in January 1986. Neither of them received a raise at that time. They believed the raises were only provided to those employees who were not yet at the top of their scale for their particular job classification. Under cross-examination, Deane, employed since 1979, testified that if an employee was due a raise under the Company's wage plan, it was received in January. A review of the General Counsel's exhibit documenting employee salary history shows that, effective 8 July 1985, each of the unit employees received an increase and, effective either 3 or 13 January 1986, 15 of the 26 employees received another raise.

Under article 25, entitled "Wages," of the Company's final offer, ratified by the union members in the bargaining unit on 2 July, each job position had a rate shown for each of 3 years with three different rates shown for each year depending on whether the employee in the position was in the first, second, or third year on job. As explained by Woods, without contradiction, the increase each year would take effect for each employee in a particular position on his anniversary date in that job. Although the Company did put the different increases due employees in each position under its final offer into effect in or close to what would have been the first year of the contract, near the beginning of July 1985, it gave further increases to certain of its employees uniformly in January 1986, and not on their anniversary dates of employment as called for in the final offer. In the cases of Deane, Stowell, and a few other employees, because of their length of employment, the raises they received in July 1985 placed them immediately at the third-year-in-job top rate, and the Company refrained from granting the second-year increase to them in January 1986, unlike all other employees who were not yet at the third-year rate. By granting raises in January 1986 to 15 employees the Company apparently continued but modified a practice predating its bargaining relationship[2] and failed to comply with the terms of its final offer.

Stowell and Deane also testified to their receipt, along with all other unit employees, in January or February 1986 of winter outerwear jackets for use while working for the Company, but which they kept at their homes. The Company had never previously supplied any work clothes to its employees. In response to a General Counsel subpoena, Connors noted in writing that winter jackets were purchased in these months for the Company's northern system field personnel employed at 10 different locations, including 26 employed at Finger Lakes, at a total cost of $6055.

Stowell also testified without contradiction that in January 1986 the Company started to supply the unit employees with a boot allowance by giving $50 a year toward the purchase of a pair of work boots to any employee who wanted it.

[2] According to Connors, prior to 1986 the Company had a practice of giving employees wage increases twice a year, including one in January, but in January 1986 this was changed to once a year in January.

The evidence showed that at an employee meeting called by the Company in early November 1984, at the office garage in Geneva near the end of the workday, addressed by Connors and attended by another management official, Connors asked if there were any questions about what the Company could do for them. An unidentified employee asked if the Company would supply jackets and Connors said that he would look into it and get back to them at a later time. At a subsequent meeting of the employees called in January 1986, Connors, accompanied by another management official, said the Company was going to supply jackets and took down the sizes of the employees who wrote their names on a list.

Connors disputed the statement attributed to him by Deane asking employees what the Company could do for them, claiming that he asked "if there were any problems or something like that I'd be happy to help them" (Tr. 259), but Deane stood by it during vigorous cross-examination, even concluding emphatically in response to one question asked about what he had gathered from Connors' remark that "they had something for us." (Tr. 106.) Connors, as noted previously, was evasive and contradictory in his testimony, he also testified in conclusionary form instead of reciting the substance of conversations as he recalled them (see, e.g., Tr. 298–300), and I credit Deane in his recital of this matter.

The Company's final offer contained no provisions pursuant to which the Company agreed to provide clothing for use on the job. Neither did the Company offer any evidence, nor does the record show, that Respondent gave prior notice to or offered to bargain with the Union about these benefits.

B. *Respondent's Alleged Threats of Loss of Benefits*

Independent of its alleged refusal to execute the proposal ratified by the Union's members and the unilateral changes it made in terms and conditions of employment, Respondent is alleged to have engaged in certain other conduct coercive of employee rights under Section 8(a)(1).

At the November meeting previously described, employee Stowell testified, Connors told the assembled employees that the contract negotiations were stalled because of the Union. He went on to say that if an employee were to be covered by a union contract the Company would no longer make him a participant in its profit-sharing plan. When Stowell asked Connors to explain this further, Connors said that the employee covered by a union contract would retain his share in the plan and interest on that share would continue to be added but that the Company would no longer put yearly contributions on his behalf into the profit-sharing plan. Deane corroborated Stowell as to these remarks by Connors at the November meeting.

According to a composite of testimony by Stowell and Deane, at another employee meeting called by the Company in the first or second week of December 1985, addressed this time by Alan Gerry and also attended by Connors and another management official, Gerry mentioned that it had been quite a while since he had been up to talk to them.[3] He said he had to be careful what he said because he did not want any problems with the Union and any lawsuit. He was there against the wishes of the company attorney but he wanted to come up and talk to them anyway, face to face, and have an informational-type meeting. Stowell could not recall specific remarks, but Deane said Gerry talked of the 5-percent increase that other people in the Company were getting versus the 1-1/2 percent that they, the unit employees, were not getting because of the Union. After Gerry's general remarks, Deane, in a group with other employees, asked Gerry about the profit-sharing plan. Gerry said that once, a long time ago, he wrote a clause in the profit-sharing plan that if anyone was represented by a union-type situation he could not have them be a participant in the plan.

The Cablevision Industries profit-sharing plan and trust, in full force and effect at all times material to this proceeding, in article 3.1 entitled "Eligibility" provides: "Members of a collective bargaining unit will not be eligible for participation in this Plan."

According to Stowell, at the company meeting held early in January 1986, Connors repeated his earlier remarks about the profit-sharing plan, saying that "if you're covered by a union contract you will not be a participant in the plan." The other company official, who was probably Schulte, read figures from a piece of paper he was holding, comparing the 5-percent raise the rest of the employees in the Company were getting with the 1-1/2 percent listed in the Company's final offer. This official said the average employee would be losing around $530. He also said, "[I]f you're not a participant in the profit sharing plan you would lose approximately eight hundred and some dollars a year because you're part of a contract in the Union."

Connors acknowleged that he spoke with the employees in the bargaining unit concerning the profit-sharing plan. At first recalling his remarks as having been made shortly after the bargaining session of 27 June 1985, after being refreshed that they probably occurred at the meeting at which there was a discussion of jackets and/or boots, Connors then said he dealt with the plan at employee meetings in November 1985 and January 1986. It was Connors' testimony that the subject came up for the very first time during the course of the negotiations by way of a question by one of the employees. He was asked what the status of the profit-sharing plan was with the contract, and he told the employees at that time that it had never been brought up, that it was not part of the package, that it had not been incorporated into the proposed contract being negotiated, and that the way it stood anybody in the bargaining unit would not be receiving future profit-sharing contributions. They would not lose any moneys that were in the plan for them and the accrued interest that their shares were earning would be given to them. Although Connors agreed there was further discussion following his remark, his testimony here was vague. Connors further testified that at the Jan-

[3] Gerry came to the Finger Lakes Division only a couple of times a year.

uary 1986 meeting, a similar question from an employee elicited a similar response. When asked if he had made any reference to the profit-sharing plan article which excludes bargaining unit employees from coverage, Connors said he did not know whether he had, he did not remember, he was aware of that article at the time, but he did not feel it was necessary to do so because the subject matter had never been raised in the negotiations.

Connors also testified that the company meeting called among employees in January 1986 was held after raises to some employees in the unit, as well as to other employees, had been received. According to Connors, one of the unit employees present said he understood that some of the other employees received a 5-percent increase if they had been at maximum status on their step on their scale. Connors explained that this in fact did happen; the other employees of the Company did receive a 5-percent adjusted wage increase. Another employee asked what would happen if the contract was in effect and Connors said that there was no provision for the 5-percent increase in the contract. The first year there was a very large increase; the second year of the contract called for a 1-1/2-percent increase.

I credit the employee witnesses, Stowell and Deane, who corroborated each other that Connors, in November 1985 and January 1986, told employees that if they were covered by a union contract they would lose their continued participation in the Company's profit-sharing plan. Gerry did not testify. Accordingly, the remarks attributed to him by Deane at a December 1985 meeting, in which Gerry referred to the clause excluding members of a collective-bargaining unit from participation in the profit-sharing plan, are credited. They show that the basis for Connors' and the other company official's remarks dealing with the unit employees' exclusion from further participation in the plan made at both the November 1985 and January 1986 meetings was the plan's written prohibition and not the alleged failure of the union negotiators to raise the issue of continued coverage during the negotiation sessions. Connors, in particular, who at first failed to deal with the anomaly that the Company offered and granted certain benefits, jackets, and a work shoe allowance, not provided for in the Company's final offer, while it refused to continue participation in the profit-sharing plan allegedly because it was not included in the final offer, finally relied on the plan's written exclusion for the Company's announcements at the three employee meetings that employees would no longer be receiving the plan's benefits. (Tr. 314, LL. 13–17.)

It is also clear, and I find, contrary to Connors' interpretation, that the company spokesmen at the January 1986 meeting in particular, independent of employee questions, contrasted the minimal increases unit employees would receive under the Company's final offer with the more generous increases nonunit employees not represented by the union were then being granted. The remarks attributed to Gerry at the December meeting, and to the company official at the January 1986 meeting, who graphically portrayed the financial losses unit employees were incurring by adhering to the Union through the negotiations and its breakdown since July 1985, reinforce my findings in this regard.

C. Analysis and Conclusions

Dealing first with the Company's alleged refusal to bargain, the basic issue in this case is whether the parties had arrived at a collective-bargaining agreement when the union membership ratified the Company's final offer on 2 July 1985 before the Company had removed any portion of its offer from the bargaining table. So long as the Company's offer remained outstanding, the Union's acceptance of it, evidenced by the 2 July ratification by its membership, would, under normal principles of contract law applicable here, ripen into a fully enforceable agreement, provided the Company's offer was not subject to any condition subsequent of which the respective parties had notice. The condition subsequent which, Respondent urges, forstalled agreement was the known requirement that the Company's offer was subject to approval by its board of directors. Respondent argues that once that board rejected the tentative accord, agreement was not achieved and the Company could insist on union acquiescence with changes in certain paragraphs of the offer contained in the board's resolution of 8 July 1985. The Union having refused to agree to the changes insisted upon, Respondent finally argues it has not violated its duty to bargain.

The General Counsel and the Union counter Respondent's defense by urging that the actions of the Company's negotiators bound Respondent to the terms of its final offer by evidence that the Union's negotiators were led to believe by the Company's negotiators that final approval of the terms of the final offer had been obtained from the necessary company principal and, accordingly, that the negotiators' approval thus represented final approval of the agreement.

These countervailing contentions thus place in issue whether the Company's negotiators bound Respondent under the doctrine of apparent authority. Notwithstanding prior reservations by Attorney Rosenberg of the right of Respondent's board of directors—in reality Respondent's chief executive officer and chairman, Alan Gerry—to approve and ratify any tentative agreement reached by Rosenberg, Rosenberg and Connors did manifest by their actions that such approval had indeed been obtained when Rosenberg executed the agreement.

The Board has recently enunciated the governing principles in the following language:

> It is well established that a principal may limit its agent's negotiating authority by affirmative, clear, and timely notice to the other party that any tentative agreement is contingent upon subsequent ratification. E.g., *University of Bridgeport*, 229 NLRB 1074 (1977); *Aptos Seascape Corp.*, 194 NLRB 540 (1971). An agent whose authority depends upon such a contingency may have the apparent authority, however, to convey its satisfaction. *Walnut Hill Convalescent Center*, 260 NLRB 258 (1982).

Ben Franklin National Bank, 278 NLRB 986 fn. 2 (1986).

How may an agent become clothed with apparent authority? "Apparent authority results when the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had the authority he purported to have." *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 756 (9th Cir. 1969).

Applying these principles to the facts found herein, I conclude that under the circumstances of this case Rosenberg had the apparent authority to convey the Company's final offer, which was not withdrawn before the union membership subsequently ratified it, thereby resulting in a binding agreement.

Preliminarily, I conclude that the principal for Respondent, on whose behalf Rosenberg and Connors were employed as agents to negotiate the collective-bargaining agreement, was Alan Gerry and not the board of directors. The evidence is convincing that it was Gerry who controlled and determined the company positions in bargaining and whose approval was necessary before an agreement could be obtained. Rosenberg clarified his use of the term "Company" at the first bargaining session and in the company offer a number of times, most significantly at the 20 June session when Woods sought such clarification. The "Company" in article 29 and the "Co B of D" written in by Rosenberg above his signature on the Company's 7 May 1985 proposal in June both meant Gerry, the sole shareholder and chief operating officer. Neither Nichols nor O'Neill, the other two company directors until their removal by Gerry in March 1986, seemingly played any role in the preparation of the Company's proposals or negotiating posture or strategy. Although Roger Turner was elected president on 28 February 1985, Gerry, then as chairman, retained all the powers he previously exercised as president, and was clearly the decisive figure in Respondent's decision-making process, which Rosenberg repeatedly acknowledged.

I further conclude that Rosenberg, by his statements and conduct during the bargaining sessions, as well as Connors in his conversations with Woods, reasonably led Woods and the other union representatives to believe that Rosenberg had the authority from Gerry to conclude the agreement by submission of the Company's final offer. Woods, whose testimony has been credited, reported that Rosenberg, who did not testify, told him from time to time he had discussed various union demands with Gerry. Connors testified that Gerry participated in the meeting at which company proposals were first discussed and personally approved the wage portion of the Company's final offer, which was unilaterally implemented in early July 1985. Connors also briefed Gerry periodically and, significantly, met with him on 30 June to discuss recent developments with the Union. Connors also regularly reported on the negotiations to his immediate superiors, Turner and Schulte, who, in turn, would have kept Gerry apprised as they would "normally do." Woods also testified credibly and without contradiction that at the 2 May 1985 bargaining session Rosenberg informed him that he would obtain Gerry's prior approval of the Company's final offer as a collective document before forwarding it to the Union. Connors' own bargaining notes essentially corroborate this conversation by referring to "Cablevision representatives" whose prior approval was a condition of the company package being forwarded to the Union and the Federal mediator. When, at the 20 June 1985 meeting, Rosenberg acknowledged that he had expressed such an intent to Woods and then assured Woods there was no problem in obtaining Gerry's approval, Woods acted reasonably in expressing on the record his understanding that Gerry's approval or ratification was already completed prior to Rosenberg's submission of the final offer to the Union.

Against this array of testimony, Respondent's counsel would have the Board believe that, because Gerry was involved in personally negotiating acquisitions of new out-of-state cable operations, he had no time to review the Company's offer prior to 8 July 1985. I am not prepared to so find. At their 20 June 1985 session Rosenberg did not dispute Woods' attributing to him a statement that he had intended to meet with Gerry before giving the final offer to the Union. Neither did Connors or Rosenberg in subsequent conversations with Woods convey any sense that the Company had either withdrawn or changed any provision of its offer. At the 27 June session, Rosenberg finally said he would take the two items involving subcontracting and dues checkoff back to Gerry; Rosenberg said nothing about the Company's reexamination or rejection of any other portion of its final offer. None of these conversations would have led Woods to believe that Gerry had not been, or would not continue to be, available to review the agents' conduct at the bargaining table. By seeking to create a factual ambiguity at the hearing as to the authority of its negotiators to reach agreement because of a supposed inability of Respondent's principal to timely consult its agents, which it failed to raise during the material evidentiary interchanges between the parties, Respondent's defense must fail. Absent clear notice to the contrary, Rosenberg, as agent, must be deemed to have had apparent authority to bind his principal to the terms of the Company's final offer. See *University of Bridgeport*, supra.

Apart from the foregoing, all of the circumstances surrounding Respondent's withdrawal from the tentative agreement its negotiators had reached are convincing that permitting Gerry to disapprove the agreement would undermine collective bargaining, and permit Respondent to effectively undermine the Union's support and destroy its majority status.[4] Although Respondent admittedly obtained the contract language it wanted at the cost of a large first-year increase in wages, it subsequently reneged on putting the language into effect but unilaterally granted the onerous increases and other fringe benefits and then, in January 1986, pointedly contrasted the extremely limited second-year contract in-

[4] See, e.g., *NLRB v. F. Strauss & Sons*, 536 F.2d 60, 64 (5th Cir. 1976): "Finally, withdrawal by the employer of contract proposals tentatively agreed to by both the employer and the Union in earlier bargaining sessions, without good cause, is evidence of a lack of good faith bargaining by the employer in violation of § 8(a)(5) of the Act." See also *Industrial Wire Products Corp.*, 177 NLRB 328, 333–334 (1969), enfd. 455 F.2d 673 (9th Cir. 1972); *NLRB v. Alterman Transport Lines*, 587 F.2d 212, 221 (5th Cir. 1979).

creases it granted only in part with the more generous percentage increases it distributed to all of the nonunion complement. In its 8 July 1985 resolution, Respondent's board of directors not only reneged on its negotiators' prior agreement, but it retrogressed to proposals which were substantially more onerous than the ones it had insisted on since early in the negotiation process, from restricting and limiting resort to arbitration and seniority rights in significant areas to adding a fourth contract year at nominal increases. Respondent could have reasonably anticipated union rejection of these changes and the resulting encouragement of employee dissatisfaction with the Union's bargaining role which these company actions would induce. Even the reasons the board of directors advanced for rejecting the tentative agreement evidence a lack of legitimacy. Reliance was placed on a claim of a bribe for the vote of a single employee at the Union's ratification meeting and the company negotiating team having exceeded its authority. At the hearing, and in its brief, the Respondent did not assert or argue either ground in its defense to the complaint. The first would appear to be irrelevant to the issues framed at trial and there is no claim that the company negotiators ever made the Union aware of any limitation on their authority to enter a tentative agreement.

Finally, two officials who previously had no formal role in the negotiations were added on 8 July 1985 to Respondent's board for the sole purpose of reviewing the final offer in what appears to have been an attempt to insulate Gerry from the consequences of company rejection of its final offer. Connors' credible testimony about his regular consultations with and reports to these two officials, Turner and Schulte, during negotiations also conflicts with the factual claim made in the resolution of this special meeting that the company negotiating team failed to report regularly as to the progress of the negotiations.

As noted by the Board under similar circumstances, to fail to find that Rosenberg as agent had the apparent authority to bind Gerry as his principal to the terms of the Company's final offer "would effectively mean that an undisputed negotiator for the Respondent had made a comprehensive, unconditional final contract offer in bad faith, without any intention to be bound thereby." *Ben Franklin National Bank*, supra.

Accordingly, I conclude as alleged that the parties reached full and complete agreement with respect to terms and conditions of employment of the unit employees, embodied in the Company's final offer, when the union membership ratified that offer on 2 July 1985.[5]

The Union continued to remain the certified bargaining representative of the unit employees after Respondent reneged on its own final offer in violation of its obligation under the Act. The certification year could not terminate while that agreement remained unexecuted and rejected. Neither has Respondent claimed in this proceeding that the Union has lost its majority support although there was a hint that such a claim might be advanced. (See Tr. 225.) Such a claim, of course, would be unavailing given the Company's refusal to bargain. Thus, when the Company granted wage increases to unit employees in early January 1986, not in conformity with the terms of the agreement by which I have concluded it was bound, and granted clothing benefits and shoe allowances to the unit employees in January and February 1986, all without prior notice to, or consultation with, the Union, Respondent committed further violations of its bargaining duty under Section 8(a)(5) and (1) of the Act. It is no defense to these acts to claim, as the Company does, that the jackets were purchased for all of its northern system field personnel or that it was an employee inquiry which instigated their purchase and distribution. Respondent owed a duty not to undermine the Union's status as exclusive bargaining agent by continuing to negotiate with it on items which were not part of its final offer.

Respondent also restrained and coerced its employees in their activities on behalf of the Union in violation of Section 8(a)(1) of the Act by threatening them with the loss of continued participation in the Company's profit-sharing plan because they had chosen the Union to represent them in collective bargaining and were seeking a union contract, and by maintaining language in its profit-sharing plan which precludes, on its face, participation by "members of a collective-bargaining unit." *Precision Founders*, 278 NLRB 544 (1986); *Niagara Wire*, 240 NLRB 1326, 1327–1328 (1979). As noted, the plan restriction, conditioning eligibility on the unrepresented status of employees, was relied on in remarks to employees in November 1985 and January 1986 and was publicized by Gerry himself at a December 1985 meeting at which, on one of his rare visits to the Company's Geneva facility, Gerry also stressed the contrast in salary increases between the generous 5-percent increases being granted nonunit employees and the much lower 1-1/2-percent contract increase contained in the Company's final proposal not yet in place because of the breakdown in negotiations.

This emphasis on the losses in salary the employees were suffering because of their union adherence was also stressed in the Company's January 1986 meeting when figures were presented to them so the employees could see clearly how much their union affiliation was costing them. Such comments interfered with the employees' rights to select and retain the Union as their collective-bargaining representative under Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Cablevision Industries, Finger Lakes Division, is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Communication Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

[5] Although the complaint alleges that agreement was reached about 20 June 1985, rather than 2 July 1985 as I have concluded herein, that discrepancy is not a material deviation between the complaint and the proofs, Respondent has not objected and, most important, Respondent is on notice that the union membership's ratification and Woods' subsequent request for execution of the agreement are key elements in the General Counsel's claim of a refusal to bargain.

3. On 13 September 1984 the Union was certified as the exclusive bargaining representative of the employees employed in the following described unit appropriate for the purposes of collective bargaining:

> All regular full-time installers, technicians, converter control employees, construction employees and dispatchers employed by the Employer at R.D.2, Route 5 and 20, Geneva, New York, and 5585 Buffalo Extension, Canandaigua, New York and 515 No. Main Street, Newark, New York; excluding all engineers, customer service representatives, outside sales employees, clerical employees, and professional employees, guards and supervisors as defined in the Act, and all other employees of the Employer.

4. On 2 July 1985 Respondent and the Union reached agreement on the terms of a collective-bargaining agreement covering the terms and conditions of employment of the employees of Respondent in the above-described bargaining unit.

5. As a consequence of the agreement reached by the parties, Respondent incurred the statutory obligation to execute a written contract incorporating that agreement but, since about 12 July 1985 and at all times thereafter, has failed and refused to do so.

6. By refusing since about 12 July 1985 to execute the written contract incorporating the agreement reached between it and the Union, Respondent has failed and refused to bargain collectively and in good faith with the certified representative of its employees, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and (5) and 8(d) of the Act.

7. By granting pay increases to unit employees about 7 January 1986 not calculated in accordance with the terms of the agreement reached with the Union, by granting a new benefit to unit employees consisting of a winter jacket in January and February 1986, and by granting another new benefit to unit employees consisting of an allowance for the purchase of work boots in January 1986, all granted without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain with respect to such benefits and their effects on the unit employees, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

8. By threatening employees in the bargaining unit described above with the loss of profit-sharing plan benefits because they chose to be represented by the Union for purposes of collective bargaining, by maintaining and continuing a provision in its profit-sharing plan and trust conditioning participation in the plan on being unrepresented by any union, and by informing its unit employees that they would be granted wage increases less than they would have been granted had they not selected the Union as their collective-bargaining representative because the agreement reached with the Union provides for a lesser increase than would be granted to employees employed outside the bargaining unit, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be ordered to cease and desist and to take certain affirmative action necessary to effectuate the purposes and policies of the Act.

Having further found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by, inter alia, failing and refusing to execute a written agreement reached, I shall recommend that Respondent be ordered to cease and desist and to sign the agreement forthwith. I shall also recommend further that Respondent be ordered to give effect to the terms of the agreement retroactive to 1 July 1985, and that the employees shall be made whole for losses they may have suffered by reason of the failure of Respondent to sign the agreement,[6] with interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 298 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

Having found that Respondent violated Section 8(a)(1) of the Act by, inter alia, continuing to maintain a provision in its profit-sharing plan and trust which by its terms unlawfully excludes from participation therein otherwise eligible employees who are members of a collective-bargaining unit, I shall recommend that Respondent be ordered to amend the profit-sharing plan and trust so as to clearly eliminate the unlawful eligibility restriction.[7]

On these findings of fact and conclusions of law and on the entire record,[8] I issue the following recommended[9]

ORDER

The Respondent, Cablevision Industries, Finger Lakes Division, Geneva, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with Communication Workers of America by declining to execute a written agreement embodying the terms of the contract fully agreed to on 2 July 1985, and which covers its employees in the following appropriate unit:

---

[6] "The Board may properly prevent the Respondents from gaining an advantage by their unlawful conduct. An order requiring that the employees be made whole for the unlawful repudiation of a collective bargaining agreement serves this end." *NLRB v. DMR Corp.*, 795 F.2d 472, 477 (5th Cir. 1986).

[7] The General Counsel requests a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing an eventual Board order. Absent special circumstances, which are not present here, this request is denied. See *Nathan's Furniture Store*, 278 NLRB 268 (1986); *O. L. Willis, Inc.*, 278 NLRB 203 (1986).

[8] In an Order Correcting Record which I issued on 22 October 1986, I ordered corrections to the record in certain limited respects.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

> All regular full-time installers, technicians, converter control employees, construction employees and dispatchers employed by the Employer at R.D.2, Route 5 and 20, Geneva, New York, and 5585 Buffalo Extension, Canandaigua, New York and 515 No. Main Street, Newark, New York; excluding all engineers, customer service representatives, outside sales employees, clerical employees, and professional employees, guards and supervisors as defined in the Act, and all other employees of the Employer.

(b) Refusing to bargain collectively and in good faith with the Union by granting pay increases to unit employees not calculated in accordance with the terms of the agreement reached with the Union, and by granting new benefits to unit employees, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain with respect to such benefits and their effects on the unit employees.

(c) Threatening employees in the bargaining unit with the loss of profit-sharing plan benefits because they chose to be represented by the Union for purposes of collective bargaining; maintaining and continuing a provision in its profit-sharing plan and trust which excludes from participation therein otherwise eligible employees who are members of a collective-bargaining unit; and informing its unit employees that they would be granted wage increases less than they would have been granted had they not selected the Union as their collective-bargaining representative because the agreement reached with the Union provides for a lesser increase than would be granted to its employees employed outside the bargaining unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Sign the collective-bargaining agreement containing the terms and conditions of employment agreed to between the Respondent and the Union on 2 July 1985, give retroactive effect to its terms and conditions, and make its employees whole for losses, if any, they may have suffered as a result of its refusal to sign such an agreement, in the manner set forth above.

(b) Amend its profit-sharing plan and trust by eliminating therefrom the provision which by its terms excludes from participation in the plan otherwise eligible employees who are members of a collective-bargaining unit.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Geneva, Canandaigua, and Newark, New York facilities and branches copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively regarding wages, hours, or other terms and conditions of employment with Communication Workers of America as the exclusive representative of our employees in the following unit:

> All regular full-time installers, technicians, converter control employees, construction employees and dispatchers employed by the Employer at R.D.2, Route 5 and 20, Geneva, New York, and 5585 Buffalo Extension, Canandaigua, New York and 515 No. Main Street, Newark, New York; excluding all engineers, customer service representatives, outside sales employees, clerical employees, and professional employees, guards and supervisors as defined in the Act, and all other employees of the Employer.

WE WILL NOT refuse to execute the contract with the Union which was agreed upon on 2 July 1985.

WE WILL NOT fail and refuse to give effect to the terms and provisions of the agreed-on contract with the Union.

WE WILL NOT grant pay increases to unit employees not calculated in accordance with the terms of the agreement we reached with the Union, or grant new benefits to unit employees, without prior notice to the Union and having afforded the Union an opportunity to negotiate and bargain with respect to such benefits and their effects on them.

WE WILL NOT threaten employees in the bargaining unit with the loss of profit-sharing plan benefits because they chose to be represented by the Union for purposes of collective bargaining; maintain and continue a provision in our profit-sharing plan and trust which excludes from participation therein otherwise eligible employees

who are members of a collective-bargaining unit; and inform our unit employees that they would be granted wage increases less than they would have been granted had they not selected the Union as their collective-bargaining representative because the agreement reached with the Union provides for a lesser increase than would be granted to our employees employed outside the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL sign the collective-bargaining agreement containing the terms and conditions of employment agreed to between us and the Union on 2 July 1985.

WE WILL give retroactive effect to its terms and conditions and make our employees whole for losses, if any, which they may have suffered as a result of our refusal to sign a contract, with interest.

WE WILL amend our profit-sharing plan and trust by eliminating therefrom the provision which by its terms excludes from participation in the plan otherwise eligible employees who are members of a collective-bargaining unit.

CABLEVISION INDUSTRIES, FINGER LAKES DIVISION

Daniel Gerhardi d/b/a Daniel's Pallet Service *and* Kenneth Early *and* David Crist. Cases 7–CA–24270(1) and 7–CA–24270(2)

26 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 12 August 1986 Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions, a supporting brief, and a brief opposing the General Counsel's cross-exception. The General Counsel filed a cross-exception and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Daniel Gerhardi d/b/a Daniel's Pallet Service, Flat Rock, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer to Kenneth Earley and David Crist immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them by payment to each of them a sum of money equal to that which each normally would have earned as wages or received as benefits, from the date of the discrimination to the date of the Respondent's offer of reinstatement, less net earnings during such period, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977)."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate you about your union activities and sympathies, or threaten you with more onerous working conditions because you support the Union.

WE WILL NOT harass, change the working conditions of, or constructively discharge you because of your activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Kenneth Earley and David Crist immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make them whole for any loss of earnings and other benefits they may have suffered because of the discrimination against them, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

[1] We note that, in addition to the incidents mentioned by the judge, several other incidents occurred in which the Respondent harassed employee Earley. On 2 February 1985, immediately after cursing Earley for having signed an authorization card, the Respondent ordered him, for the first time, to have his blood tested for intoxicants. On the same day, the Respondent's owner, again for the first time, visited Earley's house at 11:30 p.m. and ordered him to report to work on Saturday morning. On 4 February, during a mandatory employee meeting, a supervisor passed out written reprimands to Earley and employee Crist, cursed them, and remarked, "You guys want a union that bad, take these." During the same meeting, Earley complained about having been previously cursed by the Respondent for having signed an authorization card. The owner's wife, a supervisor, replied, "You are low lives, fucker. You no-good son-of-a-bitch." On 5 February, as Earley was punching out, the same supervisor yelled, "Have a good day, you motherfucker." Two days later, the Respondent's owner, complaining about a low payroll, approached Crist and asked him to inspect the books because Crist "knew all the answers." The Respondent then approached Earley, who was working nearby, took Earley's hammer, shouted, "I want rock and roll," and smashed an adjacent stereo to pieces. Earley testified that he was frightened by this incident and that he quit the next day because, with Crist having quit, he thought that the Respondent's harassment would be directed solely at him.

[2] It appears from the record that the Respondent may have denied Crist and Earley employment-related benefits, as well as wages, because of their union activities. To require the Respondent to compensate the discriminatees for such losses of benefits, if any, we have modified the judge's recommended Order accordingly. Member Johansen also notes that the Respondent's removal of Crist's firewood, not found to be a separate unfair labor practice by the judge, was mentioned in the charge and litigated at the hearing, but was not specifically alleged in the complaint.

All our employees are free to join and support Cylinder Gas, Chemical, Petroleum, Distillery, Auto Service and Accessory Drivers Local Union No. 283, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of their choosing.

DANIEL GERHARDI D/B/A DANIEL'S PALLET SERVICE

Richard Connolly, Esq., for the General Counsel.
Paul Richards, Esq. and *Craig W. Lange, Esq.*, of Troy, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On charges filed on 8 February and 25 March 1985, by Kenneth Earley and David Crist, against Daniel Gerhardi d/b/a Daniels Pallet Service (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a consolidated complaint 27 March 1985, alleging violations by Respondent of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Detroit, Michigan, on 10 and 11 July, 1985, at which the General Counsel and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a sole proprietorship, is engaged, at its Flat Rock, Michigan place of business, in the repair, nonretail sale, and distribution of wood pallets and related products. During the year ending 31 December 1984, a representative period, Respondent, in the course and conduct of its business operations, repaired, sold, and distributed products valued in excess of $50,000 to Borman's, Inc., d/b/a Farmer Jack's, a Detroit, Michigan business, engaged in commerce within the meaning of the Act. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Cylinder Gas, Chemical, Petroleum, Distillery, Auto Service and Accessory Drivers Local Union No. 283, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Daniel's Pallet Service is a small family owned and operated wood pallet repair and wholesale distribution business employing some 10 or fewer laborers. The business was founded by Daniel Gerhardi and is run by Gerhardi, with the assistance of his wife, Shirley, and his sister, Cheryl Ouellette.[1]

On 31 January 1985 employee David Crist asked his fellow laborers to visit his home at the conclusion of the workday. At that time, Crist distributed cards designating the Union as the employees' collective-bargaining representative and the authorization cards were signed by Crist, Kenneth Earley, and others. On 1 February 1985 Respondent received a telegram, sent by the Union, demanding recognition. Crist and Early terminated their employment 8 February.

In the instant case, the General Counsel contends that Crist and Earley were constructively discharged because of their union activities and that, during the week preceding the constructive discharges, Respondent harassed those employees and changed their working conditions, for the same unlawful reasons. Respondent denies that it so acted in violation of Section 8(a)(3) of the Act and further contends that, in any event, and at all material times, Crist was a statutory supervisor. Also at issue is whether Respondent, during the 1 through 8 February period, violated Section 8(a)(1) of the Act by interrogating employees about their union activities and sympathies; threatening employees with more onerous working conditions because of their support of the Union; threatening employees with plant closure it they selected the Union to represent them; informing employees that it would be futile for them to designate the Union as their representative.

B. *Facts*[2]

During 1984, Respondent tolerated an undisciplined workplace environment and its work rules were not enforced. Beginning in January 1985, it sought to change that situation and it reposted its work rules and instituted a progressive disciplinary system to deal with tardiness and absenteeism. Pursuant thereto, Respondent, in January, sent written disciplinary notices to employee Tom Powell. Late in the month, Daniel Gerhardi met with the unit employees to express his concern about employee tardiness and unexcused absences. In this time period,

[1] Daniel Gerhardi and Shirley Gerhardi are, concededly, statutory supervisors. In light of the uncontradicted record evidence concerning Ouellette's authority to hire, assign work, and responsibly direct employees in their work, I find that Ouellette, too, is a supervisor within the meaning of the Act.

[2] The factfindings contained herein are based on a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so in order to resolve significant testimonial conflict, credibility resolutions have been set forth, infra.

Respondent also acted to shorten the duration of the employees' breaks and lunch periods.

Near the end of January 1985, David Crist expressed to his fellow employees Crist's dissatisfaction with the new rules. Crist was Respondent's most senior employee, having worked for it "off and on" for a period of 7 years. In the course of his last period of employment, beginning July 1984, Crist spent part of his worktime doing the basic unit work, repair and construction of pallets, and the remainder of the time driving a hi-lo by operation of which pallets were moved to and from the work area. At those times when Daniel Gerhardi was present at the worksite, he generally drove the hi-lo himself and Crist worked on pallets.

On 29 January 1985 Crist contacted the Union and discussed organization. In the next few days, he talked about that possibility to the unit employees. Crist obtained union authorization cards on the morning of 31 January and, that day, asked the employees to come to his house, after work, for the purpose of signing the cards. Crist lived in a house adjacent to the workplace which he rented from Gerhardi.

Before the end of the workday, on 31 January, Daniel Gerhardi gave Crist a written reprimand for leaving work early on 18 January, failing to report for work at all on 21 January, and arriving late for work on 22, 28, 29, and 30 January. Crist did not protest that matter. After work, he held the employee meeting as scheduled and obtained signed authorization cards which he delivered to the Union.

At 1:47 p.m. on 1 February, Shirley Gerhardi received a telephonic mail-a-gram from the Union, advising that a majority of the unit employees had designated the Union as their collective-bargaining representative and demanding recognition. It is undisputed that Shirley Gerhardi then went to the work area and asked Crist if he knew anything about the Union. Crist said that he had done it on his own time. Shirley Gerhardi then began to curse at Crist, in the presence of the other employees. When Daniel Gerhardi arrived, Shirley told him that "this asshole is trying to get a union in." She turned to the working employees and asked, "[H]ow many other fucking assholes are involved in the Union?" The Gerhardis took Crist out of the hi-lo and told him to work at "prepping," that is, construction and repair of pallets. Shirley Gerhardi stated that it was lucky that she did not have a gun and she told Crist to "prep his fucking ass off." Daniel Gerhardi said that he wanted Crist out of the house that he, Crist, was renting from Gerhardi and asked Crist who, beside himself and employee Earley, was involved in the Union. Later that day, Gerhardi served Crist with a notice of termination of tenancy and retrieved firewood he had earlier given to Crist for use in heating the house. That night, Gerhardi placed a telephone call to Crist at 2:45 a.m. and told him to report for work on the next day, Saturday, 2 February.

Employee Kenneth Earley signed an authorization card on 31 January, but was not present for the events of the afternoon of Friday, 1 February. Earley, who had worked for Respondent "off and on" for a period of 2 years and, continuously, since 22 August 1984, generally divided his time between working on pallets and loading and unloading some onto and off of a trailer. During the morining of 1 February, Early asked Daniel Gerhardi for permission to take part or all of the afternoon off so that he could make payment on his gas bill and prevent a shut off. The request was granted. Earley later told Gerhardi that, after paying the bill, he spent the rest of the afternoon at the bar. At 11:30 that night, Gerhardi went to Earley's house and told him to report for work on the next day, Saturday, 2 February.

Earley arrived at work on 2 February, as instructed, but told Gerhardi that he again needed time off to make payment on a utility bill, this time to prevent a shut off of electricity. Before Earley left, Gerhardi approached him and, according to Earley's uncontradicted testimony, asked if he, Early, had signed one of the union cards. Early said, "yes." Gerhardi stated that "there will be no fucking union here." When Earley asked, "[W]ell, what are you going to do, close down the doors," Gerhardi called Earley a "low life son of a bitch" and said, again, that there would not be a union.

The uncontradicted testimony of Crist and Early reveals that, on Monday, 4 February, employee Tim Lizyness delivered instructions from Gerhardi that Crist and Earley were to do pallet work only, and were not to drive the hi-lo or load or unload the trailer. Thereafter, Crist and Earley did pallet work almost exclusively which, the record evidence suggests, was more arduous and less desirable work. At the end of the workday on 4 February, Daniel and Shirley Gerhardi gathered the employees together and handed written reprimands to Crist and Earley for lateness and absence during the month of January. According to the corroborated testimony of Crist and Earley, Shirley Gerhardi, at this meeting, cursed at the two employees, called them backstabbers, and asked why they wanted a union.[3] It is undisputed that Daniel Gerhardi stated to the employees that a union would not do them any good. Gerhardi said that, on one occasion, he, Gerhardi, had been fired from a job and had sought, but did not receive, aid from a union.

The essentially uncontradicted testimony of Crist and Earley reveals that, in addition to the change of duties which they suffered beginning on 4 February, the two employees and, particularly, Crist, became the objects of a campaign of ridicule and harassment conducted by the Gerhardis and Ouellette during the week of 4 to 8 February. In particular, Shirley Gerhardi, in the presence of the other employees, continually cursed at Crist and called him a "backstabber" as Crist performed his assigned pallet work duties. Crist and Earley, who had not received previous criticism concerning the speed at which they worked, were constantly told they were "dogging" it and that they were to pick up the pace of their work. On 7 February, Daniel Gerhardi, a very physically imposing man, approached the work area. Gerhardi went to a stereo set located in the workplace and, in the presence of the employees, picked it up, threw it to the ground and repeatedly struck it with a hammer until it was destroyed. Later that day, Ouellette

[3] The Gerhardis in their testimony, denied that these comments were made at the 4 February meeting. As their testimony was neither corroborated nor convincing on this point, it is not credited.

cursed at Crist and demanded to know why she had not been told about the Union. Ouellette told Crist that he "would get his" and that she would ride him and make him "work his ass off." Later that day, Daniel Gerhardi gave Crist a written reprimand for returning 4 minutes late from a break on 5 February, and for disturbing other employees.

About 1:30 p.m. on Friday, 8 February, Crist told Shirley Gerhardi that he was quitting as he "just couldn't handle it anymore." Shortly thereafter, Earley informed the Gerhardis that he, too, was quitting. Shirley Gerhardi started clapping her hands and said: "Yeay, we got rid of both of them fuckers now."

Gerhardi testified that his action of 4 February, removing Crist and Earley from their hi-lo and trailer duties, was taken for safety reasons. Thus, Gerhardi claimed that he believed that Crist and Earley were under the influence of illegal drugs and he did not want them to handle power equipment. However, Gerhardi further testified that he believed that the two employees worked, while under the influence, during the month of January 1985, yet, Gerhardi made no change in their assigned duties until 4 February, immediately after the advent of the Union. Respondent offered no evidence in support of Gerhardi's claimed belief that Crist and Earley worked while under the influence of drugs.

Gerhardi also testified that, at the end of October 1984, he conducted a meeting of the employees, at which time he told them that Crist was being "placed on supervision." According to Gerhardi, the employees were further advised that, while Crist would not have authority to hire, fire, or discipline employees, he could bring matters pertaining to discipline to Gerhardi's attention. Crist was also empowered to deal with emergency situations.

Crist, in his testimony, denied that he was ever given the authority to hire, fire, grant pay increases, grant time off, discipline employees, or direct them it their work. He testified that, in the absence of the Gerhardis, the day-shift workers functioned under the supervision of Ouellette. In light of Crist's credible testimony in this regard, and in the absence of corroboration of Gerhardi's testimony concerning the October 1984 employee meeting, I find that the claimed delegation of supervisory authority, in October 1984, did not, in fact, take place. This conclusion is further buttressed by the confused and self-contradictory state of Gerhardi's testimony concerning the weight he accorded to Crist's views, in late January and early February 1985, about certain disciplinary matters. Although there is record evidence that Crist, in the fall of 1984 to the winter of 1985 period, as Respondent's most senior employee, gave occasional and incidental instruction and direction to fellow workers, and particularly new workers, and answered their questions based on his experience, there is an entire absence of evidence that he, at any time, exercised independent judgment in that regard. Rather, there is substantial evidence that the jobs of the laborers were routine in nature; that "everybody pretty much knew their own job," and that the employees frequently instructed and directed each other. At times, Respondent's supervisory officials did choose to transmit their instructions through Crist.

C. *Conclusions*

As shown in the statement of facts, Respondent, through the Gerhardis and Ouellette, during the 1 through 8 February period, engaged in repeated interrogations of its employees concerning their union activities and sympathies. On 1 February Shirley Gerhardi asked Crist if he knew anything about a union. She then turned to the other employees and asked who else was involved in the Union. On 2 February Daniel Gerhardi asked Early if he had signed a union card. At the 4 February employee meeting, Shirley Gerhardi demanded to know why the employees wanted a union. On 7 February Ouellette questioned Crist concerning why he had not told her about the Union. I find and conclude, as alleged in the complaint, that Respondent, by its interrogations of employees concerning their union activities and sympathies, violated Section 8(a)(1) of the Act. I further conclude, as alleged in the complaint, that on 7 February Respondent threatened employees with more onerous working conditions because of their support of the Union, in violation of Section 8(a)(1). On that date, Ouellette, after interrogating Crist about the Union, told him that he "would get his" and that she, Ouellette, would ride him and make him "work his ass off."

The complaint further alleges that Respondent, through Daniel Gerhardi, threatened employees with plant closure if they selected the Union to represent them. This allegation, apparently, is based on Gerhardi's conversation with Earley on 2 February. However, the record evidence reveals that, during that conversation, it was Earley, not Gerhardi, who introduced the subject of "closing down the doors" and that Gerhardi did not comment on that suggestion. Accordingly, this allegation must be dismissed. I likewise find no record evidence to support the complaint allegation that, on 4 February, Respondent informed its employees that it would be futile for them to select the Union as their bargaining agent. At the employee meeting on that date, Daniel Gerhardi opined that a union would not do the employees any good. Gerhardi made this statement while relating to the employees the facts surrounding an incident in which Gerhardi, as an employee, had sought, but did not receive, aid from a union. The totality of his remarks were not coercive.

As detailed in the statement of facts, the record evidence fully supports the complaint allegations that Crist and Earley were constructively discharged, in violation of Section 8(a)(3) of the Act, on 8 February 1985, 1 week after Respondent received the Union's demand for recognition. Through its unlawful interrogations of 1 and 2 February, Respondent learned that Crist had launched the union movement and that Earley was a union supporter. Respondent reacted quickly, removing those employees from their duties and assigning them to less desirable work. During the week of 4 through 8 February, Respondent, through the Gerhardis and Ouellette, repeatedly cursed at them and called them "backstabbers" in the presence of the other employees. Amidst an antiunion diatribe, Respondent continually warned Crist and Earley to pick up their work pace and accused them of "dogging" it. Crist was told that he "would get his"

and that he would be made to "work his ass off." Respondent made clear to the employees that the change in work assignments and the campaign of harassment were in retaliation for their union activities and I find and conclude that, by those actions, Respondent further violated Section 8(a)(3) of the Act. The new working conditions imposed on Crist and Earley, because of their union activities, were highly oppressive and were designed to cause, and did cause, their resignations.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent Daniel Gerhardi d/b/a Daniel's Pallet Service is an employer engaged in commerce and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. Cylinder Gas, Chemical, Petroleum, Distillery, Auto Service and Accessory Drivers Local Union No. 283, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their union activities and sympathies and threatening employees with more onerous working conditions because of their support of the Union, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

4. By harassing, changing the working conditions, and constructively discharging employees Kenneth Earley and David Crist because of their union activities, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Daniel Gerhardi d/b/a Daniel's Pallet Service, Flat Rock, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities and sympathies and threatening employees with more onerous working conditions because of their support of the Union.

(b) Harassing, changing the working conditions, and constructively discharging employees because of their activities on behalf of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Kenneth Earley and David Crist immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges. Make them whole for any loss of pay they may have suffered by reason of the discrimination against them by payment to each of them of a sum of money equal to that which each normally would have earned as wages, from the date of the discrimination to the date of Respondent's offer of reinstatement, less net earnings during such period, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977); (see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962)).

(b) Remove from its files any reference to the constructive discharges and notify the employees that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Post at its Flat Rock, Michigan locale, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

International Brotherhood of Electrical Workers, Local 113 (Pride Electric, Inc.) *and* Daniel S. Robertson. Case 27–CB–2284

26 February 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 11 July 1986 Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Brotherhood of Electrical Workers, Local 113, Colorado Springs, Colorado, its officers, agents, and representatives, shall take the action set forth in the Order.

A. E. Roybal and *Albert A. Metz, Esqs.*, of Denver, Colorado, for the General Counsel.
Dennis E. Valentine, Esq. (*Brauer & Buescher*), of Denver, Colorado, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried in Colorado Springs, Colorado, on 18 March 1986,[1] based on a complaint[2] alleging that International Brotherhood of Electrical Workers, Local 113 (Respondent) violated Section 8(b)(1)(B) of the National Labor Relations Act (Act) about 12 June 1985 by assessing a disciplinary fine of $4000 against Daniel S. Robertson, a supervisor for Pride Electric, Inc. (Pride), and, about 25 September 1985, by bringing civil suit against Robertson to collect the fine.[3]

As is later concluded, after an examination of the relevant evidence and applicable legal principles, Respondent violated the Act both as alleged and by coincidentally expelling Robertson from membership in the International Brotherhood of Electrical Workers.

I. JURISDICTION

The parties stipulate that Pride meets specified jurisdictional standards of the National Labor Relations Board, and thus is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent concededly is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED MISCONDUCT

A. *Facts*

From mid-February to about 20 April 1985, Pride was the electrical subcontractor in the construction of seven Royal Fork restaurants—five in the Denver area, two in Colorado Springs. Its complement—about 16 people split between two shifts—spent a week or so at each site, finishing its work there before moving to the next site. The complement was not represented by any labor organization.

Robertson, hired by Pride in February to serve as its foreman in this undertaking, was the ranking person in the complement at all but one of the sites. He credibly testified that his role was "to run the job, to supervise

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that Robertson was a management representative within the meaning of Sec. 8(b)(1)(B) of the Act, we particularly rely on the judge's finding that Robertson in fact was authorized to adjust grievances on the job. In this regard, we further note that it is not necessary for a supervisor to handle "contractual" grievances to be considered an 8(b)(1)(B) representative. *Elevator Constructors Local 1 (Otis Elevator)*, 281 NLRB 907 fn. 1 (Sept. 30, 1986); *Typographical Union 529 (Hour Publishing)*, 241 NLRB 310, 315 (1979).

[2] The Respondent contends, relying on *NLRB v. Electrical Workers IBEW Local 340*, 780 F.2d 1489 (9th Cir. 1986), denying enf. 271 NLRB 995 (1984), that it did not violate Sec. 8(b)(1)(B) by disciplining Robertson for working for Pride Electric, a nonsignatory employer, because the Respondent neither represents nor has demonstrated an intent to represent the employees of Pride Electric. We adhere to the Board's decision reported at 271 NLRB 995, and further note that the Supreme Court granted the Board's petition for certiorari in that case on 6 October 1986.

Finally, in adopting the judge's conclusion that the Respondent's filing of a lawsuit against Robertson to collect the $4000 fine violated Sec. 8(b)(1)(B), we reject the Respondent's contention that the filing of the lawsuit cannot be an unfair labor practice in light of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). In *Bill Johnson's*, the Court observed that its holding did not apply to a suit that "has an objective that is illegal under federal law," and gave as an example "Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act." Id. at fn. 5. We therefore conclude that *Bill Johnson's* does not preclude a finding that the Respondent's court action is unlawful. *Laundry Workers Local 3 (Virginia Cleaners)*, 275 NLRB 697 (1985).

[1] This manner of setting forth dates comports with the wishes of the Board.

[2] The underlying charge was filed on 11 December 1985, and amended on 21 January 1986, followed by an amended complaint on 26 February and an amendment to the latter at the start of the trial.

[3] Sec. 8(b)(1)(B) makes it "an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

the men," and that he did not work with the tools of the electrical trade while so doing.[4] Similarly, Pride's president, Margaret Harrison, credibly testified that Robertson was hired to "run a crew," not to do electricians' work. Both elaborated, convincingly and without refutation, that he possessed sundry specific indicia of supervisory authority.

Thus, Robertson averred, "it was [his] responsibility to take care of the time . . . to discipline the men and to settle any grievances that the men had on the job . . . to authorize overtime as [he] saw fit . . . to give [the journeymen] their particular job assignment, and to make sure that their apprentices had enough work to keep them busy." Robertson added that he transferred employees "from job to job within the project . . . all the time," that he transferred employees "off the project . . . several times," and that he received a higher wage because of his position.

To like effect, Harrison particularized that Robertson "kept track of all of the working hours on the job"; that he "was in charge of running overtime if it was necessary to get the job completed on time"; that, while he did not actually hire, he "picked the crew" from among Pride's existing employees; that, although he never discharged anyone outright, he "laid [employees] off from the project and sent them into the shop"; that he "had the authority" to "fire" anyone showing a "blatant disregard for safety"; and that, "if somebody came to him sick or injured or just . . . plain didn't want to work, he had the authority to allow them to leave the job or to dismiss them at that point."

Robertson did not belong to Respondent at any relevant time. He was a member, however, of a sister local, Electrical Workers Local No. 68, through March 1985, after which he apparently resigned. He obtained the job with Pride by pursuing a newspaper advertisement, and without being cleared through the hiring halls of these or any other labor organizations. He left Pride on its completion of the Royal Fork projects in April.

On 29 March 1985, three officials of Respondent visited the Colorado Springs site where Pride was then engaged. One of the three, Lyndon Zak, a member of its executive board and an acting hiring hall dispatcher, had a brief exchange with Robertson, asking him if it was "a union job" and if he was "a union member." Robertson answered no to the first question; and, in response to the second, presented his Local No. 68 membership card showing his dues to be paid through March. Zak and his companions then confronted other of Pride's employees. "They said," according to Zak, "that they were all apprentices . . . or helpers." Zak added, "There was only one there that had any kind of registration with the state electrical board."

Later on 29 March, Zak brought internal union charges against Robertson by means of a letter to Respondent stating:

> I, L. J. Zak, Card No. D-315891, a member of Local Union #113, IBEW, hereby prefer charges against Brother Daniel S. Robertson, Card no. D-105787, member of Local Union No. 68, I.B.E.W., whose last known mailing address is 1530 Sheridan Avenue, Denver, CO for violation of the following:
>
> AGREEMENT—Article All—Section—All—Subsection—All
> BY-LAWS—Article XIV—Section—11
> CONSTITUTION Article XXVII—Section—1—Subsection 5, 6 & 17
>
> The violation occurred on March 29, 1985, at approximately 9:55 A.M., at King's Table/Royal Fork, 3020 E. Platte Avenue, Colorado Springs, Colorado 80909.
>
> The violation occurred as follows:
>
> I went in and found Daniel S. Robertson working without a clearance from Local Union #113, I.B.E.W. and working three (3) apprentices. Apprentices were not members of any Locals.

Respondent informed Robertson of the charges against him by letter dated 9 May, enclosing a copy of Zak's letter and advising him to appear before its trial board on 12 June at 5:30 p.m. to answer them.

The trial board convened on 12 June as scheduled, and informed Robertson of its decision by this letter, dated 24 June:

> Please be advised the Executive Board, sitting as the Trial Board of Local Union #113, IBEW on June 12, 1985, after due consideration of the evidence presented has acted upon the charges filed against you by Brother Lyndon J. Zak.
>
> Violation of the I.B.E.W. Local Union #113, Agreement:
>
> 1. All Articles All Sections; Decision of guilty and assessed $1,000.00 for this violation
>
> Violation of the I.B.E.W. Constitution:
>
> 1. Article XXVII, Section 1, Subsection 5; Decision of guilty and assessed $500.00 for this violation.
> 2. Article XXVII, Section 1, Subsection 6: Decision of guilty and assessed $1,000.00 for this violation and expulsion from the I.B.E.W.
> 3. Article XXVII, Section 1, Subsection 17; Decision of guilty and assessed $500.00 for this violation
>
> Violation of the IBEW Local Union #113, By-Laws:
>
> 1. Article XVI, Section 11; Decision of guilty and assessed $1,000.00 for this violation
>
> The total assessments levied [on] you for the above violations amount to $4,000.00 plus expulsion from the International Brotherhood of Electrical Workers.
>
> You are hereby notified of your right of appeal of the above findings as described in Article 27, Section 12-15 of the IBEW Constitution.

[4] The record indicates that Robertson sometimes wore a tool belt. He testified that this was "so that someone else could use [his] tools."

On 25 September 1985, Respondent brought suit against Robertson in Denver County to collect the $4000, plus interest and costs. The complaint alleges that the claim arose from "the following event or transaction":

> The Defendant worked for and was employed by a contractor in violation of the collective bargaining agreement; Article XIV, Section 11 of the By-Laws of the International Brotherhood of Electrical Workers, Local 113 ("IBEW, Local 113") and Article XXVII, Section 1, Subsections 5, 6 and 17 of the Constitution of the International Brotherhood of Electrical Workers ("IBEW"). Defendant was obligated and bound by the collective bargaining agreement, IBEW, Local 113 By-Laws and IBEW Constitution at the time of these events as a result of his membership in IBEW and his work and employment within the area of jurisdiction of IBEW, Local 113 in accordance with the By-Laws and Constitution which placing [sic] him under the jurisdiction of IBEW, Local 113.

The trial was to be held on 8 April 1986. The "agreement" the trial board found Robertson to have violated in totality ("All Articles All Sections") is the collective-bargaining contract between Respondent and the Southern Colorado Chapter of the National Electrical Contractors Association. It provides, among other things, that "the Union shall be the sole and exclusive source of referral of applicants for employment," and that an employer is to have no more than one apprentice for from one to three journeymen, and no more than two apprentices, for from four to six journeymen.

Those subsections of article 27, section 1, of the constitution Robertson was found to have violated provide that a member "may be penalized" for:

> (5) Engaging in any act or acts which are contrary to the member's responsibility toward the I.B.E.W., or any of its [Local Unions], as an institution, or which interfere with the performance by the I.B.E.W. or a L.U. with its legal or contractual obligations.
>
> (6) Working for, or on behalf of, any employer, employer-supported organization, or other union, or the representatives of any of the foregoing, whose position is adverse or detrimental to the I.B.E.W.
>
> . . . .
>
> (17) Working for any individual or company declared in difficulty with a L.U. or the I.B.E.W., in accordance with this Constitution.

That section of article 14 of the bylaws found to have been violated states:

> Sec. 11. The handling of jobs for unemployed members shall be under the full supervision and direction of the Business Manager. He shall devise such means as are considered practical and fair in distributing available jobs to qualified members. Members violating any rule or plan established shall be penalized as decided by the Executive Board.

B. *Conclusions*

The testimony of Robertson and Margaret Harrison, previously detailed and credited, establishes that Robertson's duties required that he exercise substantial amounts of independent judgment in handling Pride's employees. The conclusion necessarily follows that he was a supervisor as defined by Section 2(11) of the Act.[5]

The Board takes the view that "persons who are supervisors within the meaning of the Act are employer representatives within the meaning of Section 8(b)(1)(B)" even if not "actually vested with authority to act for [their] employer in collective bargaining or the adjustment of grievances."[6] It reasons that "such individuals form the logical 'reservoir' from which the employer is likely to select his representatives for collective bargaining or grievance adjustment."[7]

A union consequently violates Section 8(b)(1)(B), under Board law, when it visits disciplinary sanctions on a supervisor-member "unless the offense occasioning the discipline involves a matter purely of internal union administration, unrelated, either directly or indirectly, to any dispute between the union and the employer," or unless the "supervisor-member is disciplined after he has engaged in more than a minimal amount of rank-and-file work during a strike."[8] By matters of internal union administration, the Board contemplates such things as "failing to pay . . . union dues or . . . disturbing a union meeting."[9]

Further, the Board reads the word "grievances" in Section 8(b)(1)(B)—and in the Section 2(11) definition of supervisors—to embrace employee grievances unrelated to collective bargaining.[10] This means, the so-called reservoir doctrine aside, that a supervisor who deals with employee complaints or problems relating to job assignments, time off, etc., is an 8(b)(1)(B) grievance adjuster.[11]

The foregoing principles apply regardless of the existence of a collective-bargaining relationship.[12]

Applying the reservoir doctrine to the situation at hand, Robertson, as a supervisor, was a management representative under Section 8(b)(1)(B). Respondent's acts of fining him and expelling him from membership in the

---

[5] E.g., *Electrical Workers IBEW Local 340 (Hulse Electric)*, 273 NLRB 428, 438 (1984); *Electrical Workers IBEW Local 340 (Royal Electric)*, 271 NLRB 995, 997 (1984), enf. denied 780 F.2d 1489 (9th Cir. 1986).

[6] *Carpenters Local 14 (Max M. Kaplan Properties)*, 217 NLRB 202 (1975). See also *Musicians (Royal Palm Theatre)*, 275 NLRB 677, 682 fn. 8 (1985); *Teamsters Local 296 (Northwest Publications)*, 263 NLRB 778, 779 fn. 6 (1982).

[7] *Hulse Electric*, supra at 430 fn. 5; *Royal Electric*, supra at 997 fn. 5. The evolution of the "reservoir doctrine" is traced in *Florida Power & Light v. Electrical Workers*, 417 U.S. 790, 798–802 (1974).

[8] *Max M. Kaplan Properties*, supra at 202 fn. 6.

[9] Ibid.

[10] *Royal Palm Theatre*, supra at 677 fn. 2, 679 fn. 6 and accompanying text; *Hulse Electric*, supra at 430, 434–435; *Royal Electric*, supra at 997 fn. 5.

[11] Ibid.

[12] *Royal Palm Theatre*, supra 680–681; *Hulse Electric*, supra at 440–441; *Royal Electric*, supra at 1001–1002.

parent international did not involve a matter of internal union administration, moreover, nor were they prompted by his doing rank-and-file work during a strike. The fine, the expulsion, and the court action to collect the fine therefore violated Section 8(b)(1)(B) as alleged.[13]

Alternatively, given the credited testimony of Robertson and Harrison, respectively, that he was responsible for "settl[ing] any grievances that the men had on the job," and that, "if somebody came to him sick or injured or just . . . plain didn't want to work he had the authority to allow them to leave the job," Robertson in fact was authorized to adjust grievances within Section 8(b)(1)(B). The fine, the expulsion, and the lawsuit consequently violated that section by this approach, as well.[14]

CONCLUSIONS OF LAW

By fining Robertson $4000 and expelling him from membership in the International Brotherhood of Electrical Workers following a trial board hearing on 12 June 1985, and by suing him on 25 September 1985 to collect the fine, Respondent in each instance violated Section 8(b)(1)(B) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, International Brotherhood of Electrical Workers, Local 113, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing Pride Electric, Inc., in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances by pressing charges, holding trial board hearings, fining, suing to collect such fines, expelling from membership in the International Brotherhood of Electrical Workers, or otherwise disciplining Daniel S. Robertson, or any other supervisor or representative of Pride Electric acting in that capacity, for allegedly violating the provisions of a collective-bargaining agreement, Respondent's bylaws, or the constitution of Respondent's parent international.

(b) In any like or related manner restraining or coercing Pride Electric in its selection of representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Rescind the disciplinary action taken against Robertson for working as a supervisor and employer representative for Pride Electric, Inc., including the $4000 fine assessed against him and his expulsion from membership in the parent international; remove from its records all references to and evidence of those actions; notify him in writing that these steps have been taken; and make him whole for any loss of earnings and benefits he may have suffered, and for any travel and other expenses he may have incurred, to attend the trial board proceeding against him on 12 June 1985.[16]

(b) Withdraw with prejudice the lawsuit filed against Robertson to collect the fine; or if judgment adverse to him has been entered, cause it to be vacated with prejudice; make him whole for all expenses incurred in the defense of this suit; and also make him whole for any losses suffered and expenses incurred, in the manner set forth in the preceding paragraph, to attend the trial and any proceeding relating thereto.

(c) Return to Robertson, with interest, any moneys collected from him in satisfaction of the fine.[17]

(d) Reinstate Robertson, if he wishes, as a member in good standing of International Brotherhood of Electrical Workers.

(e) Notify Pride Electric, in writing, that Respondent has no objection to Robertson's working for it as a supervisor and representing it for the purposes of collective bargaining or the adjustment of grievances.

(f) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

---

[13] Although the complaint says nothing about Robertson's expulsion, the underlying disciplinary proceeding was fully litigated. The legality of the expulsion therefore is properly on the table. Expulsion in the circumstances is no less unlawful than is the fine. *Electrical Workers IBEW Local 323 (Drexel Properties)*, 255 NLRB 1395 (1981), enfd. 703 F.2d 501 (11th Cir. 1983).

[14] Respondent's argument is rejected that its ignorance of Robertson's supervisory status is exonerative. *Hulse Electric*, supra at 438 fn. 24. Also rejected is Respondent's contention that, since Robertson—and presumably Pride—did not learn about the internal union charges herein, let alone the conduct in issue, until after he had left Pride, that conduct "logically . . . cannot coerce Pride" within the purport of Sec. 8(b)(1)(B). This ignores the inherently coercive effect of the conduct, prospectively, on Pride's selection of 8(b)(1)(B) representatives, not to mention the untoward diminution of Sec. 8(b)(1)(B), particularly in seasonal industries, were unions so easily to evade its prohibition.

Rejected, finally, is the defense raised in Respondent's answer (but not mentioned in its brief) that the conduct in issue is outside the 6-month limitation period prescribed by Sec. 10(b) of the Act. Although Robertson was informed of the charges against him over 6 months before he filed the present unfair labor practice charge, Respondent did not take the "unconditional and unequivocal" actions in question until well within the 10(b) period. *Stage Employees IATSE Local 659 (Paramount Pictures)*, 276 NLRB 881 (1985); *Wisconsin River Valley District Council (Skippy Enterprises)*, 211 NLRB 222, 226 (1974).

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] That Robertson is entitled to be made whole in this manner is established by *Laborers Northern California Council (Baker Co.)*, 275 NLRB 278 (1985).

[17] Interest shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Sign and return to the Regional Director sufficient copies of the notice for posting by Pride electric, Inc., if willing, at all places where notices to employees are customarily posted.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce Pride Electric, Inc., in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances by pressing charges, holding trial board hearings, fining, suing to collect such fines, expelling from membership in the International Brotherhood of Electrical Workers, or otherwise disciplining Daniel S. Robertson, or any other supervisor or representative of Pride Electric acting in that capacity, for allegedly violating the provisions of a collective-bargaining agreement, our bylaws, or the constitution of our parent international.

WE WILL NOT in any like or related manner restrain or coerce Pride Electric in its selection of representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL rescind the disciplinary action taken against Robertson for working as a supervisor and employer representative for Pride Electric, Inc., including the $4000 fine assessed against him and his expulsion from membership in the parent international; WE WILL remove from its records all references to and evidence of those actions; WE WILL notify him in writing that these steps have been taken; and WE WILL make him whole for any loss of earnings and benefits he may have suffered, and for any travel and other expenses he may have incurred, to attend the trial-board proceeding against him on 12 June 1985.

WE WILL withdraw with prejudice the lawsuit filed against Robertson to collect the fine; or if judgment adverse to him has been entered, WE WILL cause it to be vacated with prejudice; WE WILL make him whole for all expenses incurred in the defense of this suit; and WE WILL also make him whole for any losses suffered and expenses incurred, in the manner set forth in the preceding paragraph, to attend the trial and any proceeding relating thereto.

WE WILL return to Robertson, with interest, any moneys collected from him in satisfaction of the fine.

WE WILL reinstate Robertson, if he wishes, as a member in good standing of International Brotherhood of Electrical Workers.

WE WILL notify Pride Electric, in writing, that we have no objection to Robertson's working for it as a supervisor and representing it for the purposes of collective bargaining or the adjustment of grievances.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 113

Triple A Maintenance Corp. *and* Local 32B–32J, Service Employees International Union, AFL–CIO and Local 732, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party to the Contract. Cases 29–CA–11100 and 29–CA–11487

26 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 23 December 1985 Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs. The Respondent filed an answering brief to the General Counsel's exceptions, the Charging Party filed an answering brief to the Respondent's exceptions, and the General Counsel filed a response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

We agree with the judge, for the reasons stated by him, that the Respondent violated Section 8(a)(5) and (1) of the Act by instituting unilateral changes affecting the terms and conditions of employment of employees at its Flatbush Avenue location without bargaining with Local 32B–32J, Service Employees International Union (Local 32B). Contrary to the judge, however, we find that the Respondent further violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of Local 32B at Flatbush Avenue for the reasons set forth below.

Clifton Boone, an employee at the Respondent's Flatbush Avenue facility, testified that about 2 or 3 October 1984 the Respondent's area supervisor, Michael Metcalf, and Operations Manager Bernie Ross met with the employees at the facility. Ross told the employees that "as of today" the Respondent was no longer recognizing Local 32B and that

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the judge's inadvertent error in stating that Local 32B–32J, Service Employees International Union (Local 32B) began organizing the employees at the Police Operations Bureau (POB) in mid-1984; it is clear from the record that such organizing actually began in mid-1983. We also correct the judge's inadvertent error in referring to Joseph Metcalf, the Respondent's director of operations, as the Respondent's area supervisor.

The General Counsel excepts, inter alia, to the judge's failure to find that the Respondent acquired the cleaning contracts for John F. Kennedy Airport Buildings 141, 80, and 20 as part of the same bid package with the International Arrivals Building (IAB) in 1982 and with the IAB and POB in 1984. We find, based on record evidence, that buildings 141, 80, and 20 were acquired by the Respondent as part of the IAB bid package in 1982 and as part of the IAB and POB bid package in 1984. We further find that the employees at buildings 141, 80, and 20 were represented by Local 32B, and that the Respondent recognized Local 32B at these buildings. These findings, however, do not affect the results of our decision regarding the Respondent's failure to hire the predecessor employer's employees at the POB and to recognize Local 32B at that location.

Finally, we do not rely on the judge's statement that the Respondent defended its transfer of IAB employees to the POB on the grounds that there was a large number of experienced employees at the IAB. The record indicates that the Respondent defended its actions at 111 Livingston Street on such grounds, but that it did not defend its actions at the POB on such grounds.

[2] In adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by failing and refusing to hire the predecessor employers' employees at the POB and 111 Livingston Street, we particularly rely on the lack of evidence that the Respondent's hiring practice was discriminatorily motivated.

The complaint also alleged that the Respondent violated Sec. 8(a)(5) and (1) of the Act by its refusal to comply with established past practice and its contractual obligations as set forth in art. I of the Independent Contractor's Agreement (ICA), which provided for a citywide bargaining unit, when it failed to recognize Local 32B at its newly acquired sites at the POB and 111 Livingston Street and failed to hire the predecessor's employees at those sites. The judge did not address this allegation in his decision. Regarding the Respondent's alleged refusal to comply with ICA art. I, we note that the ICA had expired on 31 December 1983, i.e., before the alleged dates that the Respondent acquired the contracts at the two new sites. Since a recognition clause is not a mandatory subject of bargaining, *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), we find that the Respondent did not violate Sec. 8(a)(5) by not adhering to ICA art. I when it acquired the contracts at the two new sites. *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157 (1971). We also note that the practice of having an employer recognize Local 32B at any newly acquired site was not always followed. For example, when the Respondent acquired the contract for the IAB in 1982, Local 32B declined to represent the IAB employees because they were already represented by the Teamsters, with whom Local 32B had a no-raid pact. The no-raid pact was not referred to in the ICA, and there is no evidence that the Respondent had been aware of its existence. Furthermore, after obtaining the IAB contract, the Respondent was awarded the bid on Brooklyn Union Gas Service Stations. The Teamsters immediately organized the employees there, and the Respondent entered into a contract with the Teamsters for that job. There is no evidence that Local 32B objected to the Respondent's recognition of the Teamsters. Thus, we find that the Respondent's failure to follow the alleged past practice in the instant case does not warrant a finding that it violated Sec. 8(a)(5) and (1).

[3] The Charging Party excepts to the judge's failure to order that the Respondent make its employees whole for any losses suffered as a result of the cessation of payment for unused sick leave days at the end of each year. We find merit in this exception and shall modify the judge's recommended Order accordingly.

The General Counsel excepts to the judge's failure to order that the notice to employees be printed in Spanish and English. The General Counsel requested at the hearing that the notice be printed in both languages. The General Counsel has, however, failed to show that there are a substantial number of Spanish-speaking employees. Thus, we leave to the compliance stage of this proceeding the determination of whether the notice should also be printed in Spanish.

they were "no longer going by the same rules" as they had under Local 32B. Ross then proceeded to list various changes in the employees' benefits, including reductions in sick days, holidays, and vacation time. Later that day, Metcalf told Boone that some of the changes would apply only to new employees hired after 2 October 1984. The following day Metcalf distributed a document listing the changes in benefits, including, inter alia, that the Respondent would no longer contribute to the Local 32B welfare fund, that there would be a reduction in benefits for new hires, and that employees would no longer be paid for unused sick days at the end of the year.

Boone testified that shortly thereafter his paycheck stubs indicated that Local 32B dues were not being deducted from his pay, so he and his fellow employees paid their dues directly to Local 32B. Boone's employment with the Respondent terminated on 18 November 1984, but he learned from the employees still at Flatbush Avenue that at some later time the Respondent resumed deducting Local 32B dues.

Ronald Atkinson, the Respondent's president, testified that about 1 October 1984 Metcalf informed him that he had told the Flatbush Avenue employees that the Respondent no longer recognized Local 32B. Atkinson replied that he had never authorized Metcalf or anyone else to say that, that it was not true, and that they had always recognized Local 32B at that location and would continue to do so. Atkinson then prepared the document, referred to above, which was distributed to the Flatbush employees by Metcalf the day following their meeting with Metcalf and Ross.

Atkinson testified that the Respondent has continued to recognize Local 32B at the Flatbush Avenue location; has continued to contribute to the Local 32B pension fund for all the employees; and has continued to deduct Local 32B dues from its Flatbush Avenue employees, although there was a brief delay in these deductions in late September or early October 1984 due to a turnover of clerical and managerial employees. According to Atkinson, the dues deduction problem was corrected shortly thereafter, however, and any delinquencies were remitted to Local 32B.

The judge dismissed the allegation that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition of Local 32B. He found that Atkinson, on learning that Ross and Metcalf had told the employees that the Respondent was withdrawing recognition, had the remarks corrected and that the Respondent has since continued to recognize Local 32B at locations where it is the collective-bargaining representative of the Respondent's employees.

Contrary to the judge, we find that the Respondent withdrew recognition from Local 32B at its Flatbush Avenue location and thus violated Section 8(a)(5) and (1). Atkinson's alleged repudiation of the statement that the Respondent was withdrawing recognition was not effective under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). *Passavant* holds that in order for a repudiation to be effective it must meet the following standards:

> [It] must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." . . . Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after publication. . . . And, finally . . . such repudiation . . . should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.

Passavant, 237 NLRB at 138–139, quoting from *Scott & Fetzer Co.*, 228 NLRB 1016, 1024 (1977) (and cases there cited).

In the instant case, there was no "adequate publication of the repudiation to the employees involved." Although Atkinson told Metcalf, a supervisor, that the Respondent was not withdrawing recognition from Local 32B, there is no evidence that the employees were ever so informed. The document prepared by Atkinson which was distributed to the employees failed to state that the Respondent was continuing to recognize Local 32B. Moreover, there was further proscribed conduct by the Respondent, i.e., various unlawful unilateral changes in terms and conditions of employment. Furthermore, such unilateral changes, as well as the cessation of dues checkoff, reinforced the statement that recognition had been withdrawn. Finally, there was no contact between the Respondent and Local 32B until 26 December 1984, when the Respondent wrote a letter to Local 32B suggesting that they meet. Under these circumstances, we find that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from Local 32B at its Flatbush Avenue location from about 1 October to 26 December 1984.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Triple A Maintenance Corp., Brooklyn,

New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs.

"(a) Withdrawing recognition from Local 32B as the collective-bargaining representative of its employees at its Flatbush Avenue location."

2. Substitute the following for paragraph 2(c).

"(c) Make its employees whole for any losses suffered due to the reduction in vacation and sick leave days and to the discontinuance of payment for unused sick leave days at the end of the year in the manner set forth in the remedy section of the judge's decision."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from Local 32B–32J, Service Employees International Union, AFL–CIO as the collective-bargaining representative of our employees at our Flatbush Avenue location.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees who are represented by Local 32B without prior consultation and negotiations with Local 32B, the collective-bargaining representative of those employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unilateral changes made about 1 October 1984 and restore the terms and conditions of employment of our employees who are represented by Local 32B as they existed prior to 1 October 1984, and WE WILL make whole these employees for any losses they suffered due to our unilateral changes regarding their health and insurance coverage, paid leave for birthdays and health center visits, vacation and sick days, payment for unused sick leave, and starting salary.

TRIPLE A MAINTENANCE CORP.

Kathleen Troy, Esq., for the General Counsel.

Stanley Israel, Esq. (Kliegman, Goldstein, Israel & Cooper), for the Respondent.

Leroy Walker, for Local 32B–32J, the Charging Party.

Herbert K. Lippman, Esq., for Local 732, Party to the Contract.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was tried before me in Brooklyn, New York, on 17, 18, 19, and 25 July 1985. The complaint in Case 29–CA–11100 issued on 22 October 1984,[1] and was based on an unfair labor practice charge filed by Local 32B–32J, Service Employees International Union, AFL–CIO (Local 32B) on 15 March; this complaint alleges that Triple A Maintenance Corp. (Respondent) violated Section 8(a)(1), (2), (3), and (5) of the Act when it engaged in the following conduct at two distinct locations—the Police Operations Bureau at J.F.K. International Airport (the POB) and 111 Livingston Street, Brooklyn, New York: refused to hire the employees of predecessor employers, and recognized and entered into and maintained collective-bargaining agreements with Local 732, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 732), rather than Local 32B, the recognized or certified representative of the employees at these locations. The complaint in Case 29–CA–11487, which issued on 30 November, was based on an unfair labor charge filed by Local 32B on 15 October; this complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by demanding the exclusion of the above two locations as a condition of consummating a collective-bargaining agreement with Local 32B covering other of its locations with employees represented by Local 32B, by unilaterally changing existing wage rates, health and life insurance benefits, pension benefits, holidays, vacations, and sick day benefits without prior notice to Local 32B, and by withdrawing its recognition of Local 32B as the collective-bargaining representative of its other employees. On 16 January 1985 an order consolidating cases issued, consolidating the above two complaints. On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by counsel for Respondent and Local 32B, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

There being no dispute, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and Local 32B and Local 732 are each labor organizations within the meaning of Section 2(5) of the Act.

[1] Unless indicated otherwise, all dates referred to are for the year 1984.

II. THE FACTS

A. *Introduction*

Respondent is engaged as a building maintenance contractor in the New York City area, more particularly in Brooklyn and Queens. In that regard, Respondent contracts with the owner or manager of commercial or residential buildings and, in exchange for a fee paid to it, supplies employees and supplies to clean, maintain, and/or repair the buildings. These contracts often contain 30-day cancellation clauses which contribute to the competitive and transient nature of the industry.

The Service Employers Association (SEA), an association of maintenance contractors, negotiates collective-bargaining agreements with Local 32B on behalf of its members; on completion of these negotiations, the independent maintenance contractors are informed by letter of the contents of this agreement and are given the choice of signing such an agreement with "exactly the same" economic terms as the SEA agreement (this is called the Independent Contractor's Agreement (the ICA) or negotiating a separate agreement. For a number of years, Respondent has executed the ICA, the last one being for the period 1 January 1981 through 31 December 1983. Some of the relevant provisions of this agreement are:

> Article I, Paragraph 2: This agreement shall apply to all service employees employed in any facility, including residential buildings, in the City of New York.
>
> Article XIII, Paragraph 1(c): With respect to all jobs contracted for by the employer where members of the union were employed when the contract was acquired, it is agreed that the employer shall retain at least the same number of employees, the same employees, under the same work schedule, and assignments including starting time of each employee.
>
> Article XIV, Paragraph 50: 3. The Employer shall make no agreements with any other union unless the Union and the Association agree otherwise in writing; such written agreements between the Union and the Association and the Employers presently in effect shall continue for the duration of this Agreement.

In addition, article II, paragraph 2, states:

> The Employer shall immediately notify the Union in writing on forms to be supplied by the Union as soon as a cancellation of an account becomes effective where Union members are employed. The Employer shall immediately notify the Union when he acquires a new job. The Employer shall be liable for any lost wages and/or damages sustained by employees as a result of the Employer's willful failure to comply with the job cancellation notice and/or new job notification provisions of this Agreement.

Local 32B's theory of recognition, based on the terms of the SEA and ICA agreements, together with many years of practice, can best be described as: "Once you sign a contract with us, we have all your employees, wherever they may be, unless we decide not to take them." Donald Mumm, Vice President of Local 32B, testified that when a signatory employer takes over the maintenance operation at a building where the employees of the predecessor employer were members of Local 32B, the successor employer must recognize Local 32B at that location, and

> they must retain the exact same people that were on the job. Not just the same number. The same people that were there, the same hours, the same wages, the same benefits, everything. Absolute status quo when they take over a job where our members are employed.

The same is true when a Local 32B signatory employer takes over an operation where the predecessor's employees were not members of Local 32B. As Mumm testified: "Where the employees are non-union the contractor takes over the job under the agreement, within 30 days he has to put those people in the union and they are covered under our standard contract." These rules apply as long as the work locations are within the city of New York (which includes all the boroughs) through Nassau and Suffolk Counties. Mumm testified that the reason for these rules is to stabilize an otherwise turbulent industry; i.e., employers bidding on jobs know, in advance, the wages that they will pay their employees if their bid is successful, and this is the same wage that the present contractor is paying the employees. He also testified that about 1978, at a time when Ronald Atkinson, presently the president of Respondent, was employed elsewhere, he told Atkinson that the Local 32B contract requires that an employer acquiring a maintenance contract at a location where the maintenance employees are Local 32B members "must employ those people, retain their seniority, their hours and their benefits." The only exception to Local 32B's rules of jurisdiction is when the incumbent union at the acquired site is an AFL–CIO affiliated union or one which has a no-raiding pact with Local 32B; in that situation Local 32B will not accept jurisdiction over those employees. As will be seen, infra, this exception to the Local 32B jurisdiction rules was the genesis of the problem here.

B. *JFK Airport*

Sometime shortly prior to January 1982 the Port Authority of New York and New Jersey (the PA), the operator of JFK Airport, requested bids for maintenance work at the International Arrivals Building (IAB), the principal passenger facility at the airport, together with three small buildings. Maintenance work at the POB, approximately a mile away and substantially smaller, was not included in this bid. Respondent was the low bidder and obtained the contract for the IAB commencing about February 1982. The predecessor employer at the IAB was Triangle Maintenance, which had a collective-bargaining agreement with Local 732 covering its employees at that location. On learning that they were the successful bidder, Atkinson and his predecessor called

Mumm and informed him that they were awarded the contract and they were prepared to recognize Local 32B for that location. However, about that time, Gus Bevona, Local 32B president, received a call from the Teamsters president informing him that Local 732 had a contract at the IAB. Because Local 32B had a no-raid pact with the Teamsters, Mumm advised Respondent that "we could not have jurisdiction on that job" because of the no-raiding pact between Local 32B and the Teamsters. Respondent never grieved this action. On 1 December 1982 Respondent and Local 732 entered into a collective-bargaining agreement covering this location. Approximately 100 employees are employed by Respondent at this location.

All Service Cleaning (All Service) was the maintenance contractor at the POB from 1 February 1983 through 31 January 1984; Respondent was unsuccessful in bidding on this contract. In mid-1984, Local 32B began organizing the All Service employees at this location, and, as a result of a Board-conducted election, was certified on 25 October 1983 as the representative of its employees in the following unit:

> Included: All full time and regular part time building service employees employed by the employer at its location at JFK International Airport.
>
> Excluded: All other employees, clerical employees, guards and supervisors as defined in the Act.

Representatives of Local 32B and All Service met for one bargaining session in November 1983; after receiving the Local 32B demands, Joseph Schlogel, one of the All Service partners, said that he could not afford the increases demanded by Local 32B, and he would speak to the PA to request increased renumeration so that he could afford the proposed increases. He never contacted Local 32B again and there were no further collective-bargaining sessions between them. Late in 1983 All Service was being penalized by the PA for poor work; the PA threatened to cancel the contract in October 1983, but did not. Schlogel testified that the contract was canceled because of the poor work of his employees, but the PA worded the cancellation letter (effective 31 January) in a more diplomatic way.

Atkinson testified that sometime in late 1983 the PA put out a bid package for the IAB and the POB together, unlike the previous separate bids for these locations. About November 1983 Respondent was informed that it was the low bidder and was awarded the PA contract for maintenance work at the IAB and POB effective 1 February 1984. Atkinson testified that "the building became a situation that was part of our original International Arrivals Building package"; because of that, Respondent observed the seniority and bumping provisions of its agreement with Local 732 at the IAB and allowed Local 732 members employed at the IAB to bid for the POB jobs. As a result, all five positions at the POB were initially filled by Local 732 members who had previously been employed at the IAB. Respondent defends this action on the grounds it had a pool of a large number of experienced employees nearby at the IAB, and that it was unaware of Local 32B's status at the POB at the time. As will be discussed, infra, one source of difficulty between Respondent and Local 32B was allegedly inaccurate information given by Local 32B representatives to Respondent in answer to queries regarding the staffing of facilities Respondent was considering bidding for. Atkinson testified that it was not necessary for him to get such information from Local 32B regarding the POB as he was not aware of its presence at the site and it was not necessary as the PA bid packages contain the square footage of the building, the number of stations, and the hours required.

Respondent's lack of knowledge of Local 32B's status at the POB is disputed by the testimony of Anthony Poccio, business agent for Local 32B. He testified that in December 1983 he had a telephone conversation with Atkinson, although he could not be sure whether he called Atkinson or Atkinson called him. In this conversation Atkinson told him that he had a good chance of being awarded the POB contract and he wanted to know "the staffing of the men there" and the rates of pay. Poccio told him that because Local 32B and SEA were then negotiating for a new agreement he could not tell him what the new rate would be, but the employees were then earning $5.60 an hour. Poccio testified that this was the average rate then being earned by the All Service employees at the POB; because All Service had not entered into a collective-bargaining agreement with Local 32B, this was not a contractual rate, nor was All Service paying the fringe benefits required by the contract.[2] On cross-examination, for the first time, Poccio testified that in this conversation he also informed Atkinson that Local 32B was certified at the POB. Shortly after this testimony, he testified:

> A. Maybe the certification wasn't mentioned, but we had won the election at the POB.
>
> Q. You are sure you mentioned that?
>
> A. I am pretty sure of that, yes.
>
> Q. Your mind is clear on that?
>
> A. Yes.

Poccio was then shown his affidavit given to the Board, which makes no mention of informing Atkinson of the election or certification. He then testified:

> Q. The question is, did you tell Mr. Atkinson you won the election?
>
> A. I can't answer that. To the best of my knowledge, no. I can't really answer that. I don't know.
>
> Q. Is your answer right now you simply don't recall whether you discussed election or certification with Mr. Atkinson?
>
> A. Yes.

Atkinson testified he never had any such conversation with Poccio or anybody else at Local 32B regarding the POB bid.

---

[2] The All Service payroll register for its last week at the POB is in evidence. This register does not separate regular hours from overtime hours, or indicate whether overtime is paid at a higher rate. In addition, for that period, it appears that the average hourly wage for these employees was approximately $5.50 an hour.

C. *111 Livingston Street*

New York Telephone Company (the Telephone Company) owns a high rise building at 111 Livingston Street in Brooklyn, New York (Livingston Street). It occupies the lower 11 floors and leases space in the top half of the building. The Telephone Company contracts with a maintenance company to clean and maintain the space it occupies, together with the common areas, principally the lobby and the plaza. Beginning about 1981 the Telephone Company contracted with Organized Maintenance Inc. (Organized Maintenance) to provide the cleaning and maintenance of the floors it occupied and the common areas. Presumably, at that time the employees of Organized Maintenance, at least at that location, were not represented by any labor organization. About mid-1983, Local 32B organized the employees of Organized Maintenance employed at Livingston Street. Pursuant to a Board election, on 19 September 1983 Local 32B was certified as the representative of the full-time and regular part-time porters employed by Organized Maintenance at this location. On 7 December 1983 one inconclusive negotiating session between the parties took place; no further sessions were held. Leroy Walker, Local 32B's chairman for its Brooklyn district, testified that the reason no further negotiating sessions took place is that about a week after the sole session he received a telephone call from one of the Organized Maintenance employees at the site who told him that there was a rumor that Organized Maintenance might lose the contract at the site and be replaced by Respondent. Walker made no attempt to contact Organized Maintenance or the Telephone Company to verify this rumor. He testified that shortly after learning this he called Respondent and asked to speak to Atkinson; on learning that Atkinson was not in, he left a message for Atkinson to call him. A few days later, having received no call from Respondent, he called again and was connected with Joseph Metcalf, Respondent's area supervisor (who did not testify). He asked Metcalf if Respondent was going to get the contract for the maintenance work at Livingston Street; Metcalf said that he did not know. Walker said that he was certified at that building and "we were expecting him to pick up the employees in that building." Metcalf told him that he did not know but he would look into it and get back to Walker; he never did. The next Walker heard of the situation was about 9 January when one of the Organized Maintenance employees at Livingston Street came to his office and informed him that he was no longer employed there because "he was not picked up . . . . He was not hired." Respondent began maintaining Livingston Street about 8 January.

Mumm testified that about 10 or 11 January he called Atkinson and told him that Walker and Poccio had informed him that Respondent had taken over the POB and Livingston Street operations and had failed to employ the employees of the predecessor employers. He told Atkinson that he expected him to adhere to the contract and put those people back to work. Atkinson said that he did not know that Local 32B members were working on the job. Mumm replied that he did know about it because Walker had told Metcalf that Local 32B's members were employed at these sites. Atkinson then mentioned the IAB difficulty he had with Local 32B and said that he was caught in the middle of it and it was costly to him. Mumm said that he was sorry that it had happened that way, but there was nothing Local 32B could do about it because it was a Teamsters job.

Walker testified that on 31 January he received a call from Atkinson and in that call he asked Atkinson whether he was going to employ the Organized Maintenance employees at Livingston Street. Atkinson said that he had replaced them with his employees, and three-quarters of them were Local 732 members and the others had signed cards for Local 732. Walker said that he had "an overall agreement" with Respondent and Atkinson said that he had an overall agreement with Local 732.

Atkinson testified that the Telephone Company is Respondent's largest customer and that Respondent had originally bid on the Livingston Street contract, but was the second highest bidder to Organized Maintenance. He testified further that in the last week of December 1983 he received a telephone call from George Muhs, representative of the Telephone Company in charge of contracting (who did not testify), asking if he would be willing to take over cleaning Livingston Street; when Atkinson asked at what price, he said at the previous bid. Atkinson said that he would have to check with his office, but he would call him back. Atkinson met with some of Respondent's office employees and discussed the original bid; he called Muhs and told him that he would take the job on those terms. Atkinson testified:

> There was still some days lag because then he had to go back to—he meaning George Muhs had to go back to his people and see if it could be confirmed. At this point the holidays were around us. We're at the beginning of the year. If he's telling me that if I was to take over it was going to happen on or about January 8th. Within—I almost say it's a day, within a day or two I found out from George Muhs it's been confirmed. You have the job. You are to start January 8th. I had approximately one week to get on the job.

Atkinson then asked Muhs if the employees presently working in the building should be considered for employment. Muhs' response (according to Atkinson's testimony) was: "Ron, I'd like you to come over and look at the building." He testified that he inspected the building about 4 or 5 January although, of the three affidavits he gave to the Board regarding this matter, none mentions such a personal inspection. He inspected all the floors occupied by the Telephone Company to determine what would be needed to bring it to an acceptable standard and how many employees would be needed on a regular basis to maintain the area. Atkinson testified:

> I had an extremely dirty building. Not only was I going to have to go on with a complete complement of staffing, but I was also going to have to go on the job site with cleaning crews that were involved in special cleaning duties to bring the building up to par.

This survey of the building convinced him that the maintenance employees employed by Organized Maintenance were not properly performing their job; that is the reason he did not hire them; and it had nothing to do with the fact that they were members of Local 32B.[3]

Atkinson testified:

> So at that point I needed to move very quickly in terms of where I am going to get the personnel to clean this building. . . . I was dealing with the primary client of the company without question in terms of the percentage of business we do with them than with anyone else.
>
> As a result of that I have the largest crew of personnel that Triple A has anywhere is at the International Arrivals Building. If in fact a contractor is going to pull people from other locations to help service a new startup of an account you have to do so that it doesn't affect your overall operation. By example if I have a two man building in location I can't pull both of those people out of there. The continuity of cleaning will fall apart if I try to take two out of one building and put in two new.
>
> So the place where I could go that would least affect my overall operation was the largest pool I had, the International Arrivals Building. I called the Triple A manager at the I.A.B building and I told him that as rapidly as possibly he should contact the entire work force within the I.A.B. and ask does anyone . . . live in the Brooklyn area, anywhere around the Brooklyn Downtown area, and if so would they be willing to relocate to that building. He said he would do so.
>
> Within a day, if my memory serves me, I'm getting a call from a man by the name of Hank Habel, who was the then Business Agent for Local 732 I.B.T. which represented all of the people at the International Arrivals Building. His conversation was that I understand that you're asking for people to work in Brooklyn. I said yes. Where? 111 Livingston Street. I want you to understand if they go into that building those people are mine.
>
> I said, "Look, I just need people. I've got to get as many people as I can." He said, "Well nobody is forced to go over there." I said, "No, nobody is forced."
>
> So it was on a voluntary basis we pulled as many people as we could from the International Arrivals Building and put them in place in that building. Those were the operational modes that came up to starting the building on January 8th.

On 9 January, Respondent and Local 732 entered into a two-page "addendum" to the master collective-bargaining agreement between the parties, which is dated 1 May 1982 through 30 April 1985, covering Respondent's employees who are "engaged in custodial and cleaning operations." This addendum agreement was "for employees located at the New York Telephone Company facility at 111 Livingston Street, Brooklyn, New York." Respondent and Local 732 are also parties to another agreement, effective 1 December 1982 through 31 January 1986, covering building maintenance cleaners engaged in cleaning operations at John F. Kennedy International Airport, Jamaica, New York, and all airports in the New York-New Jersey metropolitan area.

Anthony Saraceno, district manager for the Telephone Company in its Building Management Division, testified that Organized Maintenance had been the maintenance contractor at Livingston Street since about 1981, having been the low bidder for the contract. In 1983, he and his colleagues at the Telephone Company had a number of conferences regarding the cleaning of the building by Organized Maintenance. There were a number of areas where they felt the contractor was deficient: the main hall and elevator were not swept or vacuumed in a timely manner; the washroom was occasionally dirty with paper towels missing; the spray buffing of the cafeteria was not performed at a proper level; and, on occasion, light bulbs were not changed. On 21 November 1983 the Telephone Company gave Organized Maintenance a final warning that if its work did not improve its contract would be terminated; there was no noticeable improvement after this warning was given. On 7 December 1983 the Telephone Company wrote to Organized Maintenance giving it 30 days' notice of the termination of its agreement. "Immediately after" receiving the return receipt of this letter Muhs called Respondent and proposed that it take the contract at the prior bid price, which Respondent accepted. The Telephone Company did this rather than requesting bids for the job because it had less than 30 days to locate a new contractor, and issuing new specifications and requesting bids on them would have required too much time. Saraceno also testified that he did not request that Respondent not hire any of the Organized Maintenance employees, nor did he inform Respondent of the reasons the Telephone Company terminated Organized Maintenance, although "I am sure they found out."

Joan Anderson, secretary-treasurer for Organized Maintenance, testified that the complaints regarding its work at Livingston Street were minor; lighting fixtures and paper towels were not changed fast enough. When she visited the premises she felt that it was being properly maintained.

D. *Refusal to Bargain and Unilateral Changes*

As stated, supra, prior to 1984 Respondent had always executed the ICA agreement, which was patterned after the SEA agreement. About January, in the course of complaining to Atkinson about his failure to reemploy the Local 32B members at the POB and Livingston Street, Mumm told Atkinson that Local 32B was in the process of negotiating a new agreement, but because Respondent's actions were "contrary to the practice of the industry and to the practice of Triple A in the past" the language in a new contract with Respondent would be "so crystal clear that there would . . . be no way that he could claim to misinterpret it again." Mumm testified:

[3] Atkinson testified that prior to 8 January "a few" of these employees filed applications to work for Respondent, but most applied to work at other sites after Respondent commenced its operation at Livingston Street.

> I think he told me at that time that they would be willing to sign the same contract that everybody else signed and I told him you really have the same contract now that everybody else has, but you are not interpreting the way everybody else interprets it. Since that is the case, then we are going to have to make it crystal clear in your case.

The General Counsel alleges three distinct 8(a)(5) violations regarding the negotiations that followed:

(a) During negotiations between about March and July, Respondent insisted on excluding the POB and Livingston Street units from the unit descriptions as a condition of consummating an agreement with Local 32B.

(b) About 3 October, Respondent made certain unilateral changes in its employees' benefits without prior notice to or consultation with Local 32B.

(c) About 3 October, Respondent withdrew its recognition of Local 32B in a citywide unit, as described supra.

The evidence regarding these allegations comes principally from the testimony of Ira Sturm, Esq., attorney for Local 32B. Atkinson also testified on the subject.

Sturm testified that at the negotiating sessions he was, basically, the spokesman for Local 32B. The first meeting took place about 8 March; present were he, Mumm, Thomas Latimer, contract director for Local 32B, Atkinson, and Stanley Israel, Esq., attorney for Respondent. Mumm began by saying that Local 32B had requested negotiations with Respondent to replace the expired contract. Atkinson asked why they were changing the former practice of simply sending him for signature the pattern agreement previously reached with the SEA and the other independents. Mumm said that Local 32B previously had problems with Respondent's interpretation of provisions in the expired contract and they wanted to clarify these provisions by bargaining separately with Respondent, which they had the right to do. Israel said that Respondent was willing to execute the standard independent agreement provided article XIII, paragraph 1(c), was eliminated and it did not apply to Long Island, Livingston Street, the POB, or any location Respondent acquired after the contract was executed. Sturm said that Respondent could not pick and choose what it liked and disliked in the standard independent agreement; he was there to negotiate an agreement "on the unit as it existed, which included 111 Livingston Street and the POB." Israel said that "under no circumstances would he negotiate to include 111 Livingston Street and the POB because he had a contractual relationship with another union, 732" and was caught in a dilemma. Sturm said that the unit he was negotiating for included Livingston Street and the POB; Israel said that they should continue bargaining and the unit would be decided by the Board pursuant to the unit clarification petition that he had filed. Local 32B gave Respondent an 18-page "Proposal . . . for Revision and Amendment" of the independent agreement. At this meeting, Atkinson also complained that when he called Local 32B for staffing information of locations on which he was going to bid (where Local 32B represented the incumbent contractor) he was often given erroneous information which, he felt, was done purposely. Latimer denied this, saying that Local 32B gave him the most accurate information it had. At this meeting and at later meetings of the parties, Israel suggested that the best way of settling the dispute involving the POB and Livingston Street was for the two Unions to meet and solve the problem (because only the Unions or the Board could solve the problem) and that Respondent would agree to whatever determination was made. Local 32B's response was, "[Y]ou created the problem, you resolve it."

The next meeting took place on 22 March with the same individuals, except Mumm, present. Atkinson again complained about receiving incorrect staffing information from Local 32B for jobs on which he was preparing to bid. Sturm then went over each of the items in Local 32B's proposal. Israel asked whether each of the items was in the SEA agreement and, when Sturm said that it was not, Israel said they would not accept it. Israel reiterated that the unit in the agreement should not include Livingston Street and the POB. Sturm insisted that Livingston Street and the POB were part of the negotiations. Israel objected to article XIII of the expired agreement alleging that it should only encompass those locations that Respondent acknowledged were Local 32B locations. Sturm answered that such a clause was necessary in the New York building maintenance industry. No agreement was reached at this meeting.

The next meeting was held about 3 May with the same participants. Atkinson, again, briefly complained about the information he received from Local 32B regarding jobs on which he was about to bid. Israel repeated that any contract should not include Livingston Street or the POB because he had an overall agreement with Local 732 covering these locations and others. Israel stated that the two Unions should decide the jurisdiction problem. Sturm asked for a copy of the agreement with Local 732 and was told that he would be supplied with one; he never was. Sturm then brought up one of Local 32B's proposals that there be no layoffs, reductions in force, or change of schedules or duties without Local 32B's prior approval; he felt this was necessary because of Respondent's actions earlier that year. Sturm testified:

> I took a position that if that were the case and he is in essence, he meaning Triple A. If Triple A is denying the existence of the reality of the cleaning service industry in New York where there is you know gains and loses [sic] on a daily basis, I would demand that there be absolutely no layoffs of any employees during the life of the contract, that there be absolutely no reduction in forces on any site that was acknowledged to be 32B during the life of the contract without prior written consent of the Union.

Respondent did not agree with this. At that point Israel said: "I guess we are at an impasse." Sturm testified:

> I looked at him and I said well I guess we are at an impasse . . . basically I considered us at being at

> a position where I was not being able to negotiate with the then recognized unit . . . and I realized that I couldn't make any progress because . . . all the negotiations were being conditioned on Triple A's interpretation of what the unit was.

At that meeting, Sturm gave Israel a copy of the recently negotiated SEA agreement. The meeting concluded without agreement on any of the issues.

The next meeting took place about 17 July with the same participants plus an associate in Sturm's law firm. At either this meeting or, initially, at the 3 May meeting, Sturm recited Local 32B's demands, which were reduced to the following: the economics of the SEA agreement ("which really was never a problem"); no layoffs, discharges, or reductions in force without the prior consent of Local 32B, in the citywide unit (as discussed supra); a $10-a-week per employee contribution by Respondent for an annuity fund, in addition to the standard pension then in existence; no change in an employee's duties or work schedule without the prior consent of Local 32B; Respondent's assumption of the cost of an attorney to represent its employees in connection with any problem arising out of their employment; and 2 hours' leave four times a year for all employees to attend union meetings. Israel said that if these demands were included in the SEA agreement he would accept them; if not, he would not. No agreement was reached on any of these issues.

During early to mid-July, Local 32B struck and picketed Respondent without warning at three high rise commercial buildings in Manhattan; within hours of these strikes, Respondent lost all of these contracts, which had good profit margins and were the "mainstay of the contractor's business in the New York City area," according to Atkinson's testimony. At the time of the hearing, Respondent was the maintenance contractor at only one commercial building in Manhattan.

The next meeting took place about 19 July. Sturm testified that present, in addition to the usual participants, was Joe Sorotkin, who, Sturm was informed, was an owner of Respondent. Sorotkin asked Mumm what he wanted and Mumm said that he wanted a counterproposal. At that point Mumm and Atkinson spoke privately in Mumm's office for about a half hour. When Mumm emerged from the room he told Sturm that an agreement had been reached and Respondent would sign the standard independent agreement with two additions: it would agree that there would be no peremptory discharges and no reductions in force during the term of the contract. Additionally, Respondent agreed to withdraw its unit clarification petition and both sides would withdraw all unfair labor practice charges. The final (and crucial) aspect of this agreement was that the POB and Livingston Street would be within Local 32B's jurisdiction as long as Local 732 agreed to relinquish jurisdiction. Mumm told Sturm to prepare such a stipulation for the parties' signatures. About the following day Sturm was informed that this proposed agreement had collapsed.

Atkinson testified that Israel was not present at this meeting. Sorotkin asked how the strike could be settled; Mumm pointed to Atkinson and said that he knew what had to be done. At that point, everybody but Atkinson and Mumm left the room. Mumm told Atkinson that the issues that could settle the matter were Local 32B's jurisdiction at the POB and Livingston Street and the two proposals demanded by Local 32B providing for no layoffs without the consent of Local 32B and no discharges prior to an arbitrator's decision permitting it. As to the former, Atkinson told Mumm that he was not sure what, if anything, he could do about it, but he would speak to someone in Local 732 to see if this jurisdiction issue could be settled. As to the latter, he would speak to Respondent's owners and legal counsel about it. At that point they left the room and the meeting ended. They met the next day and Atkinson told Mumm that Local 732 refused to relinquish jurisdiction over either the POB or Livingston Street. Atkinson said: "It's not mine to give." They then rejoined the others and Mumm said that all of Local 32B's demands were back on the table. Mumm asked Israel if there was anything to talk about, he said no, and the meeting ended. There were no further meetings between the parties.

On Monday afternoon, 24 September, Atkinson called Sturm and asked to set up another meeting as Respondent had some proposals to make. Sturm said that it was a bad week for him because, being an Orthodox Jew, he would not be working late Wednesday, Thursday, or Friday of that week as it was Rosh Hashanah, but that he would be willing to meet anytime the following week and he would call Mumm to arrange such a meeting. When he did so, Mumm told Sturm that he would be attending a convention the following week, but he would be available the next following week, the week of 8 October. Sturm then called Atkinson and reiterated that he was not available that week because of the Jewish holiday and Mumm was not available the following week due to a convention, but they could meet on 8 October. Sturm testified that Atkinson's response was: "[T]hat was not in my instructions. My instructions were to make it before that." By letter to Atkinson, with a copy to Israel, dated 24 September, Sturm wrote:

> I would just like to confirm with you our conversation of this morning. I returned your call and you advised me that you would like to set up a negotiation session. I advised you that this week was difficult due to the fact that the Jewish Holiday falls on Thursday and Friday. Although I agreed to meet early next week, I called Mr. Mumm and he indicated that he would be out of town next week, but that we would be willing to meet on October 8th or during that week. After you called Stan Israel to find out about his availability, you advised me that your proposals would be delivered to me and that the matter could not wait until the week of the 8th. I asked if we could set up a meeting anyway and you indicated that such were not in accord with your instructions.
>
> I would like to formally advise you that the Union is prepared to meet and negotiate at mutually agreeable dates and times. Our offer remains open, subject to limitations that we all have as to getting our schedules to coincide.
>
> Should you wish to meet, please give me a call.

By letter to Sturm dated 1 October (which indicates that it was hand delivered), Israel wrote:

> As you are aware, we have been trying to set up a further negotiating session with you since Friday, September 21. We have been unable to do so because of your unavailability due to the Jewish holidays and Mr. Mumm's complete unavailability during the week of October 1.
>
> Mr. Atkinson and I, however, will be able to meet with you some time during the week of October 8. At this point I would suggest either October 10 or 11 at approximately 5:30 P.M.
>
> In the interim, however, I feel that it is incumbent upon me to present to you the Company's revised proposals for a new collective bargaining agreement. The prior offer of the Company, which consists of its willingness to enter into the Independent Contractors Agreement (excluding, of course, those jurisdictional clauses which we have previously objected to) continues in effect with the following modifications:
>
> (1) Effective October 1, 1984, the Company will no longer make contributions to the Local 32B-J Health Fund but rather will maintain a Blue Cross, Blue Shield (employee only) coverage, together with $2,500 group life insurance per employee. Existing employees will be covered under the Company's direct coverage immediately, whereas employees hired on and after October 2, 1984, will have to be with the Company for 180 days of continuous employment in order to be eligible for coverage.
>
> (2) Effective October 2, 1984, the employee's birthday will be eliminated as a paid holiday.
>
> (3) Effective October 2, 1984, the two Health Center visits will be eliminated.
>
> (4) All employees hired on and after October 2, 1984, will receive the following paid vacation allowances:
>
> 1 year of service—1 week
> 3 years of service—2 weeks
> 8 years of service—3 weeks
> 15 years of service—4 weeks
>
> (5) Employees hired on and after October 2, 1984, will receive five (5) paid sick days per year. There shall be no payment for any unused sick leave, regardless of the date of hire of the employee.
>
> In view of the prolonged nature of our bargaining impasse and the job actions/strikes at 11 Broadway, 29 Broadway and 170 Broadway, resulting in the loss of these facilities, the above-described changes in the Company's proposal will be implemented effective as of the dates shown above, unless agreement with respect to each of the items and the contract as a whole, is reached at our proposed meeting during the week of October 8th.
>
> Your immediate response will be appreciated.

This was followed by another letter from Israel to Sturm dated 2 October, which states:

> We inadvertently omitted in our October 1 letter to you one further revision of the Company's proposal:
>
> The Company proposes that the hiring rate for employees hired on and after October 2, 1984, in Manhattan be $6.00 per hour.
>
> The foregoing should be considered as Modification #6 of the prior proposal.

Sturm was not in his office on Monday, 1 October. He was in his office for a short time on the following morning and on Wednesday, and after reading Israel's 1 October letter he called Israel and told him that the dates he suggested for negotiations, 10 and 11 October, were a Jewish holiday, Succoth, and he would not be working on those days. Israel told him that he would be receiving another letter from him (i.e., the 2 October letter, supra) supplementing the 1 October letter.

Sturm testified that he did not see any urgency to scheduling a bargaining session because "it was a moot point at that time" for two reasons: Israel's letter of 1 October was inconsistent and could be read to mean that these modifications would be put into effect on 1 and 2 October. In addition, concurrently with receiving these letters Walker told him that a Local 32B member who was employed by Respondent at 395 Flatbush Avenue, Brooklyn, New York (Flatbush Avenue), had informed him that Respondent had made changes in their conditions of employment and distributed a notice to the employees to that effect.

Clifton Boone, who had been employed by Respondent as a porter at Flatbush Avenue, in a unit represented by Local 32B, testified that about 2 or 3 October Metcalf (a supervisor whose area encompasses Flatbush Avenue) called the Flatbush Avenue location and told the crew not to leave until he spoke to them. About 3 p.m., Metcalf and Bernie Ross, Respondent's operations manager, arrived. Ross did all the talking (although he did not testify). He said that "as of today" Respondent was no longer recognizing Local 32B; they did not want to fire anybody but "we are no longer going by the same rules" as they had under Local 32B. He informed them of the following changes: 5 days' sick leave and 5 holidays instead of the 10 they had been receiving; 1 week's vacation after 5 years of employment, compared to the 3-week vacation they had been receiving after 5 years of employment; and Blue Cross would cover only the employee, not his family as well, which they had been receiving. Ross and Metcalf then left Flatbush Avenue. Shortly thereafter, Metcalf called and told Boone that he, Atkinson, and Ross met and they decided that the present employees would maintain their present sick days, holidays, and vacation time, but these items would not be provided to employees hired in the future. Metcalf told him that the following day he would bring the crew copies of the new rules and Blue Cross and life insurance forms. On the next day, Metcalf distributed the following form together with a Blue Cross application (under "Type of Contract" "Individual," the word "only" was handwritten) and a group life insurance enrollment card to each employee at Flatbush Avenue:

> If you stay please be advised that:
>
> A) Triple A will no longer contribute moneys to the 32B-32J Welfare Fund.
>
> A.1) Instead you will have a Blue Cross/Blue Shield Insurance plan covering yourself only and a company paid life insurance policy of $2500.
>
> B) Your current holidays stay the same.
>
> C) Triple A will no longer pay for a Birthday day off.
>
> D) Triple A will no longer pay for clinic days off.
>
> E) Your current vacation schedule based on your seniority will continue to be observed as usual.
>
> E.1) All employees hired after 10/2/84 will have the following VACATION ENTITLEMENT: After 1 year—5 days; 3 years—10 days; and 8 years—15 days
>
> G) Your pension will continue to be paid by Triple A.
>
> G.1) Employees hired after 10/2/84 will be provided no pension by Triple.
>
> H) Existing employees will continue to receive the Sick Day benefit of up to 10 days per calender year. However you *will* not be paid for unused sick days at the end of the year.
>
> H.1) New hires will only receive 5 sick days per year and are also *excluded* from sick day rebate for unused sickdays at the end of the year.[4]

Boone testified that shortly thereafter his paycheck stubs indicated that dues were not being deducted from his pay, so he and his fellow employees paid their dues directly to Local 32B to protect their benefits. His employment with Respondent terminated 6 weeks later, but he learned from the employees at that location that some later time Respondent resumed the checkoff of Local 32B dues.

Atkinson testified that shortly prior to 1 October Respondent was anticipating another strike of its operations by Local 32B; in that regard, Atkinson held a meeting with his supervisors (including Ross and Metcalf) and instructed them to tell the employees what their benefits would be in case they remained at work during such a strike. About 1 October, Metcalf told him that he had met with the Flatbush Avenue employees and told them that Respondent no longer recognized Local 32B. Atkinson told Metcalf that he had never authorized him or anyone else to say that, and that it was not so; they had always recognized Local 32B at that location and would continue to do so. Atkinson then prepared the above document, which was given to supervisors to inform employees of their benefits; it was not meant for distribution to employees. Atkinson testified:

> It was intended as a guide to supervisors as to a relationship that might develop with 32B-J. [If there were a strike] . . . if union members decided to stay to work versus going out on strike this is what the situation would be in the event that they stayed.

[4] Sturm testified that none of the proposed changes in this letter or the 1 October letter had been discussed between the parties at any of the earlier bargaining sessions.

These changes were implemented between 10 and 14 October. Atkinson testified that Respondent still recognizes Local 32B as the collective-bargaining representative of the employees at Flatbush Avenue, still contributes to the Local 32B pension fund for all its employees at that location and the others where Local 32B represents its employees, and continues to checkoff union dues for its employees at that location, although there was a brief delay in these checkoff remittances in late September or early October due to a turnover of clerical and managerial employees. This problem was corrected shortly thereafter and any delinquencies were remitted to Local 32B.

III. DISCUSSION AND ANALYSIS

The initial and paramount issue to be discussed is the legality of Respondent's recognition of (and subsequent execution of a collective-bargaining agreement with) Local 732, rather than Local 32B, for its employees at the POB and Livingston Street, and its failure to rehire the predecessor's employees at these locations. The General Counsel alleges that Respondent refused to rehire these employees because they were members of, and represented by, Local 32B, as well as to avoid its "collective-bargaining obligations" with Local 32B, in violation of Section 8(a)(1), (2), (3), and (5) of the Act. Respondent, on the other hand, defends that it had no knowledge that Local 32B was certified at these locations when it became the maintenance contractor at these locations, and the actions it took were good-faith business decisions unrelated to the employees' union affiliation.

The principal cases in this area are *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Howard Johnson Co. v. Hotel & Restaurant Employees* 417 U.S. 249 (1974). In *Burns*, the Court stated that "where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent," the new employer may be ordered to bargain with the incumbent union; however, in the absence of consent to be bound, the successor employer is not obligated to assume the predecessor's collective-bargaining agreement with the union. In this decision, at footnote 5, the Court states:

> The Board has never held that the National Labor Relations Act itself requires that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer. . . . However, an employer who declines to hire employees solely because they are members of a union commits a § 8(a)(3) unfair labor practice.

Howard Johnson involved an action by a union under Section 301 of the LMRA to compel an employer who purchased the assets of a motel and restaurant to arbitrate under the arbitration provision of its collective-bargaining agreement with the predecessor employer the extent of its obligations to the predecessor's employees, none of whom it employed. The Court ruled that such

an action was "completely at odds with the basic principles this Court elaborated in *Burns*," as quoted supra. The Court stated (417 U.S. at 262): "Clearly, *Burns* establishes that Howard Johnson had the right not to hire any of the former Grissom employees, if it so desired."

In a footnote, similar to that in *Burns*, the Court stated (id. at 262 fn. 8):

> Of course, it is an unfair labor practice for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity under § 8(a)(3) of the National Labor Relations Act . . . . Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union.

As Respondent did not employ a majority of the predecessor's employees at the POB or Livingston Street, a successor obligation cannot be found in that manner. If, however, the evidence establishes that Respondent did not hire the predecessor's employees at these locations because of their union membership, this would directly establish an 8(a)(3) violation, which would result in an 8(a)(5) refusal-to-bargain violation as well. *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979). This issue therefore boils down to whether the record evidence establishes that Respondent refused to hire the former employees at the two locations because they were Local 32B members and to avoid having to recognize and bargain with Local 32B at these locations. I find that it does not.

There are numerous cases which have found that an employer's refusal to hire the predecessor's employees violated Section 8(a)(3) of the Act and, at the same time, created a successorship relationship; e.g., *Houston Distribution Services*, 227 NLRB 960 (1977); *Potter's Chalet Drug*, 233 NLRB 15 (1977); *Love's Barbeque*, supra; and *C.J.B. Industries*, 250 NLRB 1433 (1980). However, in each of these cases there was substantial evidence that the employer's hiring practice was purposely formulated to avoid hiring the predecessor's or union employees. I find such evidence lacking in the instant matter.

Initially, it should be stated that I did not find Atkinson to be a totally credible witness. His testimony regarding the notice he received prior to obtaining the contract at Livingston Street is contradicted by the testimony of Saraceno, a disinterested and more credible witness. In addition, as stated in the Charging Party's brief, an extensive amount of time was consumed at the negotiating sessions by Atkinson's complaints about his inability to obtain accurate information from Local 32B regarding staffing at locations Respondent was attempting to obtain. This creates a strong doubt about his testimony that a few months earlier he did not attempt to obtain this information from Local 32B about the POB and Livingston Street. However, that does not establish the necessary elements of a violation. The element for finding such a violation is animus, and I find it lacking here.

Discussing the POB initially, and without deciding whether Respondent's recognition of Local 732 was valid under the Board's accretion doctrine, I find the evidence fails to demonstrate animus toward Local 32B. Respondent had a unit of 100 employees at the IAB, a 1 mile distance from the POB, which was a unit of 5 employees. This IAB unit had been represented for a year or two by Local 732 after Local 32B refused Respondent's request to take these employees due to its no-raiding pact with the Teamsters. Atkinson's testimony regarding accreting this POB unit to the IAB unit is not unreasonable: he had a ready and convenient pool of experienced employees to employ in his new operation. Respondent's argument regarding Livingston Street is not as persuasive; yet, the necessary animus is still lacking. Although Atkinson's three affidavits given to the Board fail to mention any personal inspection of Livingston Street prior to 8 January, considering his experience in the industry it is fair to conclude that he was aware that Organized Maintenance was being canceled as the contractor because the Telephone Company was not satisfied with its operation at Livingston Street. Saraceno's frank testimony that although he did not tell Respondent the reason for the cancellation. "I am sure they found out," supports this finding. Finally, as the Telephone Company was Respondent's largest customer it is understandable that Respondent would want to employ at this facility employees whom it knew to be capable. For these reasons, I shall dismiss the allegations that Respondent violated Section 8(a)(1), (2), (3), and (5) of the Act in this manner.

There remains for consideration the allegations that Respondent violated Section 8(a)(5) of the Act by withdrawing recognition of Local 32B, by demanding the exclusion of the POB and Livingston Street as a condition of consummating an agreement with Local 32B, and by instituting unilateral changes in its employees' terms and conditions of employment. The initial allegation is clearly without merit; the uncontradicted testimony is that after Atkinson learned of what Ross and Metcalf had informed the Flatbush Avenue employees, he had the remarks corrected; the evidence also establishes that from that time until the present time Respondent has continued to recognize Local 32B at those locations where it is the collective-bargaining representative of its employees.

I also find that Respondent did not unlawfully condition the consummation of an agreement with Local 32B on their agreement to exclude the POB and Livingston Street from the unit. The testimony regarding the parties' negotiations establishes that they were both playing "hardball"; due to the events of January and February, Local 32B was insisting on extremely stringent terms in its negotiations with Respondent, terms that were more stringent than those contained in its SEA or ICA agreement. Respondent, on the other hand, was proposing (and insisting) that any new agreement exclude the POB and Livingston Street on the ground that it had valid collective-bargaining agreements with Local 732 covering these locations. Most importantly regarding this allegation, however, during these negotiations Israel proposed, on a number of occasions, that the parties consummate an agreement and let the Board (in the unit clarification petition) or the Unions resolve the unit issue. Local 32B refused such an offer for the reason: "[Y]ou

created the problem, you resolve it." I therefore find that Respondent was not adamant in its position; rather, it was attempting to find a solution to the predicament that it, and Local 32B, had gotten it into. This allegation is therefore dismissed.

Finally, it is alleged that Respondent violated Section 8(a)(5) in October by making unilateral changes in certain terms and conditions of employment of its employees. Respondent defends that these changes were made after an impasse had developed, and I agree. In an oftencited case, *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (1968), the Board stated:

> An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.
>
> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

An impasse is present when it is clear "that further good-faith bargaining . . . would have been futile." *Alsey Refractories Co.*, 215 NLRB 785, 787 (1974).

There were five negotiating sessions between early March and mid-July; apparently no agreement was reached at the first four meetings. Respondent was insisting that it could not "give" Local 32B the POB and Livingston Street while Local 32B was insisting on obtaining these locations and other terms not present in the SEA or ICA agreement. When Local 732 refused to relinquish jurisdiction over the POB and Livingston Street the tentative agreement of 19 July was destroyed, and, in my opinion, so was any possibility that the parties would subsequently reach an agreement. I make this finding even though Respondent later attempted to schedule further negotiations with Local 32B. The nature of Respondent's letters of 1 and 2 October, together with Atkinson's earlier call to Sturm, creates some question in my mind of the good-faith nature of these communications. Respondent's long-term relationship with Local 32B, together with the fact that, prior to Atkinson's 24 September call to Sturm, Respondent had not contacted Local 32B for in excess of 2 months, creates a strong suspicion that either Atkinson or Israel was aware of Sturm's religious affiliation and chose the dates involved because of the Jewish holidays during those weeks. Regardless, I need not make such a finding, as the fact that the parties have attempted to schedule further negotiating sessions does not preclude the finding of an impasse. There was no evidence of any movement in the parties during the first five meetings and crucial issues remained to be resolved. Additionally, no evidence was adduced to establish that either party's position had changed since then. *Lou Stecher's Super Markets*, 275 NLRB 475 (1985).

Once it has been established that an impasse exists, "an employer can only make unilateral changes in working conditions consistent with its rejected offer to a union." *Caravelle Boat Co.*, 227 NLRB 1355 (1977).

Counsel for Respondent, in its brief, states:

> While the implemented changes were not made in the course of face to face negotiations (since 32B refused to engage in face to face negotiations) 32B nevertheless received advance, specific and clear written and detailed notice of the proposals. Triple A could not have done anymore.

> I disagree. The Board in *Taft*, supra, found no violation as the postimpasse unilateral changes "were reasonably comprehended within the Respondent's proposals which preceded impasse." In the instant situation Respondent first proposed the changes on 1 and 2 October; other than the 24 September call from Atkinson to Sturm, there was no contact between Respondent and Local 32B for the prior 10 weeks. There is certainly no evidence of bad faith on the part of Local 32B in scheduling a meeting and, if Respondent had been patient, a meeting would have been arranged within 2 weeks. I therefore reject Respondent's argument and find that the unilateral changes were not previously part of its negotiations with Local 32B, and therefore violate Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Triple A Maintenance Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 32B and Local 732 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the following terms and conditions of employment of its employees without prior adequate notice to, and negotiations with, Local 32B.

(a) Discontinuing contributions to the Local 32B health fund and substituting employees-only coverage of Blue Cross and Blue Shield, together with a $2500 life insurance policy, for all existing employees and for new employees after 180 days of employment with Respondent.

(b) Eliminating the employee's birthday and two health center visits yearly as paid leave.

(c) Reducing vacation allowance and paid sick leave days for all employees hired after 2 October 1984.

(d) Reducing the hiring rate to $6 an hour for all employees hired after 2 October 1984.

4. Respondent did not further violate the Act as alleged in the consolidated complaint.

THE REMEDY

Having found that Respondent unlawfully made the above unilateral changes in the terms and conditions of employment of certain of its employees, I shall recommend that it cease and desist therefrom, restore the terms and conditions of employment as they existed prior to the unilateral changes in October, and make its employees whole for any losses they suffered due to these changes in their terms and conditions of employment. The reimbursement shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Triple A Maintenance Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its employees without prior consultation and negotiation with the collective-bargaining representative of its employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make its employees whole for any losses they suffered due to the discontinuance of contributions to the Local 32B health fund in the manner set forth above under the remedy section of this decision.

(b) Make its employees whole for the loss of their birthday and two health center visits yearly as paid leave in the manner set forth above under the remedy section of this decision.

(c) Make its employees whole for any losses suffered due to the reduction in vacation and sick leave days due its employees in the manner set forth above under the remedy section of this decision.

(d) Make its employees whole for any losses they suffered due to the reduction in the hiring rate to $6 an hour in the manner set forth above under the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Notify Local 32B, in writing, that it is rescinding these changes and restoring its employees' terms and conditions of employment to what they were prior to 1 October 1984.

(g) Post at each of its offices and facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Mail a copy of the notice, by certified mail, return receipt requested, to every employee employed by the Respondent on or after 30 September 1984 at a location where the employees are represented for purposes of collective bargaining by Local 32B.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the consolidated complaint herein be dismissed insofar as it alleges violations of the Act not specifically found.

---

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Grey Line Scenic Tours, Inc. d/b/a California Nevada Golden Tours *and* Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 533, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Chauffeurs Union Local 265, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 533, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 32–CA–5967 and 32–CB–1637[1]

26 February 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 28 March 1985 Administrative Law Judge Earldean V.S. Robbins issued the attached decision. Respondent Grey Line Scenic Tours, Inc., d/b/a California Nevada Golden Tour filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Grey Line Scenic Tours, Inc. d/b/a California Nevada Golden Tours, Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The judge approved a unilateral settlement agreement in Case 32–CB–1637, and granted the General Counsel's motion for leave to withdraw the complaint.

[2] In the last full paragraph of sec. III,A,2 of the judge's decision the judge stated that the Respondent engaged in separate negotiations with Local 265, which resulted in a separate agreement being entered into on 21 November. We find the date of that agreement was 21 October. We also correct an error appearing at the beginning of sec. III,A,4 of the judge's decision. The judge's sentence begins: "On March 18 Tarson sent a letter to Perry." The date of that letter was 28 March. These inadvertent errors do not affect our decision.

Daniel R. Fritz, Esq., for the General Counsel.
James A. Carter, Esq., of San Francisco, California, for the Respondent Employer.
Kenneth N. Silbert, Esq. (Beeson, Tayer & Silbert), of San Francisco, California, for the Respondent Union.
Patrick D. Dolan, Esq., of Reno, Nevada, for the Charging Party.

283 NLRB No. 12

DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge. This matter was tried before me in Oakland, California, on October 23 and 24, 1984. The charge in Case 32–CA–5967[1] was filed by Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 533, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 533), on October 17, 1983, and served on Grey Line Scenic Tours, Inc. d/b/a California Nevada Golden Tours (Respondent) on October 18, 1983. The amended consolidated complaint, which issued on August 16, 1984, alleges, inter alia,[2] that Respondent violated Section 8(a)(1), (2), and (5) of the National Labor Relations Act (the Act).

The principal issues herein are:

1. Whether Respondent violated Section 8(a)(1), (2), and (5) of the Act by recognizing Local 265 as the collective-bargaining representative of a portion of the appropriate bargaining unit; by negotiating separately with Local 265; and by entering into, and implementing, the terms of a separate collective-bargaining agreement with Local 265, which covered only a portion of the certified appropriate unit and reduced the wages of the covered employees.

2. Whether Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally reducing the wages of employees pursuant to its "final offer" in December 1983; by unilaterally changing wages and working conditions of unit employees in May 1984; and by refusing to provide the joint bargaining representative of unit employees with requested financial information.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Nevada corporation with an office and place of business in Oakland, California, is engaged in the operation of an interstate bus transportation system. During the 12-month period preceding the issuance of the amended consolidated complaint Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $50,000 from the transportation of passengers from the State of California directly to points outside the State of California.

[1] At the commencement of the hearing, I granted the General Counsel's motion to sever Case 32–CB–1637 from Case 32–CA–5967 and approved a unilateral settlement agreement in Case 32–CB–1637, which remedied all the allegations of the complaint relating to that matter. In his posthearing brief, the General Counsel requested that I treat this request as a motion for leave to withdraw the complaint in Case 32–CB–1637 required by the settlement agreement on compliance therewith. That motion is granted.

[2] Because I approved the unilateral settlement agreement that disposed of all the allegations of the consolidated complaint relating to Case 32–CB–1637, the hearing and decision herein relates only to Case 32–CA–5967 and the 8(a)(1), (2), and (5) allegations of the consolidated complaint pertaining thereto.

The amended consolidated complaint alleges, Respondent admits, and I find that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that Local 533 and Local 265 are now, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Introduction

Respondent transports individuals between the San Francisco Bay Area and resort casinos in Reno and South Lake Tahoe, Nevada. In January 1974 Local 533 and Local 265 were certified as the joint collective-bargaining representative of Respondent's drivers in the San Francisco Bay Area, Reno, and South Lake Tahoe. Thereafter in 1974 and 1977 Respondent and the joint representative entered into successive collective-bargaining agreements. In 1979, during the term of the second agreement, Peerless Stages, Inc. purchased Respondent.[3] Thereafter in April 1981 Respondent and the joint representative entered into a collective-bargaining agreement effective by its terms from November 1, 1980, through October 31, 1983. According to Lloyd Perry, who has been Respondent's president since it was acquired by Peerless, this was his first negotiation with the joint representative and at no time was it ever mentioned, nor was he ever aware, prior to the incidents involved herein, that Local 533 and Local 265 were the certified joint representative of Respondent's drivers.

Even though Local 533 and Local 265 are joint representatives, the Nevada drivers are members of Local 533 and the collective-bargaining agreement as to them is administered by Local 533, and the San Francisco Bay Area drivers are members of Local 265 and the collective-bargaining agreement is administered as to them by Local 265. Respondent's passengers originate in the Bay Area from where they are transported to Nevada and back to the Bay Area. However, for purposes of driver assignment, some of the runs originate in Reno. The runs that originate in Reno are manned by Local 533 drivers and the runs that originate in the Bay Area are manned by Local 265 drivers. These runs are posted for bids and are awarded to the most senior bidder.

The 1980–1983 collective-bargaining agreement provides that Respondent shall maintain at least 10 bid run assignments[4] and that Respondent shall attempt to provide nearly equal numbers of bid run assignments for the San Francisco Bay Area and the Reno-Lake Tahoe area. In November 1982 Respondent reassigned some runs that had previously originated in Reno so that they originated in San Francisco.[5]

Local 533 and the Reno drivers expressed displeasure with this arrangement and on June 13, 1983,[6] Perry met with Local 533 Shop Steward Al Bice, Local 533 Secretary-Treasurer Ed Greeley, and Local 265 Secretary-Treasurer Bill McElroy to discuss Local 533's objection to the existing arrangement. Despite McElroy's stated objections to the proposed change, an agreement was reached whereby Reno would receive additional bid runs effective July 7. However, the Reno drivers would be required to pay any cost of lodging in excess of the $10.70 Respondent paid for the lodging of San Francisco drivers in Reno.

Thereafter Bice posted a memo to all drivers setting forth this agreement. By letter dated July 1 and addressed to Clay Pierce, business agent for Local 533, Perry acknowledged the Bice memo and set forth some aspects of the agreement that allegedly were not included in this memo—specifically, that the Reno runs were only guaranteed during the summer season, that the guarantee was only for four runs instead of the five referred to in the Bice memo, and that the formula for lodging expenses applied in both San Francisco and San Jose.

2. The separate negotiations with Local 265 and the implementation of the resulting agreement

On July 25 Local 533, through Greeley, notified Respondent of its intent to modify the agreement. The body of the letter reads:

> Please accept this letter as notification of our wish to open our Agreement with your company in accordance with the provisions of the Labor Relations Act of 1947.
>
> We hope to continue our friendly relationship with your Company.

The record does not indicate the response, if any, to this letter.

On September 21 McElroy sent the following mailgram to Respondent:

> IN REGARDS TO NEGOTIATIONS ON OUR CURRENT WORKING AGREEMENT LOCAL 265 HAS TAKEN THE POSITION TO NEGOTIATE THE CONTRACT AS A SINGLE BARGAINING UNIT PLEASE REPLY ASAP.
>
> R. W. MCELROY, VICE PRESIDENT

[3] Peerless owns a group of companies consisting of three operating bus companies, including Respondent, a sales company, California Nevada Golden Tours, Inc. d/b/a Betty's Tours, which is the sales arm for the bus companies, and an overhead company, Sunwest Travel Industries, which is the overhead arm for all of the companies owned by Peerless.

[4] This requirement is subject to the proviso that Respondent's operations are sufficient to cover that number of runs.

[5] According to Perry, the reason for this was the weather conditions. Specifically, at times during the winter, weather conditions are such that drivers on a Reno run could not be returned to Reno on a paying run. Instead the driver would have to fly from the Bay Area back to Reno or deadhead back to Reno in a bus, causing an additional operational expense.

[6] Unless otherwise indicated, all dates in June through December are in 1983 and all dates in January through May are in 1984.

Respondent responded by mailgram as follows on September 23:

> PEERLESS STAGES—GOLDEN TOURS AGREES TO BARGAIN WITH YOU AS SINGLE UNIT.
>
> YOURS TRULY
>
> A.J.G.

On October 3 Local 533 sent a mailgram to Respondent, the body of which reads:

> PLEASE BE ADVISED THAT LOCAL 533 REMAINS READY AND WILLING TO MEET WITH YOUR COMPANY TO NEGOTIATE TERMS AND CONDITIONS OF SUCCESSOR LABOR AGREEMENT TO BE EFFECTIVE NOVEMBER 1 1983. ALSO PLEASE BE ADVISED THAT LOCAL 533 EXPECTS AND DEMANDS ALL NEGOTIATIONS MEETINGS INVOLVING SUCCESSOR LABOR AGREEMENT INCLUDE, AND TAKE PLACE IN THE PRESENCE, BOTH LOCAL 533 AND 265, THE JOINTLY RECOGNIZED BARGAINING REPRESENTATIV [SIC]. ANY SEPARATE MEETING WITH LOCAL 265 CONCERNING A SUCCESSOR LABOR AGREEMENT WILL BE DEEMED TO BE UNLAWFUL UNILATERAL NEGOTIATION FOR WHICH WE WILL TAKE APPROPRIATE ACTION. GIVEN THE OCTOBER 31 ANNIVERSARY DATE OF THE EXISTING AGREEMENT LOCAL 533 HAS GIVEN THIS PRIORITY AND IS AVAILABLE TO MEET AT THE CONVENIENCE OF THE OTHER PARTIES.

On October 6 Respondent sent a letter to Local 533, the body of which reads:

> Lloyd Perry will be available to meet with you to discuss the working agreement. The arrangements for a meeting can be made by calling Lloyd Perry at (415) 444–2900.

By letter dated October 17, Local 533 responded as follows:

> In response to your letter of October 6th, we will be happy to meet with you or Mr. Perry at a mutually agreeable time, but must advise that representatives of Chauffeurs Local 265 must be included in all negotiating meetings since Local 533 and Local 265 jointly represent the bargaining unit.
>
> Please refer to our telegram sent on October 10th. Advise the best meeting dates for you or Mr. Perry.

On October 20 Respondent sent a letter to Local 533, the body of which reads:

> In response to your letter of October 17, 1983 to Mr. Gaeta, I am available to meet with you in Oakland at your convenience. If you wish to include representatives of Chaufeurs [sic] Local 265 in the meeting, I have no objection.

Despite being placed on notice by Local 533 that Local 265 and Local 533 were joint representatives and that Local 533 was only amenable to joint negotiations, Respondent engaged in separate negotiations with Local 265 that resulted in a separate agreement entered into by Respondent and Local 265 on November 21, which reduced the basic wage rate from $8.65 an hour to $8.00 an hour. Thereafter Respondent implemented this agreement by reducing the wages of the San Francisco drivers by 65 cents an hour effective November 1.

3. The November negotiations and the implementation of Respondent's November 9 proposal

On November 7, Local 533 sent a mailgram to Local 265, the body of which reads:

> AS YOU ARE WELL AWARE WE HAVE SET UP A MEETING WITH CALIFORNIA NEVADA GOLDEN TOURS TO BEGIN NEGOTIATIONS ON A NEW CONTRACT FOR NOVEMBER 8 1983 . . . . WE EMPHASIZE THAT THIS IS A JOINT AGREEMENT BETWEEN LOCAL 265, 533 AND THE COMPANY AND WHATEVER COMES FROM THESE NEGOTIATIONS WILL BIND ALL THREE PARTIES JOINTLY . . . . AS PER CONVERSATION WITH AL TARSON THIS DATE IT IS IMERATIVE [SIC] THAT A REPRESENTATIVE FROM YOUR LOCAL BE THERE.

On October 17, Local 533 filed an unfair labor practice charge against Respondent in Case 32–CA–5967 alleging that Respondent's separate negotiations with Local 265 violated Section 8(a)(1), (2), and (5) of the Act.

On November 8 Local 533 met with Respondent as scheduled. Present for Local 533 were Business Representative Al Tarson, Greeley, and Bice. Present for Respondent was Perry. The shop steward for Local 265, Tom Mueller, was also present but, according to Tarson, was there only as an observer and did not participate in the negotiations. Tarson testified that, at the outset of the meeting, Greeley stated that because there was no spokesman for Local 265 present they could not enter into joint bargaining negotiations. Perry said they could go over the contract and submitted some proposals that included provisions that the expired agreement be modified to eliminate all references to Local 265, to limit the agreement to the Nevada operation only, and, inter alia, to reduce wages for full-time employees to $7.20 an hour and for casual employees to $6.90 an hour for the first year of a 3-year agreement with 30-cent increases in each of the remaining 2 years of the agreement.

Following a caucus to review these proposals, Local 533 rejected all of Respondent's proposals and submitted its proposal for, inter alia, an increase in wages of 50 cents per hour in all classifications each contract year and, further, that all drivers be paid the same whether casual or full time. Following a second caucus Perry rejected Local 533's proposal, and submitted a counterproposal for, inter alia, a wage rate of $8 an hour for full-time employees and $7.617 an hour for casual employees for the first year of the contract with no increase in wages for casual employees throughout the life of the contract, a 33-cent increase the second year of the contract, and a 32-cent increase for the third year of the contract. This counterproposal, which Perry character-

ized as Respondent's final proposal, was rejected by the Union at which point Greeley stated that because Local 265 was not in fact represented by the business agent they could not actually consider this as negotiations and since Local 265 was not party to the negotiations because they had signed the contract with Respondent there was no alternative except to wait for a decision from the Board as to the legality of the separate negotiations between Local 265 and Respondent. The meeting adjourned with no date set for further meetings.

Perry does not dispute that Tarson's testimony as to this or subsequent negotiation sessions is accurate as far as it goes. He does testify as to additional details of his comments regarding Respondent's financial situation. According to him, when he met with the Union on November 8, Respondent was in pretty desperate financial straits and he told the Union he had to have concessions immediately. Perry further testified that Respondent's attorney advised Respondent that in order to avoid the financial burden of going into Chapter 11, Bankruptcy, Respondent should hire a financial consultant to assist it out of its financial difficulties. On this advice Curtis was hired and thereafter Curtis negotiated settlements with Respondent's major creditors in a manner that permitted Respondent to continue operations. Respondent's cash flow problems became critical about the end of January 1983 when it came to management's attention that Respondent's controller had failed to file the withholding statements and to remit to the Internal Revenue Service taxes withheld from the pay of about 200 employees. Curtis negotiated a settlement with the IRS for extended payment of the tax liability over a 3-year period with a balloon payment at the end of the period. He also set up a cash flow budget, which he monitored on a daily basis. The three owners agreed to forgo their salaries for December 1982 and took a 10-percent pay cut for 1983. Four or five presidents were terminated and some middle management personnel. One of Respondent's two accounting offices was closed, and the position of controller was eliminated. Curtis advised that wages would have to be reduced to less than $8 per hour. According to Perry, he related these details to the Union.

On November 9 Local 533 sent a letter to Respondent, the body of which reads:

> In reference to the contract negotiations between Local 533 and your company held at Sacramento, California on November 9, 1983, this letter is your notification that Local 533 does not accept your company's final offer regarding our proposals and counter-proposals, as bein [sic] inadequate in many phases.
>
> Furthermore, although Local 265 was represented by a Shop Steward (Tom Mueller), only as an observer, Local 533 must reiterate it's [sic] stand as stated at the meeting that all parties involved must await a decision from the National Labor Relations Board regarding charges filed by Local 533.
>
> With best regards . . . .

By letter dated November 18, Respondent responded as follows:

> Your letter, of November 9, 1983, reconfirms your rejection of our final offer in contract negotiations between your local and our Company. It appears that we have reached an impasse.
>
> I suggest that you reconsider your position. If you do not notify me of a change in your position by November 30, 1983, we will implement our final offer on December 1, 1983.

On November 21 Local 533 sent Respondent a letter, the body of which reads:

> Your letter dated November 18, 1983 was received this date and I agree with you, we are now at an impasse regarding your final offer in contract negotiations submitted November 8, 1983.
>
> As stated previously, Local 533 stands by it's [sic] committment [sic] that Local 265 and Local 533, jointly, must negotiate any and all contract agreements with your company as has been done for many years past, and, furthermore, Local 533 has filed charges with the National Labor Relations Board and will await the outcome of those decisions before proceeding with further negotiations.
>
> With best wishes . . . .

On November 29 Respondent issued the following memo:

> To: All Nevada Drivers
>
> From: Lloyd G. Perry
>
> There is an impasse in contract negotiations between Local 533 and the Company. Your bargaining agent rejected the Company's final offer on November 18, 1983 and confirmed our impasse on November 21, 1983.
>
> As stated in our letter of November 18, 1983, we will implement our final offer on December 1, 1983.
>
> The final offer changed the pay rates as follows:

	11-1-83 to 7-31-84	8-1-84 to 7-31-85	8-1-85 to 7-31-86
45—9 Hourly rates of pay:			
Full Time	$8.00	$8.33	$8.65
Casual	7.617	7.617	7.617
45-1 Mileage rates of pay:			
Full Time	$0.2807	$0.2922	$0.3037

	11-1-83 to 7-31-84	8-1-84 to 7-31-85	8-1-85 to 7-31-86
Casual	0.2673	0.2673	0.2673

Copies were sent to both Local 533 and Local 265.

On December 1, the wages of the Nevada drivers were reduced to $8 per hour.

4. The 1984 negotiations between Respondent and the joint representatives

A negotiation session was scheduled for January 18. However it was cancelled when McElroy walked out prior to the commencement of the meeting. On January 19 Respondent sent its proposals to Local 533 and Local 265, along with a letter, the body of which reads:

> Our scheduled joint contract negotiations for January 18, and 19 have failed because Local #265 was not present for the scheduled meeting in Sacramento. According to Local #533, they had met with Local #265 earlier in the day (18th) and that Local #265 had departed as they would not participate with Local #533 in joint contract negotiations.
>
> I stand ready, as I have in the past, to participate in joint contract negotiations. If you will not negotiate jointly, I will ask the NLRB to withdraw all complaints filed against us.
>
> Since I was not able to present our negotiating proposal to you jointly, I am submitting it as an attachment to this letter. I am ready to meet with you and jointly negotiate a new contract. However, because we have not had joint negotiations, I must insist that we meet on January 26, 27, 30 and 31 in our office at 228 Broadway, Oakland, Ca. 94607. When you have agreed on a meeting time, please notify me.
>
> If the two locals are unwilling to jointly negotiate, the Company can no longer permit your position to delay our ability to operate on a reasonable basis. Unless you meet and negotiate as requested, we will have no alternative but to assume that we have reached an impasse and we will implement the enclosed proposal on February 1, 1984.

On January 27 Local 533 sent Respondent a letter that states inter alia:

> . . . Your availability for negotiation on February 7th in Oakland is convenient to Local 533, as arranged by Local 265, yesterday. . . .
>
> . . . .
>
> We ask that you re-establish and maintan [sic] the status quo of employment conditions, i.e., return to the terms and conditions of the labor agreement existing as of October 31, 1983, and reimburse the employees for improperly reduced wages and benefits. By doing so, negotiations would then be taking place under the conditions that existed at the time of your unlawful and singular bargaining with Local 265, and unilateral change of conditions.
>
> Simply offering to meet for negotiations does not avoid or remedy the charges against your company.
>
> Moreover, inasmuch as both Local 265 and 533 are necessary for negotiations, and 533 cannot speak for 265, we cannot report on that Local's availability, and leave it to that Local to respond to your letter.
>
> Your ultimatum of declaring impasse based upon a submission of proposals, coupled with notice and demand for bargaining in the present circumstances hardly forms a lawful basis for implementation of employer's terms and conditions of employment. Should you do so, additional charges will be filed.
>
> If you are truly interested in resolution of this matter, we suggest you ask the Labor Board to structure and oversee settlement efforts. Please inform us of your intentions concerning re-establishing the October 31, 1983 conditions, re-imbursement to employees of unpaid wages, and payment of delinquent health insurance benefits.

Another negotiating session was held on February 7. Greeley, Bice, and Tarson were present for Local 533, McElroy and Shop Steward John Stringer for Local 265, and Perry and Jim Noe for Respondent. Greeley was the principal spokesman for the Unions. According to Tarson, at the outset of the meeting Greeley said he wanted an understanding from Respondent that the expired contract was still in effect and they were bargaining under that contract. Perry said Respondent would not agree to that. After seeking legal advice during a caucus, Greeley stated that, on advice of counsel, the Unions were maintaining their position. Again Perry said Respondent would not bargain under those conditions. Following another caucus Greeley stated the Unions would bargain under those conditions, but the Unions' attorney was filing for an injunction and it would be advisable for Perry to contact Respondent's attorney to try and settle this matter.

After another caucus Perry agreed that they would commence bargaining under the contract that expired on October 31. Greeley said they would have to delay negotiations on monetary items until they had some sort of official report as to Respondent's financial position. Respondent's representatives stated that they were in the process of having an audit done that they would provide to the joint representative in March. Greeley said the Unions wanted to see some sort of records to prove that the Company needed the financial relief it was requesting. Tarson said that Respondent had provided an audit report for 1980–1981 and for 1981–1982 by another audit company and that after reviewing the reports carefully, they had found a discrepancy in 1981 of about $1 million between the two reports and therefore they needed more information as to the Company's financial status. Perry

said Respondent would provide an audit report. At this point Ronald Curtis, financial consultant, began giving them information as to Respondent's financial status and stated that Respondent owed the IRS $400–500 plus 17-percent interest. Tarson again stated that before the Unions could get into negotiations concerning wages they needed further reports to substantiate Respondent's position. Curtis said the Unions would get the audit report as soon as Respondent received it.

After lunch Curtis stated that Respondent needed the 7.6-percent cut in wages and an overall 10.45-percent cut in benefits and wages until at least May 1985 because, according to the Company's projection, they thought they would be operating in the black around the end of April 1985. Curtis said Respondent had begun to cut the fat out of its operation, they had cut services, some employees had been affected, and four vice presidents had been let go. There was some discussion of Respondent's liability for back wages and benefits.

Negotiations resumed on February 8. Present were Tarson and Bice for Local 533, McElroy and Stringer for Local 265, and Perry and Noe for Respondent. Tarson was the spokesman for the Unions. Tarson said the Unions would negotiate contract language but would withhold any discussion of monetary items until they received the audit report. The discussion in this session was based on Respondent's proposal that had been attached to Respondent's January 19 letter to the Unions. After discussing several items on this proposal, Tarson requested that Curtis be called in so the Unions could submit a proposal referring to Respondent's request for a 10-percent relief. After Curtis arrived Tarson said the Unions would be willing to grant approximately 10-percent relief by giving back three paid holidays—Memorial Day, Fourth of July, and Labor Day—3 sick days, 3 vacation days, and pay for the 15-minute check time before and after a run. Tarson explained that based on a wage rate of $8.65 an hour and annual earnings of approximately $25,000 this relief would amount to approximately $2500 for a driver, but would not specifically hurt an employee's ability to pay his bills whereas giving back 65 cents an hour would directly reduce an employee's paycheck. Perry requested a lunch break so he and Curtis could review the proposal to determine whether it would in fact amount to the 10-percent relief they were requesting.

According to Larson, when the meeting resumed after lunch Perry said he thought it would be unfair to take 3 sick days away from an employee because it was for the employee's protection in the event of illness. Curtis said Respondent needed the 65 cents an hour give-back. Tarson said it was the Unions' position that they could not accept a 65-cent give-back. After a caucus they discussed Respondent's proposal to delete the 4, 6, and 8 hours minimum pay provision, and the union committee requested documentation as to cost incurred by Respondent under that provision. Tarson proposed that if Respondent could not afford to pay back wages at the time but would agree to assume liability for such, the Unions would be agreeable to applying the back wages to future health and welfare payments. At the conclusion of the meeting they agreed to meet again on February 23.

A meeting was held as scheduled on February 23. Present were Perry and Noe for Respondent, McElroy and Stringer for Local 265, and Greeley, Tarson, and Bice for Local 533. At the outset of the meeting Greeley said the Unions wished to continue negotiations on the monetary items and they proceeded to do so. The Unions submitted a proposal that included, inter alia, an additional three holidays, deletion of the cap on health and welfare contributions and on sick leave accumulation, and a $1-per-hour wage increase in all classifications for each contract year. Some of the items in the Unions' proposal were discussed but no agreement was reached. Greeley asked when the Unions would receive Respondent's audit report. Perry said March 1 but no later than March 15. Another meeting was scheduled for March 13.

Present at the March 13 meeting were Tarson, McElroy, Stringer, Perry, and Noe. Both the Unions' and the Company's proposals were discussed. Some agreement was reached as to language in certain of the proposals. Perry offered to consider having a union representative on the company board of directors. Tarson said that would be agreeable to the Unions but he had no knowledge at this time as to who that person could be. Perry said, due to some errors in the preparation of the audit report, it would not be ready until April 1, or April 15 at the latest. The Unions' representatives *again* said they could not engage in negotiations on financial proposals until they received the audit report.

The next meeting was on March 15. Present were Tarson, Bice, McElroy, Perry, and Noe. Perry presented a summary of the tentative agreements reached in negotiations. They reviewed each section of the summary and the union representatives either indicated that they agreed that it was a correct summary of the agreement reached or corrected the summary or indicated that additional negotiations would have to be undertaken because of uncertainty as to whether the items involved were a monetary loss to employees. The Unions presented written clarification of certain of their proposals.

Another meeting was held on March 15 at which time Respondent and the Unions continued to discuss the nonmonetary items of their proposals on which tentative agreement had not been reached. Respondent submitted a summary of the tentative agreements that had been reached through that date together with Respondent's proposals for continued negotiations. These proposals dealt with monetary items and contained the following justification for its proposal for reduction in the economic package:

> Following are the Company's proposals for continued negotiation. These include money items which are predicated on certain facts. First, is the Company's need for lower payroll costs so that the Company can continue to exist. Money savings are required to liquidate, the Internal Revenue Service's liability, the loan payment requirements for buses, and the trade account deficits. Cost savings are required so that the Company can compete with Greyhound, who is now able to substantially undercut our Tariff. We also have to compete with a greatly increased number of competitors who are

> non-union. Second, there have been requests by the Union to increase our costs for some items. Each increase will have to be matched with a corresponding decrease in another area.

On March 16 Tarson cancelled the negotiation session scheduled for March 19 citing staffing problems in his office and scheduling conflicts. Tarson offered to meet on alternative dates but suggested that since most of the noneconomic items had been settled, Local 533 would just as soon wait for the audit report so that economic items could be discussed at the next meeting. Perry agreed to do so and although no definite date was set for the next meeting, according to Tarson, it was understood that it would be sometime after April 15.

By letter dated March 20, addressed to Perry, Tarson expressed his regrets at the cancellation of the March 19 meeting and further stated:

> As I mentioned to you during our phone conversation, it is regrettable we could not meet to finalize negotiations for a new contract this week.
>
> With all due respect, the next available dates will depend largely on the availability of the new audit report, as those concerned can examine them in order to come up with some idea of what your company's financial dilemma might be.
>
> Hoping that the cooperation between all parties will continue to produce an amicable solution in a new agreement, I remain . . .

Respondent responded by letter dated March 21, addressed to Local 533 and Local 265, which requested that the Unions seek membership approval of Respondent's "final" proposal, which was attached thereto, and stated Respondent's intent to implement this proposal on April 1. The body of the letter reads:

> The Company's proposal for a new working agreement includes money items which are predicated on certain facts. First, is the Company's need for lower payroll costs so that the Company can continue to exist. Money savings are required to liquidate the Internal Revenue Service's liability, the loan payment requirements for buses, and the trade account deficits. Cost savings are required so that the Company can compete with Greyhound, who is now able to substantially undercut our Tariff. We also have to compete with a greatly increased number of competitors who are non-union. Second, there have been requests by the Union to increase our costs for some items. We have increased the health and welfare contribution. Any other increase will have to be matched with a corresponding decrease in another area.
>
> Local 533's cancellation of negotiations that was scheduled for March 19, 1984, is of concern to me. We have to do something for our employees to ease their uncertainties. It appears that the officers of that Local are delaying the negotiations. That conduct along with positions taken previously and with previous cancellations lead us to believe that additional negotiations will be unproductive. Therefore, we submit herewith our "final" proposal and request that you seek membership approval of it. If approval is not received by March 31, 1984, we will consider that we are at an impasse and will implement our "final/final" proposal on April 1, 1984.
>
> If the Unions wish to meet for the purpose of additional negotiations in sufficient time to permit a membership vote not later than March 31, 1984, please let me know.

Upon receipt of this letter Tarson telephoned Perry and expressed his position that Perry's request was improper and further that Perry did not allow the Unions sufficient time to submit a referendum to their members. Perry said that regardless of the outcome or whether he actually implemented Respondent's final offer they could still resume negotiations.

On March 18 Tarson sent a letter to Perry, the body of which reads:

> I have reviewed your March 21st letter concerning our negotiations. It is becoming obvious that you are more interested in declaring "impasse" than engaging in collective bargaining.
>
> In response to your company's claimed lack of financial "ability to pay," we have repeatedly requested that you provide financial records for our auditors to review. To date, no such records have been provided.
>
> You have again submitted a proposal and without providing for negotiations concerning it, have demanded acceptance and approval. As even evidenced in your second letter, in your haste, you have now indicated section 19-5, "may be misinterpreted." Is this bargaining in good faith?
>
> As we have previously advised, this "take it or else" and unilateral declaration of impasse in these circumstances will not provide lawful basis to avoid bargaining or implement your proposals.
>
> The reason for Local 533's request to cancel the March 19th meeting as explained were due in part to our office staff being short handed due to sickness, and out of town commitments to our International's requests, as well as myself being sworn in as a Delegate, our one o'clock meeting had to be cancelled under these circumstances. As to our previous mutual agreements to cancel scheduled meetings, I'm sure there were no improprieties by any of the concerned parties when requesting meeting places, times, dates, etc.
>
> Furthermore, you have stated financial records would not be available until March 31st, and now later to April 15th. Your obligation to furnish financial information requested and to bargain collectively remains unsatisfied, particularly in light of our actions to secure these rights made necessary by your company's earlier conduct.
>
> Please advise when financial information requested will be available since that information is necessary for us to evaluate your company's claimed lack of ability to pay.

Respondent did, in fact, implement the terms of its "final/final" offer on April 1. On April 10 Tarson sent a letter to Perry, the body of which reads:

> Referring to your recent letters and memo declaring "impasse" and then implementing your final/final offer, please be advised that both Locals are going forward with a mail referendum vote to accept or reject your final offer.
>
> Assuming they reject it, we are still uncertain when the company intends to: (a) repay back wages; (b) make the audit report available, and; (c) company proof of liabilities concerning wages, work rules and benefits that may require monetary relief, until May, 1985.
>
> These items were first negotiated on February 7, 1984 but as yet have not been forthcoming. Therefore, it is respectfully requested that within seven (7) days of receipt of this letter, the above items be answered before negotiations can resume.

On May 3, by mail ballot, the unit employees rejected Respondent's final offer by a vote of 33 to 4. Local 533 notified Respondent, by mailgram, of the results of the vote. On May 7 Tarson sent a letter to Perry, the body of which reads:

> You are now aware your drivers rejected your "final offer" by a wide margin by secret ballot. As the Union has been consistent in bargaining in good faith, you have shown to be contrary to negotiate for reasons yet revealed.
>
> The Union still requests:
>
> 1. The company promised financial and/or audit report so that the Union can make an intelligent judgment regarding wages, work rules, benefits, etc., of the company's claim for relief until May, 1985.
> 2. Re-establishment of bid runs to the Reno/Tahoe domicile to San Jose, California that the Nevada drivers enjoyed since 1974 until you arbitrarily removed all of them last November under the guise of higher costs of hotel rooms in San Jose and unpredictable winter road conditions.
> 3. Re-establish back wages and working conditions as ascribed [sic] in the agreement still in effect.
>
> There are of course other items still to be negotiated, i.e., your declaration of impasse and implementation of different wages, work rules, etc.
>
> Therefore, as stated in our mailgram sent you May 4th, Locals 265 and 533 stand ready to resume negotiations at your earliest convenience when all parties amicably meet.
>
> With best regards, I remain . . . .

Perry responded by letter dated May 9 addressed to Local 533 and Local 265, the body of which reads:

> Your wire of rejection raises the question, "Can we resolve the impasse?"
>
> The letter from Local #533, dated April 10, 1984, indicated your uncertainty on three points:
>
> First, as to our intention to provide back pay. Our final offer to the drivers provided for back pay.
>
> Second, as to the availability of our annual audited reports. We have made the audited reports for 1980 through 1982 available and if you desire we will provide you with copies. The audited report for 1983 is still not available even though the certified public accountant, Arthur Young & Company, had indicated a completion date of March 15, 1984. We will make the 1983 audited report available as soon as we receive it from Arthur Young & Company.
>
> Third, as to our need for monetary relief. Our books are open to you for examination on this item. We have previously documented that money is needed to liquidate our liabilities with the Internal Revenue Service, our loan payments on the buses, and our trade account deficits. Those requirements still exist and there are two new large items (over $100,000 each). One is a court-awarded judgment to James Wood. The other is retrospective insurance premiums for 1979 to 1983 that will have to be paid to Transit Casualty.
>
> Our financial position has deteriorated below this year's forecast for at least three major reasons:
>
> One is that Greyhound and many new small bus companies are quoting charter rates that are lower than our operating costs and this has taken business away from us or has resulted in our moving at marginal rates in order to generate cash flow.
>
> Two is that we have less buses to generate revenue. In the last two years we have had to sell 13 buses in order to generate money to allow us to continue operations. Additional bus sales have been considered, but a depressed used bus market would not provide any operating money as virtually all of the proceeds would have to be applied to our debt to the Internal Revenue Service and to our debt on the equipment loan.
>
> Three is that we have been unable to modernize our MCI fleet, whose age averages ten years. Also, our fleet will drop four more buses in October when our lease expires on the four Eagles. We cannot renew that lease or buy any new equipment until we meet our obligations with Internal Revenue Service and with Barclay American Credit. Our inability to modernize the fleet could result in our loss of the Richard Lee account.
>
> We have drastically reduced our expenses in all areas and we have asked the drivers to help us. The only reason that we have continued to try to save the Company is our personal pride for 68 years of history in the bus business. We ask you to help us

continue our historical record and to maintain union jobs.

In view of these facts, what do you propose that will resolve the impasse and permit the Company to survive? If you desire a face-to-face meeting to discuss this, we are available, at this time, on May 14, 17, 22, 23, 24 and 25.

Thereafter there was an exchange of letters between Perry and Tarson in which each ascribed to the other blame for the status of negotiations and Tarson requested that negotiations resume in Reno on June 4 and Perry agreed to the June 4 resumption, but in Oakland. On May 29 Tarson sent a letter to Perry, the body of which reads:

Your letter of May 18th refer[ing] to a resumption "to continue discussions" beginning June 4th at your Oakland office is another clear indication of your failure to negotiate in good faith.

In my correspondence to you I have tried to answer your questions and/or statements as specifically as possible, but you ignore a simple request as to having negotiations take place at your Reno office, especially since Local 533 has gone to much expense to accomodate the company and Local 265 in meetings held in Oakland (and Sacramento, a half-way point).

In addition, there is no indication of when or where or if your financial records will be available for the Union's perusal in order that monetary items can be intelligently negotiated.

Furthermore, your declarations of impasse and implementation of yet another contract is another clear indication of your cavalier attitude toward good-faith bargaining.

Therefore, if you are really serious in resuming contract negotiations, the following criteria must be met, either wholly or in part, or we will simply await the outcome of an NLRB decision regarding all the charges filed by Local 533 or other resources at the Union's discretion:

1. Restore the contractual agreement in effect October 31, 1983 (as per company-Union agreement during negotiations February 7, 1984).

2. Restore and correct the hourly wage of $8.657, now.

3. Repay all back wages.

4. Financial and audit report.

5. Restore bid runs to operate from Reno to San Jose (see Section 9-22 of the agreement).

On June 12 Respondent sent the Unions a copy of a letter from the firm preparing its audit, which explained the delay in the completion of the audit for 1983 and stated that it was anticipated that the audit would be available no later than June 30.

D. *Conclusions*

1. The separate negotiations with Local 265 and Local 533 and the resulting reduction in wages

It is well established that the existence of a collective-bargaining agreement raises an irrebutable presumption of a collective-bargaining representative's majority status during the life of the contract. *Shamrock Dairy, Inc.*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (D.C. Cir. 1960), cert. denied 364 U.S. 892 (1960); *Pioneer Inn and Pioneer Inn Casino*, 228 NLRB 1263 (1977), enfd. 578 F.2d 835 (9th Cir. 1978); *Carmichael Construction Co.*, 258 NLRB 226 (1981), enfd. 728 F.2d 1137 (8th Cir. 1984). Here Local 533 and Local 265 were the certified joint representative of Respondent's drivers in a unit that covered drivers located in the San Francisco Bay Area and the Reno-Lake Tahoe area and were parties to a collective-bargaining agreement with Respondent covering these employees, effective by its terms until October 31. Respondent argues, however, that parties to a joint certification may voluntarily adopt a different mode of negotiations and that Local 533 had temporarily waived the right to bargain on a joint basis by its conduct, which had induced Respondent reasonably to believe that both Local 533 and Local 265 desired separate negotiations.

I reject this argument. Any waiver of a representative's right to bargain must be "clear and unmistakable." *General Electric Co. v. NLRB*, 414 F.2d 918, 923 (4th Cir. 1969). Here the evidence does not establish such a clear and unmistakable waiver. A Local 265 representative was present at the negotiations regarding the reassignment of the bid runs and, in Local 533's letter announcing a desire to open the collective-bargaining agreement, there is nothing to indicate an abandonment of joint representative status or a desire to exclude Local 265. Further, Local 533 later made its position quite clear, in its October 3 mailgram, that it was the joint representative of Respondent's employees along with Local 265 and that any separate meetings between Local 265 and Respondent would be considered unlawful. In these circumstances I find that Respondent violated Section 8(a)(5), (2), and (1) of the Act by recognizing Local 265 as the collective-bargaining representative of a portion of the appropriate bargaining unit, negotiating separately with Local 265, and entering into, and implementing, the terms of the resulting separate collective-bargaining agreement with Local 265.

As to its November negotiations with Local 533 and the December 1 implementation of its final offer submitted during these negotiations, Respondent argues that it was genuinely seeking to reach an agreement, and that it was Local 533's conduct in refusing to consider requested economic concessions and its determination to await the outcome of NLRB proceedings that thwarted attempts to reach agreement. Therefore, Respondent contends, a genuine impasse was reached that should not be affected by Respondent's conduct in engaging in the prior separate negotiations with Local 265. Contrary to Respondent's contentions, I find that no lawful impasse was reached. Respondent's proposal and its "final offer"

specifically provides that it applies only to a portion of the appropriate bargaining unit—the drivers located in Nevada—and that all references to Local 265 be deleted from the contract. Despite Local 533's immediate and unwavering rejection of this proposed modification of the certified unit and the representative status of the certified representative, Respondent remained adamantly insistent on such modification throughout the negotiations and during the exchange of correspondence immediately thereafter, and it was this position that led to a stalemate in bargaining. Since modification of a Board-certified unit is not a mandatory subject of bargaining, by bargaining to impasse thereon Respondent violated Section 8(a)(5) and (1) of the Act. *National Fresh Fruit & Vegetable Co.*, 227 NLRB 2014 (1977).

Respondent argues that its conduct in the October negotiations with Local 265 and the November negotiations with Local 533 was, at most, technical or de minimis violations, which were cured by its subsequent negotiations with the joint representative. Further, Respondent argues its conduct was not unlawful because each of the Locals had the power to bind the joint representative. Therefore, Respondent contends a valid impasse was reached and its subsequent implementation of its final offer was lawful. This argument is not convincing because Respondent negotiated with Local 265 and sought to negotiate with Local 533 not as agents of the joint representative but in derogation of the joint representative status. The disruptive nature of such conduct precludes a conclusion of a technical or de minimis violation. Rather, in the circumstances herein Respondent's conduct is indicative of bad-faith bargaining. Case law is clear that a valid bargaining impasse cannot exist in the context of bad-faith bargaining. *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343 (9th Cir. 1978); *Taft Broadcasting Co.*, 163 NLRB 475 (1967); *United Contractors Inc.*, 244 NLRB 72 (1979). In view of the above, I conclude that no valid impasse was reached. Accordingly, in the absence of a valid impasse, I find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its "final" offer on December 1. *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1969).

2. The joint representative's February request for information concerning Respondent's financial status and the April 1 implementation of Respondent's "final/final" offer

It is well established that if an employer asserts financial inability to meet a union's economic demands, upon request of the union the employer is obligated to furnish the union information to document whether it can or cannot afford to meet the union's demands. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Teleprompter Corp.*, 227 NLRB 705 (1977), enfd. 570 F.2d 4, 8 (1st Cir. 1977). Here it is undisputed that Respondent claimed inability to pay the contractual wage rate and relied thereon as justification for its proposals for reduced wages and other benefits. It is also undisputed that the Unions requested documentation of this claimed inability to pay, and that such information was not furnished for several months.

Respondent argues that it did not unlawfully refuse to furnish financial information. Rather it agreed to, and did, furnish the audit report on its receipt from the auditor. Therefore, Respondent argues, the fact that the preparation of the audit report was delayed does not constitute a violation. Respondent further contends that since Local 533 had reviewed audit reports from earlier years in the possession of Local 265, it knew that the audit reports were on a consolidated basis and would not be sufficient to enable the Unions to evaluate the legitimacy of Respondent's claims. In these circumstances, Respondent contends, the request for the audit reports was being used by Local 533 as a pretext to delay bona fide negotiation and the pretextual nature thereof is confirmed by the Unions' failure to request to review the documents on which Curtis based his oral presentation concerning the Company's cash flow position and its failure to accept Perry's offer to permit a union representative on Respondent's board of directors where he would have access to all of the Company's financial matters.

Whatever might be the validity of this argument if it were factually supported by the record, I find the argument unconvincing in the context herein. According to Tarson's undenied testimony, which I credit, on February 7 Greeley stated the Unions' position that negotiations on monetary items would have to be delayed until the Unions had some sort of official report as to Respondent's financial position. Greeley said the Unions wanted to see some sort of records to prove that the Company needed the financial relief it was requesting. It was Respondent's representative that offered the audit report in response to this request. As to the earlier audit reports, Tarson said there was some discrepancy as to a 1981 figure between the report for 1980–1981 and the report for 1981–1982 and, accordingly, the Unions needed additional information as to the Company's financial status. Perry's response was that Respondent would provide an audit report and Curtis began giving them oral information as to Respondent's financial status. Tarson again stated that before the Unions could get into negotiations concerning wages they needed further reports to substantiate Respondent's position. Curtis' response was that the Unions would get the audit report as soon as Respondent received it.

Contrary to Respondent's urging, I find that the Unions' request for financial information was sufficient to reasonably convey to Respondent that the Unions were requesting any financial information that would indicate the accuracy of Respondent's claimed inability to pay. It was the Respondent, not the Unions, that defined this documentation in terms of audit reports. The nature of any substantiating documents was peculiarly within the knowledge of Respondent and Respondent had an obligation to furnish such substantiating information as would allow the Unions to evaluate Respondent's claim of inability to pay. As stated by the Supreme Court in *Truitt*, supra, "[G]ood faith bargaining necessarily requires that claims made by either bargainer should be honest claims. [If an asserted inability to pay] is important enough to present in the give and take of bargaining,

it is important enough to require some sort of proof of its accuracy."

Here it could not reasonably be expected that the Unions would be able to evaluate the accuracy of Respondent's claim without some substantiating documents. In these circumstances I find that Respondent had an obligation to furnish the Unions with such documents. I further find that when Respondent offered to furnish audit reports in response to the Unions' request for documentation, it knew that the audit report would be insufficient to allow the Unions to evaluate Respondent's financial circumstance and that it had in its possession documents more likely to meet the Unions' requirement in that they related to Respondent's cash flow and debt problems. Nevertheless, relevant documents and records were not made available to the joint representative for more than 2 months. There is no evidence of justification for this delay as to information other than the audit reports in the process of preparation. Accordingly, I conclude that the delay in furnishing information other than the audit reports was unreasonable and contributed to the stalemate in negotiations that Respondent was so quick to characterize as an impasse. In the circumstances I find that Respondent violated Section 8(a)(5) and (1) of the Act by its refusal for a period of time to furnish the Unions with financial information to substantiate its claimed inability to pay. *International Credit Service*, 240 NLRB 715 (1979).

In view of Respondent's unlawful refusal to furnish such information, I further find that no bona fide impasse was reached as to wages. Accordingly, I find that by unilaterally implementing the wage provisions of its "final/final offer" Respondent violated Section 8(a)(5) and (1) of the Act. *Palomar Corp.*, 192 NLRB 592 (1971).

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce or a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 533 and Local 265 are labor organizations within the meaning of Section 2(5) of the Act.

3. At all material times, Local 533 and Local 265 have been the certified joint exclusive representative of the Respondent's employees within the meaning of Section 9(a) of the Act in the following appropriate unit:

> All motor coach operators and motor truck operators employed by Respondent-Employer at its Reno, Nevada, South Shore Lake Tahoe, California, and San Francisco, California facilities; excluding school bus drivers, all other employees, guards, and supervisors as defined in the Act.

4. By withdrawing recognition from, and refusing to bargain with, Local 265 and Local 533 from October 21, 1983, until January 18, 1984, as the joint exclusive collective-bargaining representative of the employees in the unit described above; by granting recognition to Local 265 as the exclusive collective-bargaining representative of the employees in the appropriate unit based in the San Francisco Bay Area; and by entering into, and implementing a collective-bargaining agreement on October 21, 1983, with Local 265 covering the rates of pay, wages, hours of employment, and other terms and conditions of employment of the San Francisco employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5), (2), and (1) of the Act.

5. By its insistence, on November 8, 1983, that Local 533 accept its "final offer" that demanded that Local 533 enter into a separate collective-bargaining agreement with it excluding all references to Local 265 and to the unit employees based in San Francisco; by bargaining to impasse over the nonmandatory subject; and by implementing on December 1, 1983, the terms and conditions of the "final offer," Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By implementing the terms and conditions of its "final/final offer" on April 1, 1984, at a time when no valid, good-faith impasse had been reached in its collective bargaining with joint representatives Local 265 and Local 533, Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By failing and refusing from February 7, 1984, until May 9, 1984, to furnish the joint representative's requested information as to Respondent's financial status, which information is necessary and relevant to the performance of the joint representative's functions as collective-bargaining representative of the employees in the appropriate unit, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that Respondent cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Since it has been found that Respondent unlawfully withdrew recognition from Local 265 and Local 533 as the joint representative of its employees in the certified unit, I shall recommend that Respondent recognize and bargain, on request, with the joint representative as the exclusive bargaining representative of the employees in the unit. Having also found that Respondent unlawfully implemented the terms and conditions of its separate agreement with Local 265 on November 1, 1983, its "final offer" to Local 533 on December 1, 1983 and its "final/final offer" to the joint representative on April 1, 1984, I shall also recommend that Respondent rescind the terms and conditions of employment unilaterally implemented on November 1, 1983, December 1, 1983, and April 1, 1984, and restore the wages and other terms and conditions of employment established by its collective-bargaining agreement with the joint representative, which expired on October 31, 1983, until such time as it negotiates in good faith to a new agreement or to a valid impasse. It is further recommended that Respondent

make the employees in the certified unit whole for any loss of wages or benefits incurred as a result of the unilateral changes implemented by Respondent, to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *Olympic Medical Corp.*, 250 NLRB 146 (1980) and *Florida Steel Corp.*, 231 NLRB 651 (1977). Any trust fund reimbursements are to be made in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Finally, as Respondent's unfair labor practices were of a nature that has the effect of totally disrupting the bargaining process and depriving employees of fundamental rights guaranteed by the Act, I find the Respondent's conduct to be "egregious" within the meaning of *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). Accordingly, it is recommended that Respondent be ordered to cease and desist from any other interference with employee rights.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

Respondent, Grey Line Scenic Tours, Inc. d/b/a California Nevada Golden Tours, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 533, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Chauffeurs Union Local 265, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive joint collective-bargaining representative of its employees in the appropriate unit described below.

(b) Bargaining to impasse over nonmandatory subjects of bargaining.

(c) Giving effect to its October collective-bargaining agreement with Local 265 covering unit employees based in the San Francisco Bay Area.

(d) Unilaterally changing wages and other terms and conditions of employment of its employees in the appropriate unit described below without giving notice to the joint representative and providing them with an opportunity to bargain or at a time when no valid, good-faith impasse has been reached in collective bargaining.

(e) Failing and refusing to furnish, without unreasonable delay, to the joint representative requested information necessary and relevant to the performance of the joint representative's functions as collective-bargaining representative of the employees in the appropriate unit.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the above-named Unions as the joint exclusive collective-bargaining representative of its employees in the appropriate unit described below and, on request, meet and bargain with the aforesaid Unions concerning wages, hours, and other terms and conditions of employment; and, if an understanding is reached, embody it in a signed document. The appropriate unit is:

> All motor coach operators and motor truck operators employed by Respondent-Employer at its Reno, Nevada, South Shore Lake Tahoe, California, and San Francisco, California facilities; excluding school bus drivers, all other drivers, guards, and supervisors as defined in the Act.

(b) Cease giving effect to the collective-bargaining agreement it entered into with Local 265 on October 21, 1983, rescind the terms and conditions of employment unilaterally implemented on November 1, 1983, December 1, 1983, and April 1, 1984, and restore the wages and other terms and conditions of employment established by its collective-bargaining agreement with the joint representatives, which expired on October 31, 1983, until such time as it negotiates in good faith to a new agreement or to a valid impasse.

(c) Make the employees in the appropriate unit described above whole for any loss of wages or benefits incurred as a result of the unilateral changes implemented by Respondent in the manner set forth in the remedy section herein.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in the San Francisco Bay Area and the Reno, Nevada area copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 533, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Chauffeurs Union Local 265, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive joint collective-bargaining representative of its employees in the appropriate unit described below.

WE WILL NOT bargain to impasse over nonmandatory subjects of bargaining.

WE WILL NOT give effect to our October 1983 collective-bargaining agreement with Local 265 covering unit employees based in the San Francisco Bay Area.

WE WILL NOT unilaterally change wages and other terms and conditions of employment of our employees in the appropriate unit described below without giving notice to the joint representative and providing them with an opportunity to bargain, or at a time when no valid, good-faith impasse has been reached in collective bargaining.

WE WILL NOT fail and refuse to furnish, without unreasonable delay, to the joint representative requested information necessary and relevant to the performance of the joint representative's functions as collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL recognize the above-named Unions as the joint exclusive collective-bargaining representative of our employees in the appropriate unit described below and, upon request, meet and bargain with the aforesaid Unions concerning wages, hours, and other terms and conditions of employment; and, if an understanding is reached, embody it in a signed document. The appropriate unit is:

All motor coach operators and motor truck operators employed by Respondent-Employer at its Reno, Nevada, South Shore Lake Tahoe, California, and San Francisco, California facilities; excluding school bus drivers, all other drivers, guards, and supervisors as defined in the Act.

WE WILL cease giving effect to the collective-bargaining agreement we entered into with Local 265 on October 21, 1983, rescind the terms and conditions of employment unilaterally implemented on November 1, 1983, December 1, 1983, and April 1, 1984, and restore the wages and other terms and conditions of employment established by our collective-bargaininig agreement with the above-named joint representative, which expired on October 31, 1983, until such time as we negotiate in good faith to a new agreement or to a valid impasse.

WE WILL make the employees in the appropriate unit described above whole for any loss of wages or benefits incurred as a result of the unilateral changes implemented by us.

GREY LINE SCENIC TOURS, INC. D/B/A
CALIFORNIA NEVADA GOLDEN TOURS

Hohn Industries, Inc. *and* Sheet Metal Workers' International Association Local Union No. 71. Case 3–CA–13209

26 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 13 August 1986 Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Hohn Industries, Inc., Batavia, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs.

"(a) Refusing to bargain with the Sheet Metal Workers' International Association, Local Union No. 71, as the exclusive bargaining representative of the employees in the bargaining unit."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the Sheet Metal Workers' International Association, Local Union No. 71, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT coercively poll you about your desire for representation by Sheet Metal Workers' International Association Local Union No. 71.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with the above-named Union regarding rates of pay, wages, hours of employment, and other terms and conditions of employment for the employees in the appropriate unit and, if an understanding is reached, reduce the agreement to writing and sign it. The appropriate unit is:

> All full-time and regular part-time employees normally employed in the manufacture of the Hirschman-Pohle line of rooftop ventilators and employed at our Batavia Industrial Park, Batavia, New York facility, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

HOHN INDUSTRIES, INC.

Michael Cooperman, Esq., for the General Counsel.
Peter J. Spinelli, Esq. (Harris, Beach, Wilcox, Rubin and Levey), of Rochester, New York, for the Respondent.

---

[1] We deny the General Counsel's request to strike the arguments set forth in Respondent's exceptions under Sec. 102.46(b) of the Board's Rules and Regulations. We also deny the General Counsel's request to add a visitatorial clause in the judge's recommended Order, since the General Counsel has failed to demonstrate sufficient grounds for a visitatorial clause in this case.

[2] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unlawfully withdrawing recognition, we agree with the judge's finding that the Respondent did not have a sufficient basis for doubting the Union's majority. The Respondent conducted a poll which failed to conform to the safeguards set forth in *Struksnes Construction Co.*, 165 NLRB 1062 (1967), for employer-conducted polls. The signing of the petition by the employees was a direct result of the unlawful poll. Therefore, the Respondent was not justified in relying on it as objective evidence of the Union's loss of majority status. Absent the 8 April 1986 petition, the facts of this case present insufficient grounds for the Respondent to raise a reasonably based doubt as to the Union's majority status. The Respondent thus violated Sec. 8(a)(5) and (1) of the Act by withdrawing recognition of the Union.

We find it unnecessary to pass on the judge's alternative rationale for finding the violation. Chairman Dotson additionally finds it unnecessary to pass on the judge's discussion of the obligations of an employer who assumes a business with respect to the incumbent union of the previous employer, or the judge's discussion of what is required before an employer has sufficient basis for conducting a poll. Member Johansen, who did not pass on the legality of the employee poll in *Boaz Carpet Yarns*, 280 NLRB 40 (1986), agrees that that case is distinguishable.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. This case was tried before me at Buffalo, New York, on 16 June 1986, pursuant to an unfair labor practice charge filed on 17 April 1986 by Sheet Metal Workers' International Local Union No. 71 (Union) against Hohn Industries, Inc. (Respondent), and a complaint issued by the Regional Director of Region 3 on 14 May 1986. The complaint alleges that the Respondent, by its agent, employee Robert Scott, violated Section 8(a)(1) of the Act by coercively interrogating his three fellow bargaining unit employees, i.e., polling them about whether they desired continued representation by the Union, and that it further violated Section 8(a)(5) of the Act by thereafter withdrawing recognition of the Union as their bargaining agent. The Respondent's answer denied the commission of an unfair labor practice.

At the trial all parties were given full opportunity to participate, to adduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to thereafter file written briefs that were ultimately received by me on 28 July 1986.

On the whole record of this case, and from my observation of the witnesses and their demeanor, and after evaluation of the oral arguments and written briefs, I make the following

FINDINGS OF FACT

I. BUSINESS OF RESPONDENT

At all times material herein, Respondent, a New York State corporation with an office and place of business at Batavia Industrial Park, Batavia, New York (Respondent's facility), has been engaged in the production of sheet metal products. Since commencing operations about August 1985, Respondent, in the course and conduct of its operations, sold and shipped from its Batavia, New York facility products, goods, and materials valued in excess of $39,000 directly to points outside the State of New York. Based on a projection of its operations since about August 1985, at which time Respondent commenced its operations, Respondent, in the course and conduct of its operations for the 12-month period beginning August 1985, will have gross revenues in excess of $150,000 and will ship and sell from its Batavia, New York facility goods and materials valued in excess of $50,000 directly to points outside the State of New York.

It is admitted, and I find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Issues*

The main issue in this case is whether the Respondent, as a successor employer which had voluntarily recognized the Union as bargaining agent for a unit of four employees, subsequent to a non-Board adjustment of a prior refusal to recognize an unfair labor practice charge, violated the Act by withdrawing recognition soon afterward based on the polling of its employees by employee Robert Scott. Subordinate within this issue is whether Scott acted as an agent of the Employer in conducting the poll.

A second issue raised by Respondent in its brief is whether, regardless of the poll, the Union had in fact lost its majority status, and whether the Respondent possessed a good-faith doubt of the Union's majority status sufficient to justify its withdrawal of recognition.

B. *Facts*

1. Background

The production of sheet metal ventilators at Respondent's facility had previously been performed by Hirschman-Pohle Company, Inc., whose production employees had been represented by the Union for 30 years. In October 1985, the product line was sold to Respondent, which continued the operation of the business with the same employees. After its acquisition of the business in early October, Respondent was confronted with and declined the demand for continued recognition of the Union. The Union thereafter filed an unfair labor practice charge in Case 3–CA–12952 that alleged a violation of Section 8(a)(5) of the Act based on the refusal of Respondent as a successor employer to recognize the Union as continued majority employee bargaining agent. The Respondent contended that it was not a successor employer.

On 7 and 12 March 1986, Respondent executed a non-Board settlement agreement, the terms of which the Respondent acquiesced as successor employer to recognize the Union as the majority bargaining agent for employees in the historic bargaining unit. After a few days the unfair labor practice charge was withdrawn with the approval of the Regional Director. All parties agree to the applicability herein of *Harley-Davidson Co.*, 273 NLRB 1531 (1985), and that Respondent's bargaining obligation arising from that settlement agreement is that of a successor employer and that the Union had at most a rebuttable presumption of majority representative status.

Between 7 and 14 March, the Union's business manager, Glenn Gibson, by telephone, requested Respondent's president and manager, David Hohn, to meet and negotiate a collective-bargaining agreement. Gibson was told to contact Respondent's attorney, Brian O' Connor. Within a day or so, Gibson communicated by telephone with O'Connor and was told to draft the Union's proposal, and that a meeting would be held after receipt of these proposals. Gibson proceeded to draft these proposals. Afterward, in the last week of March, he attempted to inform O'Connor that the proposals were complete

and that a meeting should now be arranged. He was told that O'Connor was on vacation. Subsequently, Gibson's office received a message that O'Connor had telephoned and stated that Gibson would soon be in receipt of a letter from Respondent.

About 13 April, Gibson received a letter from O'Connor dated 10 April which stated that Hohn had received an "unsolicited letter" signed by all four of the bargaining unit employees which disclosed that they had voted among themselves by 3 to 1 in favor of no further representation by the Union. A photocopy was enclosed. O'Connor's letter concluded that the Union had lost its status as majority employee bargaining agent and that it was inappropriate to engage in any collective bargaining with it.

2. The status of Robert Scott

David Hohn testified that he is the owner and president of the Respondent as well as its traveling sales agent. When engaged in sales solicitation he is absent from the plant. From the context of his testimony, it appears that he is the sole manager and production supervisor of the four unit employees. One of the four bargaining unit employees, Robert Scott, not only performs the same daily production duties as his coworkers, but he also serves as leadperson and conduit of instructions and orders from Hohn. Scott testified that he assigns work to and signs the timecards of his coworkers. Hohn testified that generally assignment of work is determined by each man's job function, and the job functions called for are determined by predetermined job plans on blueprints. He explained that when assignment decisions are made that he and Scott will jointly discuss it and that sometimes joint decisions are made and sometimes Scott will make the assignment decision. Vacation and time off requests of unit employees are submitted by the employees to Scott who in turn submits them to Hohn for approval. Scott maintains his own office at the plant.

Scott is not alleged to be a supervisor, nor is there sufficient evidence to conclude that he exercises that type of independent discretion indicative of supervisory authority as defined by the Act. However, it is clear that Scott occupies a preeminent position among the employees as the conduit of Hohn's decisions that affect employees' work conditions, i.e, what Scott tells the employees concerning their work status is certainly likely to be and intended to be perceived by them as the policy of Respondent.

3. The alleged rejection of collective-bargaining representative

Hohn testified that he decided to meet with the bargaining unit employees and to read to them a prepared statement concerning union representation. Such a meeting was held on 24 March 1986. Hohn testified initially as follows concerning the purpose of the meeting.

> [W]e had a meeting with them because there was various comments presented to me, questions regarding their rights as employees and in regards to the union. They had mentioned several times that they had requested withdrawal cards and had been refused.

When he was asked to be more specific in his testimony, Hohn responded, "This is actually—it comes to me through my engineer who is much closer to the employees in the shop than I was." In effect, Hohn then retracted his testimony. Hohn related only one conversation he had back in November 1985 with engineer Bob McCombs, a nonunit employee. He testified that McCombs had told him that during the last week of October that he had witnessed a business agent in a confrontation with three unit employees in the plant parking lot wherein their requests for membership withdrawal cards were rejected and they were threatened with blacklisting if such requests persisted. Thus Hohn gave no specifics about any conversations with bargaining unit employees concerning union representation disaffection prior to the March meeting, nor did he relate any other reports of employee disaffection.

Hohn testified further, without detail or specifications, that he held the March meeting because:

> they were getting feedback from the Union that they were going to have a contract and there was a lot of gray areas, they had questions, they were getting upset because they were getting conflicting stories, so we decided we'd have a meeting with them and set the record straight as to what actually occurred in the settlement.

Thus these more recent reports to Hohn appear related to contract negotiations, and not to union disaffection or membership withdrawal.

On 24 March, unit employees Arthur Stothers and Roger Morgan were summoned by Scott to the plant's office. Union steward David Roblee, a unit employee, was not present at the meeting. Hohn read to the employees a two-page speech prepared by his attorney. In that speech he made the following points paraphrased or quoted as follows:

> 1. Respondent entered into a settlement of an unfair labor practice charge which required continued recognition of the Union by the Respondent as a successor employer.
> 2. The Union "currently" has the right to represent and bargain for unit employees.
> 3. Unit employees are not obliged by the settlement to retain their union membership or to pay dues. There is no current contract and thus no existing union-security obligation nor check off provisions.
> 4. Employees may not be compelled to join the union by threat of blacklist.
> 5. "Some of you have asked me how they can withdraw from union membership or eliminate the Union as their bargaining representative. Under the National Labor Relations Act, you are free to decertify the Union at any time before a new collective bargaining agreement is reached. However, I cannot assist you or encourage you to do so. This is up to you alone. If you need further information re-

> garding decertification of Local 71 or any other issue, you must contact the National Labor Relations Board yourself. I have the names and phone numbers of three employees at the Buffalo office who are obligated by law to answer your questions and assist you in any way possible. There names are as follows: [names deleted]
> 7. [sic] That is all that I have to say to you. However, I would like to answer any questions that you may have regarding this situation.

Hohn failed to testify to any current event in justification of the assertions in item 5 regarding membership withdrawal or union elimination. I credit Hohn that he read the speech verbatim.

Robert Scott, a witness who was called by the General Counsel, could not recall the substance of the speech. After the speech, however, both he and Hohn testified that there was some discussion. Although Scott was not called as an adverse witness, his demeanor revealed a hesitancy and reluctance when responding to counsel for the General Counsel's questions, but a greater spontaneity, if not alacrity, in answering Respondent counsel's questions in cross-examination, particularly when those questions were of a leading nature.

Scott testified in response to counsel for the General Counsel's question that in the postspeech discussion which concerned the substance of the letter, Hohn expressed a desire for the employees to decide whether they wanted union representation. He did not particularize just how Hohn verbalized that desire. In cross-examination Scott testified that in the discussion he asked Hohn whether Respondent would encounter adversity in marketing its products as a nonunion shop and that Hohn responded that nonunion representation would not affect employees' jobs. He also responded "yes" to Respondent counsel's questions concerning whether Hohn stated that nonunion representation would make no difference, and that Scott had stated at the meeting that he was "asking for a withdrawal card from the union." He further testified on the rephrasing of another leading question that Morgan stated "something about having been suspended from the Union and he testified [Morgan] didn't want to discuss it, I guess." Scott testified that Stothers also asked whether rejection of union representation would affect employees' jobs and whether Hohn could supply the employees with the names of NLRB agents who could provide them with information. When asked by Respondent's counsel whether that request "had anything to do with a withdrawal from the Union" he answered with certitude that it did not. He answered further "yes" to the question as to whether Strothers said "anything about the men discussing it [withdrawal from the Union] among themselves," but explained that Stothers did not state that employees would make a decision as to "withdrawal from the Union."

Hohn testified that during the postspeech conversation Stothers asked about the probability of adverse economic impact by the loss of the union label from Respondent's product line. He testified that employee Morgan arose during the discussion and proceeded to walk out on stating that he had been suspended from union membership, and that Scott had stated he was asking the Union for a membership withdrawal card. He added, however, that Stothers did most of the talking and Stothers stated a fear concerning whether as a long-time union member his rejection of the Union would affect "his service if for some reason he left the Company and went someplace else and it was a Union shop," but that "some of the other guys just kidded him and said, 'look Art, you don't have any pension benefits or anything else so it doesn't make any difference.'" Hohn testified that the meeting ended, and as the employees arose Stothers stated, "Well, we're going to have to discuss this among ourselves and get back to you."

Stothers testified as a rebuttal General Counsel witness. According to him, the meeting lasted a mere few minutes, i.e., Hohn read his speech and invited questions. The only question Stothers was able to recall was that someone asked about the adverse effects of a loss of the union label. Stothers denied that he had stated anything at the meeting about withdrawing from union membership. He denied raising any concern "that if there was no union there [he] might lose benefits." He neither confirmed nor denied other accounts of the balance of the meeting by either Hohn or Scott.

Stothers testified that at the close of the meeting Hohn invited further future questions. He therefore proceeded to engage Hohn in a later private conversation. He testified without contradiction that he asked Hohn whether he wanted the employees to have union representation and Hohn stated he did not and, when asked why not, stated that union representation would deprive him of the flexibility to transfer employees from one job to another. In cross-examination it became clear that there was more to the meeting than initially testified to by Stothers. He admitted "yes," that at the meeting Hohn told the employees "that it was really up to them whether they wanted a union or not." He also admitted that during the meeting Hohn's wife, who serves as office clerical and receptionist, was also present and stated that she had "slips of paper" with NLRB agents' names, and that he took such a slip. He could not remember doing so, but testified that it was "possible" that he stated during the meeting that he was "going to find out whether the union could refuse his membership withdrawal card application." Further, in cross-examination, he did not deny that he stated at the end of the meeting that the employees would discuss continued union representation among themselves. He explained that he just did not remember.

Based on Hohn's greater certainty, Scott's corroboration, and Stothers' admissions, I conclude that Stothers did tell Hohn that the employees would discuss further the subject of union representation. I credit Scott's testimony that Stothers did not state to Hohn that the employees would come to some definite conclusion that would be reported to Hohn. Scott did not appear to have any motivation to give testimony adverse to Respondent. If anything, he appeared eager to accommodate counsel for Respondent's questions. Moreover, his self-interest would seem to mitigate against antagonizing his employer. Furthermore, Hohn's own personal notes,

which he wrote within an hour of the meeting, merely state, "Art [Stothers] said they will have to discuss among themselves." Based on Stothers' concessions, I conclude that he did make a statement to the effect that he would make inquiries concerning withdrawal of union membership. It is uncontradicted that Morgan stated that he had been suspended from union membership. In view of Scott's and Hohn's uncontradicted testimony, I conclude that Scott also stated that he was in the process of seeking a withdrawal of union membership application form. Therefore, at the conclusion of the meeting of 24 March 1986, Hohn had become aware that one employee was suspended from union membership, that one was in the process of requesting a membership withdrawal form, and a third was about to make inquiries as to withdrawing from union membership. However, no employee stated to him that they did not desire representation by the Union as nonunion members, i.e., representation without the obligation of a dues-paying membership. Nor did any employee state that they would consider decertification of the Union, despite item no. 5 of Hohn's speech which referred to withdrawal of union membership "or" the elimination of the union as bargaining representative in the disjunctive as subjects of past employee inquiry. At most Hohn was told that the unit employees would discuss further among themselves, "withdrawal from the Union." Neither the testimony nor Hohn's own notes clearly reveal whether the employees were to discuss the subject of nonunion representation, or the more limited subject of withdrawal from union membership with its attendant dues and obligations but short of complete nonrepresentation, or both. Further, Hohn was not told that the employees would report their decision to him, nor was there any deadline set for them to report any decisions reached.

Hohn was advised by his attorney during this period of time. NLRB agents were suggested to the employees as sources of information. Thus Hohn should have been aware that the employees had at least access to sources of information that would surely explain to them the distinction between nonmembership and nonrepresentation.

It appears that union steward Roblee, the fourth employee, was read Hohn's speech the next day.

According to Hohn's own testimony, it is clear that he had not been able to conclude on the basis of his information after 24 March that the majority of employees did not desire representation because he found it necessary to evoke from them some explicit decision. He testified that 2 weeks went by without any further expression from the employees on the subject of union membership or union representation. Hohn testified that on 8 April he felt constrained to ask Scott whether the employees "had any discussions," and (in implicit recognition of Scott's role as his informational conduit) he "reminded him that they were going to get back to us and let us know what had been decided.[1] Regarding Scott's response, Hohn's testimony is:

> He said he'd had a couple minor discussions; nothing concrete determined and he says, well I can't get everybody together and he says, well, I don't know how to do this, and he said, well, my answer to him was they can either take a secret ballot or they can take a vote or he can do anything, but I can't tell you how to do it.

The conclusion that the employees had not agreed to come to a formal decision or to report such decision back to Hohn is enhanced by the fact that no deliberation or "vote" was taken by them nor was any report made to Hohn. This conclusion is buttressed by Scott's testimony.

According to Scott, he did indeed have a couple of discussions with his coworkers after the speech. His motivation in not approaching Hohn with news of an antiunion decision is revealed by his testimony that after the meeting at least two of the employees, Stothers and Morgan, told him that they "thought they wanted the union." The third employee was the union steward. Thus, according to Scott and even Hohn's testimony, there had been no employee initiative toward a revocation of the status quo. Scott's testimony as to Hohn's initiative toward instilling employees' actions in this regard is in certain important aspects markedly different from that of Hohn.

Scott's testimony as to the 8 April conversation is as follows: According to Scott, on 8 April, Hohn confronted him in the work area of the plant and asked whether the employees "had decided on the Union or not." He answered that the employees "hadn't been talking about it, and nobody's made up their mind yet." Thereupon, Hohn insisted that "he had to know today whether [the employees] want it or not." Hohn then told him to "take a vote on it." Scott agreed to do so. Nothing more was said. On cross-examination to Respondent's counsel, Scott answered "yes" to the assertions that at the March meeting Hohn told the employees that union representation was a matter for their choice and that he did not want to get "directly" involved, and "yes to the question, So you took this vote on your own?" In redirect examination he admitted that the idea, i.e., the initiative to take a vote, was not his but was that of Hohn.

Within the full context of the events, and the conversation between Hohn and Scott even under Hohn's version, I conclude that it is Respondent who put Scott in motion with the objective of forcing the issue on the employees by means of some kind of a formalized group decision, which by any other name means, in effect, a polling of the employees by Scott at Hohn's order, notwithstanding Hohn's appended disclaimers. However, if credibility resolution is necessary, I credit Scott's version. As noted above, it was clearly against his self-interest to testify adversely to Respondent, whereas Hohn's testimony was, of course, otherwise. Furthermore, Scott was most certain in demeanor with respect to who authored the idea of a vote.

Hohn most certainly realized that nonaction of the employees was a vote for the status quo. Hohn's pressure on Scott to force an explicit option was a clear signal that he wanted them to reject the status quo. Thus, de-

[1] Hohn's reference to "they" and "us" strongly suggest his identification of Scott with the managerial "us."

spite having been told by two employees that they still "thought" that they desired union representation and knowing that the third employee was the union steward, Scott followed Hohn's imperative to poll the employees that very day about continued union representation. He approached each employee and told them to come to his office at breaktime. He told them, "we were going to decide on the Union or not." When they assembled in his office, he stated to them:

> Dave [Hohn] wants us to know whether we want this Union or not, he wants us to vote on it; he says we can take a secret ballot or show of hands.

One employee expressed a desire for a showing of hands which was acquiesced to by the others. The result was a 3-to-1 vote in favor of no further union representation. Scott reported the results to Hohn's daughter who is an office clerical employee. She suggested that he put the information in writing. At this time Mrs. Hohn was in the room. Scott testified that he went back to his own office and composed a note which he arranged for each of the four employees to sign which states as follows:

> The four sheet metal workers at Hohn Industries took a vote and decided 3–1 against being part of the Sheet Metal Workers' International Association.

Scott then delivered the note to Hohn's office. Thereafter, Respondent's counsel communicated with the Union as described above.

C. *Analysis*

The presumption of majority status of the Union may be rebutted by a demonstration of actual loss or a showing of a reasonable good-faith doubt.

The Respondent's position is that based on the results of the employee petition and other employee expressions, it was clear that the Union had lost its majority status, or that in any event Respondent was warranted in doubting the Union's majority status as in the *Harley-Davidson* case which involved an employee-initiated petition, and *J. & J. Drainage Products Co.*, 269 NLRB 1163 (1984). In the latter case which also involved a successor employer, it was found by the administrative law judge that the presumption of union majority status was rebutted by the existence of objective basis for reasonable doubt which consisted of (1) the age of the original certification, (2) the fact that only 6 of 32 unit employees were union members, (3) the statements of the union steward to the employer to the effect that employees did not wish to meet with the union representatives because they were not interested in the union, and (4) the absence of unfair labor practices.

The Board has traditionally considered a wide range of factors in making an evaluation whether sufficient objective phenomena individually or cumulatively supports a reasonable good-faith belief of loss of majority status. *U-Save Food Warehouse*, 271 NLRB 710, 715–718 (1984). This case, however, does not include many of the factors often taken into account, i.e., change in employee complement, absence or inactivity of the union, closeness of the original majority designation, and, apart from the 8 April petition, a clear statement of rejection of union representation by a majority of the employees.

Immediately prior to the receipt of the 8 April petition, Respondent was possessed of no greater information of possible employee disaffection with the Union than it was back in November 1985 at the outset of its half-year refusal to recognize and bargain with the Union. That lengthy period of frustrated bargaining efforts by the Union was caused by Respondent's refusal to acknowledge its status as successor, and not by a proffered doubt of majority status. Respondent recognized the Union in March 1986, having possessed essentially the same information of purported employee union disaffection, i.e., that three employees were possibly interested in withdrawing from union membership. The only difference by 24 March was that Hohn now was informed that one employee was suspended from union membership and one had only requested, not executed, a membership withdrawal and a third intended to make inquiry about obtaining a membership withdrawal card. As I have concluded above, Hohn, by his insistence on a more clear-cut renunciation of the Union, had himself concluded that he did not possess sufficient reasonable doubt that the majority of the employees did not want union representation as such, in contradistinction to union membership and its obligations. Scott's more credible testimony shows that he informed Hohn that the employees had made no disavowal decision. Even Hohn's testimony reveals this.

The Board has long distinguished employee expressions of membership and/or dues obligations rejection from expressions of a desire for nonrepresentation, and therefore the Board has not viewed such evidence alone as of sufficient weight to establish a reasonable doubt of majority status, much less evidence of actual loss of majority status. *Roger's I.G.A., Inc.*, 232 NLRB 1053 (1977), enfd. 605 F.2d 1164 (10th Cir. 1979); *Carmichael Construction Co.*, 258 NLRB 226, 230 (1981), enfd. 728 F.2d 1137 (8th Cir. 1984).

Administrative Law Judge Holmes, in *J. & J. Drainage*, supra 269 NLRB at 1171, evaluated evidence of a minority union membership as but "one factor" to support the Respondent's claim it had a reasonable doubt of the Union's majority status. He did not rely on the factor of successorship, and the factor of the age of certification was not relied on by the Board in adopting his decision. I conclude that the facts of this case do not warrant a conclusion that Respondent had, exclusive of the 8 April employee "petition," sufficient grounds to doubt the majority status of the Union.

Counsel for the General Counsel concedes that a successor employer may rely on an employee petition in doubting the union's majority status, but he points out that where such petition has been relied on, it has been one that was initiated by the employees, citing for example *Sun Coast Foods*, 273 NLRB 1642 (1985), and *Boaz Carpet Yarns*, 280 NLRB 40 (1986). In the *Sun Coast* case the Board took great pains in rejecting the administrative law judge's finding that the employee petition had been tainted by supervisory assistance. In the *Boaz* case, the employer conducted a poll of its employees in conse-

quence of the presentation of an employee-initiated petition which revealed a clear rejection of a union as their bargaining agent. The Board's majority opinion in that case carefully observed that the employer "verified" the petition in a noncoercive manner that comported with the employees' rights under the Act, i.e., the purpose of the vote was communicated to them, they were assured that regardless of the outcome there would be no reprisals, and a secret ballot was utilized.[2] The Board noted that these events occurred in the absence of a refusal of the employer to bargain in good faith.

The General Counsel argues that Respondent as a successor employer did not have "the option of postponing its bargaining obligation to make its own determination of whether the Union still enjoyed minority status." The General Counsel cites *Aircraft Magnesium*, 265 NLRB 1344 (1982). The Board stated therein that a union is not obliged to establish majority status when a successor employer assumes the business, but that it is the successor employer's obligation to demonstrate actual or reasonably believed loss of majority status. Furthermore, it held that "encouraging and sanctioning an employee-conducted election to test the Union's support" 60 days after its assumption of operations did not satisfy its obligation because, the Board stated, lack of union support on the later date had no relevance to the Union's status on the date when the Union demanded recognition, i.e., the date of the assumption of business. The essential point in the Board's reasoning is the time differential, and thus the Board did not preclude *per se* a poll by a successor employer. If a prerequisite for a poll is a reasonable doubt of majority status, then there is no need for a poll except as verification.

The Respondent argues that it took no poll in this case inasmuch as Scott was not its agent. The factual finding above indicates the contrary. Respondent had clothed Scott with the general apparent authority of its agent by virtue of his position as conduit for Respondent's orders and instructions. *Propellex Corp.*, 254 NLRB 839, 843 (1981). Scott's position as a bargaining unit member does not negate a finding of agency herein because not only did he possess a general apparent agency, he was specifically made Hohn's agent for the polling. Scott, in turn, made that agency clear to the employees when he gathered them in his office. I therefore conclude that Respondent must be viewed not only as the author of the idea of a poll, but the actual polling agent.

In the circumstances of this case, therefore, the consequent petition was a creature of the Employer's poll and did not precede it. Also, unlike the *Boaz* case, supra, the Employer did not apply the *Struksnes* safeguards. The purpose and effect of the vote was not clearly explained, there was no secret ballot, and no assurances against reprisals were made at the polling which I therefore find was a coercive interrogation. Furthermore, unlike *Boaz*, supra, the polling did not occur in the absence of a refusal to bargain. Respondent admitted that it is a successor employer. Thus it had an obligation to bargain with the Union on the assumption of the business, but it had refused to bargain for almost one-half year. Having frustrated the Union's request to bargain, only after it offered to bargain did it take a poll of its employees' sentiments.

In light of all the circumstances in this case, I cannot conclude that there was demonstrated a loss of the Union's majority status nor a reasonable good-faith doubt as to its majority status. Accordingly, I conclude that Respondent violated Section 8(a)(1) and (5) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent Hohn Industries, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers' International Association Local Union No. 71 is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees normally employed in the manufacture of the Hirschman-Pohle line of rooftop ventilators and employed by the Respondent at its Batavia Industrial Park, Batavia, New York facility, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

4. Since about 1 October 1985, and at all times material herein, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the unit described in paragraph 3, and since about 14 March 1986 the Union has been recognized as such representative by Respondent. Such recognition has been embodied in a recognition agreement dated about 14 March 1986.

5. At all times material herein and for the past 30 years, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by the conduct of its agent, Robert Scott, on 8 April 1986, whereby it coercively polled its employees concerning their desire for union representation.

7. Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act on 10 April 1986 and thereafter by withdrawing recognition of the Union as the exclusive bargaining representative of the unit and, since, failing and refusing to recognize or bargain with the Union as such representative.

8. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[2] This is an implicit reference to the safeguards required by the Board for permissive employer polling, as set forth in *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

Respondent Hohn Industries, Inc., Batavia, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively polling its employees concerning their desire for union representation.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with Sheet Metal Workers' International Association Local Union No. 71 as the exclusive collective-bargaining representative of the employees in the appropriate unit regarding rates of pay, wages, hours of employment and other terms and conditions of employment for the employees in that unit and, if an understanding is reached, reduce the agreement to writing and sign it. The appropriate unit is:

> All full-time and regular part-time employees normally employed in the manufacture of the Hirschman-Pohle line of rooftop ventilators and employed by the Respondent at its Batavia Industrial Park, Batavia, New York facility, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Post at its Batavia, New York facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to the them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Pacific Southwest Container, Inc. *and* Printing Specialties & Paper Products Union, Local 609, District Council No. 1, a/w International Printing & Graphic Communications Union, AFL–CIO, Petitioner. Case 32–RC–1829

26 February 1987

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 28 July 1983 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 23 for and 20 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings[1] and recommendations[2] only to the extent consistent with this decision.

The hearing officer recommended overruling the Employer's Objection 2, which alleged that the Petitioner materially misrepresented its nature, structure, and identity to unit employees during the election campaign. We find merit in the Employer's exception to this recommendation.

The pertinent facts are as follows. Printing Specialties & Paper Products Union, Local 609, District Council No. 1, a/w International Printing & Graphic Communications Union, AFL–CIO (PGCU Local 609) began organizing the unit employees in mid-May 1983.[3] The parties signed a Stipulated Election Agreement on 15 June, listing PGCU Local 609 as the petitioning organization. On 1 July the PGCU merged with the Graphics Arts International Union (GAIU) and formed the Graphic Communications International Union (GCIU), culminating approximately 1 year of negotiations. PGCU's District Council No. 1, which included PGCU Local 609 and 12 other PGCU locals, officially merged with GAIU's Western Graphic Arts Union No. 14 on 13 July and created GCIU Local 777. The 28 July election ballots, however, did not reflect the merger but listed PGCU Local 609 as the petitioner.

During the election campaign, Local 609 Organizer James Ziolkowski conducted weekly meetings with some of the Employer's employees. Ziolkowski testified that at each meeting he reported the merger's progress to the group. At the 24 July meeting he informed the employees of the new union's name, structure, and membership, and distributed two documents to be signed by employees stating that they acknowledge Local 777 as Local 609's successor and designate it as their collective-bargaining representative.[4] Twenty-seven of the forty-five unit employees signed both of these documents. The record does not indicate whether the employees who attended the meetings disseminated the merger information to those who were absent, but unit employees Kris Mavity testified that at the time of the election he was unaware of the merger.

The hearing officer concluded that the merger did not result in a change in the continuity of the bargaining representative. We disagree. While Local 609 encompassed only San Joaquin, Stanislaus, and Merced counties in California, Local 777 additionally includes the widespread jurisdictions of 12 other PGCU locals throughout Northern California, as well as GAIU's Western Graphic Arts Union No. 14.[5] The new union presumably

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] Absent exceptions, we adopt pro forma the hearing officer's recommendations to overrule the Employer's Objections 8 and 9 and to approve the Employer's withdrawal of Objection 1.

[3] All dates are in 1983 unless otherwise indicated.

[4] The documents read in full:

> TO: The Officers and Representatives of Graphic Communications Union Local 777. The successor to Printing Specialties and Paper Products Union, Local 609, District Council #1, affiliated with International Printing and Graphic Communications Union, AFL–CIO.
>
> We, the undersigned, are employees of Pacific Southwest Container, Inc. understand and acknowledge that Graphic Communications Union Local 777 is the successor to Printing Specialties and Paper Products Union, Local 609, District Council #1, affiliated with International Printing and Graphic Communications Union, AFL–CIO and it is our entent [sic] that the authorization cards we signed for Printing Specialties and Paper Products Union, Local 609, District Council #1 affiliated with International Printing and Graphic Communications Union, AFL–CIO indicates our desire to be represented for the purpose of negotiating our wages, hours and working conditions by Graphic Communications Union Local 777. The successor.
>
> TO: The Officers and Representatives of Graphic Communications Union Local 777.
>
> We, the undersigned, are employees of Pacific Southwest Container, Inc. By our signatures we hereby make application to Graphic Communications Union, Local 777, an affiliate of the Graphic Communications International Union (AFL–CIO), and hereby designate the Officers and Representatives of your Union as our chosen collective bargaining representatives for the purpose of negotiating wages, hours and working conditions on our behalf.

[5] The jurisdictions of the other merging PGCU locals were as follows: #362, San Francisco; #382, East Bay Cities; #460, Sacramento; #618, Salinas; #653, Modesto; #677, Richmond; #678, San Leandro; #679, Idaho; #706, Sacramento; #748, Benecia; #777, San Mateo and Santa Clara Counties; and Ink and Roller Makers #5, San Francisco and East Bay Counties.

contains far more members than Local 609. Local 777's executive board has 60 members; Local 609's had approximately 6. Local 777 drew its first officers from the former officers of PGCU's District Council No. 1 and Western Graphic Arts Local No. 14; none of them had served as Local 609's officers. Additionally, Local 777 has an entirely new constitution and bylaws. Although it did not immediately change the former PGCU and GAIU local dues payment formulas, the merger agreement states that "careful consideration of an equitable formula for a dues structure will be provided which will ultimately equally apply to all members."

We find that the merger substantially transformed Local 609. It significantly diluted the strength of any individual employee's influence in internal union matters, because Local 777 is a far larger organization than Local 609, in scope and in membership. Additionally, the new local is governed by entirely different officers, its executive board is 10 times larger, and its members are subject to a new constitution and bylaws. The merger thus did not merely effect minor administrative changes in the local. Local 609 lost its original identity and became part of a local with a vastly different structure and entirely new leadership.[6] We therefore find, contrary to the hearing officer, that the merger resulted in a meaningful change in the bargaining representative. *Independent Drug Store Owners*, 211 NLRB 701 (1974), affd. 528 F.2d 1225 (9th Cir. 1975); *Gulf Oil Corp.*, 135 NLRB 184 (1962).

Although 27 of the 45 unit employees signed statements prior to the election indicating that they knew of the merger and desired representation by GCIU Local 777, there is no evidence suggesting that as of the election date the 18 other unit employees had heard of the merger; indeed, 1 employee testified that he voted while unaware of it. Because the Petitioner failed adequately to inform all unit employees of the merger, it is uncertain that a majority of the employees who voted actually intended to vote for Local 777. Because of the circumstances, we cannot be certain that the employees knew for which union they were voting.

Thus, the employees' right to select their bargaining representative, a right embedded in Sections 7 and 9 of the Act, was compromised. In *O & T Warehousing Co.*, 240 NLRB 386 (1979), the Board stated (at 386), "That statutory right can only be meaningfully exercised if the employees are presented on the election ballot with the choice of a clearly identified labor organization." The Board in *O & T Warehousing* found that the petitioner could not appear on the ballot with the designation "AFL–CIO and/or its Appropriate Affiliate." The Board concluded that it was "far from clear what labor organization or organizations are seeking representative status." The Board will thus not certify a labor organization to represent employees unless the election results unquestionably reflect the employees' intent. Employees must be informed of any substantial change in the representative occurring during the election campaign, and the correct labor organization must be listed on the ballot. Moreover, the petitioning union may not selectively inform employees of the changes; it must notify *all* potential voters. Only then are employees ensured the opportunity meaningfully to exercise their voting rights. We therefore sustain Objection 2 and set aside the election.[7]

Although we cannot certify GCIU Local 777 to represent the unit employees based on the 28 July election results, we shall not dismiss the petition. We find that the documents signed by 27 unit employees on 24 July expressing a desire to be represented by Local 777 constitute an adequate showing of interest to justify a second election. Accordingly, we shall direct a second election, listing GCIU Local 777 on the ballot.[8]

[Direction of Second Election omitted from publication.]

MEMBER JOHANSEN, concurring.

I concur in the result.

[6] Although the merger agreement provides that Local 777 "is the legal successor to all the rights, duties and obligations of each of the merging Local Unions," this is outweighed by the evidence demonstrating that Local 777 is a substantially different entity from Local 609.

We place little weight on Ziolkowski's conclusory testimony that, following the merger, "representation of the membership remained the same."

[7] *J. F. Hink & Son*, 252 NLRB 1187 (1980), enfd. 654 F.2d 729 (9th Cir. 1981), and *American Enka Co.*, 231 NLRB 1335 (1977), relied on by the hearing officer, are distinguishable. Both cases involved mergers only at the International level, and in neither case was it established that the merger significantly affected employee representation.

The hearing officer correctly distinguished this case from *Midland National Life Insurance*, 263 NLRB 127 (1982), which held that the Board will not set aside elections due to parties' misrepresentations during the campaign. Although the Employer framed Objection 2 in misrepresentation terms, we are not setting aside the election for that reason. Rather, we find that the election did not comport with Sec. 9(a) because we cannot ascertain that a majority of the employees intended to designate Local 777 as their collective-bargaining representative.

The Employer request that because of the potential for confusion surrounding the election, the Board should permit it to withdraw from the Stipulated Election Agreement. We shall leave this matter for resolution by the Regional Director.

[8] *Monmouth Medical Center*, 247 NLRB 508 (1980); *O & T Warehousing Co.*, supra.

As we have sustained the Employer's Objection 2, we find it unnecessary to pass, and we do not pass, on the issues raised by its Objections 4 and 5.

Carpenters Local 316, United Brotherhood of Carpenters and Joiners of America, AFL–CIO *and* Lauren J. Thornhill d/b/a Thornhill Construction *and* Gould Trust d/b/a Gould Center *and* The Osborn Company, Inc. Cases 32–CC–335, 32–CC–385, and 32–CC–394

26 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 8 May 1981 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a memorandum in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, memorandum, and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

In Case 32–CC–394 of the instant consolidated proceeding, the judge concluded, inter alia, that the Respondent violated Section 8(b)(4)(i)(B) of the Act when its business agent, Rudy Valente, induced and encouraged individuals employed by a neutral subcontractor on a common construction site to stop work and walk off the job in honor of a picket line established by another union in furtherance of that Union's primary labor dispute with the general contractor on the construction project. We agree.

In *Plumbers Local 444 (T. S. Hanson Plumbing)*, 277 NLRB 1231 (1985), the Board concluded that the Union violated Section 8(b)(1)(A) of the Act by fining two members employed by a neutral subcontractor because they crossed and worked behind a lawful primary picket line established by another union at a common construction jobsite. Although the specific section of the Act that was alleged to have been violated in *T. S. Hanson*—Section 8(b)(1)(A)—is different from the section of the Act alleged to have been violated in the instant case—Section 8(b)(4)(i)(B)—the underlying issue presented in *T. S. Hanson* is presented again here: whether a union may induce its members to honor a lawful primary picket line where those members work for a neutral employer on a common situs at which no valid system of reserved gates is in effect. Like the fines in *T. S. Hanson*, the request of the Respondent's business representative that individuals employed by Cal Bay, an undisputedly neutral employer, honor the primary union's picket line by leaving the jobsite clearly discloses an objective proscribed by Section 8(b)(4)(B)—to cause the neutral employer, Cal Bay, to cease doing business with the primary employer, Osborn. The Respondent knew that Cal Bay was a neutral in the Laborers' primary dispute with Osborn. A natural and apparent object of the Respondent's request that individuals employed by Cal Bay honor the Laborers' picket line by leaving the jobsite was to induce and encourage them to stop working for the neutral Cal Bay and in turn cause Cal Bay to cease doing business with Osborn.[2] Accordingly, we conclude that the Respondent has violated Section 8(b)(4)(i)(B) of the Act as alleged in this regard.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carpenters Local 316, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, San Jose, California, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] At the hearing, the parties stipulated that the General Counsel was not alleging in Case 32–CC–335 that the Respondent's picketing at the neutral reserved gate between 27 August and 4 September 1980 was unlawful. Consequently, we do not affirm the judge's implicit finding that such picketing during that period of time was unlawful.

[2] See *T. S. Hanson*, supra, 277 NLRB 1231, *Sheet Metal Workers Local 252 (S. L. Miller)*, 166 NLRB 262 (1967), also cited in *T. S. Hanson*.

[3] In affirming the judge's finding of a violation under these circumstances, we do not rely on *Teamsters Local 505 (Carolina Lumber)*, 130 NLRB 1438 (1961), cited by the judge. The distinction drawn in that case between "low level" and "high level" supervisors, in regard to the scope of the term "individual" in Section 8(b)(4)(i) of the Act, was rejected by the Supreme Court in *NLRB v. Servette Inc.*, 377 U.S. 46 (1964).

There the Court held that the applicability of Section 8(b)(4)(i) to supervisors turns on whether the union's appeal to the supervisor is to cease performing his employment services, or is an appeal for the exercise of the supervisor's managerial discretion. In the instant case, we find that the Respondent's business agent Valente unlawfully appealed to Cal Bay's foreman Mobley to cease performing his employment services for Cal Bay.

Bernard Hopkins, Esq., for the General Counsel.
Michael B. Roger, Esq. (Van Bourg, Allen, Weinberg and Roger), of San Francisco, California, for the Respondent.
Mark R. Thierman, Esq., of San Francisco, California, for Thornhill Construction Co. and The Osborn Company, Inc.
Michael Riccitiello, Esq. (Littler, Mendelson, Fastiff & Tichy), of San Francisco, California, for Gould Trust d/b/a Gould Center and Century West Builders.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter

was held before me in San Jose, California, on January 8, 1981. The initial charges in Cases 32–CC–335, 32–CC–385, 32–CC–394, and 32–CB–795 were filed on July 10, August 18, September 24, 1979, and July 10, 1980,[1] respectively.

Thereafter, various complaints and amendments thereto were issued on July 31, September 17, 23, and 30, and December 18, by the Regional Director for Region 32 of the National Labor Relations Board (Board), alleging violations by United Brotherhood of Carpenters & Joiners of America, AFL–CIO, Local 316 (Respondent), of Section 8(b)(1)(A)[2] and (4)(i) and (ii)(B) of the National Labor Relations Act (the Act).

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for Respondent, and counsel representing both Thornhill Construction Company and the Osborn Company, Inc.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Facts*

1. Thornhill Construction Co. (Case 32–CC–335)

In June, Thornhill Construction Co.,[3] a framing contractor, was hired as a contractor on a condominium project in San Jose, California. On June 19, prior to the commencement of Thornhill's work on the job, Respondent's business representative, Rudy Valente, visited the jobsite and advised David Larimer, president of New West Associates, owner of the condominium project, that Thornhill was unwilling to sign a successor contract with the Union and that Larimer could, therefore, expect picketing on the job when Thornhill began work.

On July 9, the day that Thornhill commenced work on the site, Valente appeared at the jobsite and questioned several Thornhill employees about their lack of union membership.

Later that day, according to the testimony of Larimer, the following conversation occurred between Larimer, Larry Thornhill, owner of Thornhill Construction Co., and Valente:

> And he [Valente] turned to me and he said, what are you going to do? And I said, well, I'm just trying to build my construction project. And I said, what are you going to do? And he said, all I want to do is get Larry [Thornhill] to sign. And then he turned to Larry and pointed at me, and said this man's going to sue you if you can't finish. And I shook my head at that. And then Rudy [Valente] looked out the window and he said,—he looked out the door and he said, I'm not going to give Larry shit on this job. I'm not going to be easy on him. I want him to sign the agreement, and I want the job to be finished by Union carpenters. We want a—the Unions will all stick together and if Larry—I have the pickets right out in the car, I'll bring them out right now. And your job won't go one step further than it is right now.

Then there ensued some conversation between Valente and Larimer regarding obtaining a union framing contractor for the job. During this portion of the conversation, Valente told Larimer that the job would never get finished if Thornhill did not sign the agreement. Larimer indicated an intention to establish a reserve gate system, and testified that Valente replied:

> [t]hat doesn't matter. Gates don't matter. We don't picket gates, we picket job sites. And I have the pickets right out in the car and they'll be here tomorrow unless Larry signs.

The next morning, July 10, Respondent's pickets arrived at the jobsite, and shortly thereafter a reserve gate system was established by Larimer. Respondent's agents, including Valente, nevertheless picketed in front of the neutral gate reserved for employees, personnel, and visitors of persons other than Thornhill. On the same day, Larimer sent a telegram to Respondent, advising that a reserve gate system had been established, and requesting that the Union confine its picketing to the gate reserved for Thornhill. Nevertheless, Respondent picketed exclusively at the neutral gate from July 10 to July 14.

Thereafter, Respondent primarily confined its picketing activity to the gate reserved for Thornhill. However, when a vehicle or person would approach and enter the project through the neutral gate, the pickets would walk over to that gate, write down the vehicle's license number, and remain there while the delivery was being completed. I credit Larimer's unrebutted testimony that such conduct continued prior to August 27.

On August 27, Larimer used a forklift to bring lumber for Thornhill through the neutral gate. Thereupon, the Union commenced picketing the neutral gate, and on September 4, 1980, the Union was advised by telegrams that there would be no further tainting of the reserve

---

[1] All dates or time periods herein are within 1980 unless otherwise specified.

[2] Following the close of the hearing, the parties entered into a settlement agreement involving this matter, namely, Case 32–CB–795, and on March 23, 1981, I issued an order serving cases, remanding Case 32–CB–795 to the Regional Director for purposes of compliance with the terms and provisions of the settlement agreement.

[3] Thornhill Construction Co. is a sole proprietorship with its principal place of business in San Jose, California. In the course and conduct of its business operations, Thornhill Construction Co. annually provides goods and services in excess of $50,000 to customers meeting one of the Board's jurisdictional standards other than the indirect inflow or indirect outflow standard. It is admitted, and I find, that Thornhill Construction Co. is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

gate system. Thereafter, picketing continued at both gates until October 1980 when an injunction was granted by the United States district court, enjoining picketing at the neutral gate. Picketing at the gate reserved for Thornhill continued until late November, and ceased following the outcome of a decertification election until late November, and ceased following the outcome of a decertification election among Thornhill's employees. Valente was not called as a witness in this proceeding.

2. Gould Trust d/b/a Gould Center (Case 32–CC–385)

On August 11, Respondent's business representative, Elmer Phillips, approached Mark Allen, job superintendent for Century West Builders, Inc.,[4] the general contractor for a restaurant construction project in San Jose, California. Phillips asked Allen whether certain employees who were employees of Construction Trends, the carpentry subcontractor, were union members. Allen told Phillips to ask the employees directly. On learning that the employees were not union members, Respondent commenced picketing the project the following day.

The picket sign was attached to a mobile home vehicle that was parked at the main entrance to the shopping center, known as the Gould Shopping Center and owned by E. Gould, where the restaurant construction was taking place. The picket sign stated that E. Gould fails to meet established wages and benefits established by the Carpenters Local 316.

Reserved gates were established on the second day of the picketing. A telegram sent to the Union about August 14, advised that gate 1 was reserved for the exclusive use of E. Gould and Century West Builders, Inc. and warned the Union to confine its picketing to gate 1. However, only Gould's name initially appeared on the sign at gate 1, and sometime thereafter, Century West's name appeared. Finally, on August 28, Construction Trend's name was also placed on the reserved gate sign at gate 1. Also on this latter date, Century West sent a telegram to the Union advising that Construction Trends and its suppliers were to use gate 1 exclusively. Apparently, the Union picketed at gate 1 during all times material herein. In addition to picketing at gate 1, however, the Union did not immediately remove its vehicle, bearing the aforementioned picket sign, from the main entrance to the shopping center, some 110 feet from gate 1. The vehicle remained at this location for about a week following August 14.

In late August, Century West's job Superintendent, Mark Allen, unlocked gate 2, the gate apparently reserved for employers other than Gould, Century West, and Construction Trends, in order to permit the concrete contractor, J. C. Lomas Company, to enter the site. Thereupon, according to Allen, who observed but did not overhear the conversation, Business Representative Phillips and the individual who had been picketing at gate 1 approached and spoke to an employee of J. C. Lomas near gate 2. Immediately thereafter, the employee approached Allen and advised him that he was leaving the project as he feared being fined if he came on the job, and presented Allen with a pamphlet that had been given to him by Phillips. Allen read the pamphlet that he paraphrased at the hearing as stating that "when a good union man sees a picket, he doesn't ask questions but just leaves." Thereupon, Allen, in the presence of Phillips, suggested that the employee call his employer on the CB radio in the truck. The employee contacted J. C. Lomas on the CB and explained the situation to him. Then there ensued a conversation between Phillips and Lomas over the CB. Allen overheard Phillips, who appeared angry, mention some sort of agreement between Lomas and Phillips and accused Lomas of breaking the agreement. Phillips, according to the uncontroverted testimony of Allen, said that he had a long memory, and the matter would not be forgotten. Phillips was not called as a witness.

3. The Osborn Company, Inc. (Case 32–CC–394)

In mid-July, the Laborers Union picketed The Osborn Company, Inc.,[5] the general contractor at a condominium construction site in San Jose, California. The carpentry subcontractor on the job was Cal Bay Builders with whom Respondent maintained a collective-bargaining relationship. On September 2, Rudy Valente, Respondent's business agent, approached Cal Bay Builders' working foreman, Vern Mobley, and requested that Mobley and his crew honor the picket line established by the Laborers Union. Mobley phoned Cal Bay Builders' general manager, Steven Fisk, and reported the matter, whereupon Fisk directed Mobley to instruct the employees to leave the jobsite, while Fisk attempted to get the matter resolved with Respondent.

On the afternoon of September 2, Fisk phoned Valente and asked why Valente had requested that his employees leave the site, and how the problem could be resolved. Valente replied, according to Fisk, that there was a sanctioned Laborers Union picket on the job and that the matter could be resolved by Fisk's honoring of the picket line. Valente further stated that if Fisk, or apparently Cal Bay Builders' employees, crossed the picket line, Fisk could be subject to "further assessments." Fisk testified that Valente did not go into detail and left the matter very vague. Valente was not called as a witness.

Cal Bay Builders did not work on September 2, but the carpentry crew commenced work the following day with no further incidents.

[4] Century West Builders, Inc. is a California corporation with offices located in California, and annually performs construction services valued in excess of $50,000 for customers located outside the State of California. It is admitted, and I find, that Century West Builders, Inc. is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[5] The Osborn Company, Inc. is a California corporation with its principal place of business located in Santa Clara, California, and is engaged in the business of real estate development and construction. During the last fiscal year, Osborn performed services valued in excess of $800,000 for the United States Navy, and its operations have a substantial impact on the National Defense of the United States. It is admitted, and I find, that Osborn is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

B. *Analysis and Conclusions*

1. Thornhill Construction Co. (Case 32–CC–335)

It is clear, and Respondent proffered no contrary evidence, that Respondent, including Respondent's business representative Rudy Valente, picketed at the neutral gate reserved for persons other than employees and suppliers of the primary employer, Thornhill Construction Company. Moreover, even on belatedly moving its picket to the appropriate gate after about 4 days of picketing at the neutral gate, Respondent continued to picket the neutral gate during periods when deliveries were being made through that gate. Such picketing, under the circumstances, is conclusive evidence of an unlawful objective. Further, Business Representative Valente's statement to David Larimer, an official of New West Associates, a neutral employer, that reserved gates did not matter, and that Respondent intended to picket the jobsite, rather than any particular gate, clearly constituted a threat to engage in unlawful picketing. *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950); *Carpenters Sacramento Area District Council (Malek Construction)*, 244 NLRB 890 (1979).

Nor, as contended by Respondent, does the fact that New West Associates provided a job shack, electrical current, portable toilets, and water used by Thornhill and other subcontractors, and purchased finished lumber, doors, and millwork for Thornhill establish that New West Associates was an ally of Thornhill or that the two entitles thereby maintained coemployer or joint venture relationship. See *Carpenters Sacramento Area District Council*, supra. The cases cited by Respondent in support of its ally defenses are inapposite.[6] Thus, contrary to the contention of Respondent, these cases do not establish that a neutral employer that purchases materials for and acts as a supplier of the primary employer by bringing materials onto the jobsite, thereby becomes an ally of the primary employer.

Nor does the fact that the owner of New West Associates used either gate for his personal ingress or egress invalidate the reserved gate system. *Broadcast Employees NABET Local 31 (CBS Inc.)*, 237 NLRB 1370, 1378 (1978), enfd. 631 F.2d 944 (D.C. Cir. 1980); *Carpenters Local 639 (American Modulars)*, 203 NLRB 1112, 1118 (1973).

I, therefore, find that by the aforementioned conduct, Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act, as alleged.

2. Gould Trust d/b/a Gould Center (Case 32–CC–385)

The General Counsel maintains that Respondent's illegal objective is demonstrated by its failure to conform its picketing to *Moore Dry Dock* standards.[7] In particular, the General Counsel contends that the picket sign erroneously named Gould rather than Construction Trends as the employer with which the Respondent has a primary labor dispute. Further, the General Counsel argues that the fact that Respondent picketed the main entrance of the Gould Shopping Center, in addition to the reserved gate set aside for Gould and others, establishes an unlawful secondary objective.

I find that, given the state of the record herein, the evidence is unclear that the Respondent knew or was ever timely advised of the identity of the primary employer, Construction Trends. Indeed, it appears that even several weeks after the reserved gates were established, Gould led Respondent to believe that Century West Builders employed the carpenters on the job and, insofar as the record shows, it was not until August 28 that the name of Construction Trends was even specifically mentioned to Respondent. Moreover, as the telegram of August 14 directed that Respondent's picketing activity be confined only to Gould and Century West Builders, it would appear reasonable for Respondent to conclude that its continued picketing at the main entrance of the shopping center, owned by Gould was likewise permissible.

However, I further find that Respondent's unlawful objective has been demonstrated by the conduct of Business Representative Phillips who sought to cause an employee of neutral employer. J. C. Lomas Company, the concrete contractor, to leave the job. Moreover, Phillips also threatened Lomas with breaching an agreement and, in effect, with unspecified reprisals should Lomas continue pouring concrete at the site. Although Mark Allen, job superintendent for Century West Builders, did not overhear but rather merely observed the conversation between Phillips and an employee of J. C. Lomas Company, and overheard only Phillips' remarks over the CB to Lomas, the record clearly establishes that Allen, whom I credit, was a precipient witness to what transpired herein, and that Allen's testimony is sufficient, under the circumstances, to support the finding of a violation. Respondent has presented no evidence that would negate the import of Allen's testimony. Moreover, I draw an adverse influence from Phillips' failure to testify.[8] I, therefore, conclude that the fair interpretation of Allen's testimony warrants the determination that Phillips engaged in conduct violative of the Act, and thus find that Respondent has violated Section 8(b)(4)(i)(B) and (ii)(B) of the Act as alleged. See *Technical Engineering Division Local 130 (National Survey Services)*, 204 NLRB 348 (1973); *Iron Workers Local 597 (Linebeck Construction)*, 208 NLRB 524 (1974).

3. The Osborn Company (Case 32–CC–394)

I credit the unrebutted testimony of Steven Fisk, general manager of Cal Bay Builders, a neutral employer performing work at the construction site in question, and find that during the September 2 telephone conversation, Respondent's business agent, Rudy Valente, in effect acknowledged that he had requested Cal Bay Builders' em-

[6] *Operating Engineers Local 450 (Linbeck Construction)*, 219 NLRB 997 (1975), enfd. 550 F.2d 311 (5th Cir. 1977); *Electrical Workers IBEW Local 323 (J. F. Hoff Electric)*, 241 NLRB 694 (1979), enfd. 642 F.2d 1266 (D.C. Cir. 1980).

[7] *Sailors Union (Moore Dry Dock)*, supra.

[8] *Martin Luther King Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977).

ployees to leave the job earlier that day. Such a request even though directed to a low-level supervisor on the job, namely, Vern Mobley, is violative of Section 8(b)(4)(i)(B) of the Act. *Teamsters Local 505 (Carolina Lumber)*, 130 NLRB 1438 (1961). Moreover, I find coercive, under the circumstances Valente's unexplained reference, during the same telephone conversation, of "further assessment," directed to Fisk. This is particularly true in the absence of any testimony by Valente that would tend to explain or clarify such ambiguous language. I, therefore, find that Valente's statement constituted a threat and was calculated to cause Cal Bay Builders to cease work at the site in furtherance of Respondent's unlawful objective. I, therefore, conclude that by the foregoing conduct Respondent has also violated Section 8(b)(4)(ii)(B) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Thornhill Construction Co., Century West Builders, Inc. and The Osborn Company, Inc. are employers and persons engaged in commerce and in operations affecting commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4)(i) and (ii) of the Act.

2. Carpenters Local 316, United Brotherhood of Carpenters and Joiners of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By inducing and encouraging individuals employed by New West Associates, J. C. Lomas Company, Cal Bay Builders, or other persons engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of their employent to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform services; and by threatening, coercing, and restraining the above-named persons, or other persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring the above-named persons to cease doing business with Thornhill Construction Co., Construction Trends, and The Osborn Company, Carpenters Local 316, United Brotherhood of Carpenters and Joiners of America, AFL-CIO has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Carpenters Local 316, United Brotherhood of Carpenters and Joiners of America, AFL-CIO has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act. I shall recommend that it be ordered to cease and desist therefrom, and that it take such affirmative action as will effectuate the purposes of the Act.

The General Counsel and counsel for the various employers maintain that Respondent's conduct warrants the imposition of a broad order rather than an order limited only to the employers herein. I agree. Thus, it has been found that the Respondent, on various dates between July 10 and September 2, 1980, repeatedly engaged in clear violations of the Act affecting numerous employers and construction sites within the San Jose, California area. Under the circumstances herein, I find that Respondent's proclivity to violate the Act has been amply demonstated, and that, therefore, the requested remedy is clearly warranted. See *Sequoia District Council of Carpenters (Lattanzio Enterprises)*, 206 NLRB 67 (1973); *Teamsters Local 945 (Newark Disposal)*, 232 NLRB 1 (1979), enfd. mem. 586 F.2d 835 (3d Cir. 1978).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Carpenters Local 316, United Brotherhood of Carpenters and Joiners of America, AFL-CIO its officers, agents, and representatives, shall

1. Cease and desist from

(a) Inducing or encouraging any individual employed by New West Associates, J. C. Lomas Company, Cal Bay Builders, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is to force or require the persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with Thornhill Construction Co., Construction Trends, or The Osborn Company.

(b) In any manner threatening, coercing, or restraining New West Associates, J. C. Lomas Company, Cal Bay Builders or any other person engaged in commerce or in any industry affecting commerce, where an object thereof is to force or require said persons to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, Thornhill Construction Co., Construction Trends, or The Osborn Company.

(c) Inducing or encouraging any individual employed by any person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threatening, coercing, or restraining any person engaged in commerce; where in either case, an object thereof is to force or require any person to cease doing business with any other person engaged in commerce or in an industry affecting commerce.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its office and meeting halls copies of the attached notice marked "Appendix."[10] Copies of the

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Nation-

Continued

best copy available

notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Carpenters Local 316, United Brotherhood of Carpenters and Joiners of America, AFL–CIO to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Deliver to the Regional Director for Region 32, signed copies of the notice in sufficient number for posting by the employers involved herein, should they be willing, at all locations where notices to their employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

al Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

TO ALL MEMBERS OF CARPENTERS LOCAL 316, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO

TO ALL EMPLOYEES OF NEW WEST ASSOCIATES, J. C. LOMAS COMPANY, CAL BAY BUILDERS, AND OTHER EMPLOYERS

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, nor will our officers, business representatives, business agents, or anyone acting for us, whatever his title may be, engage in or induce or encourage any individual employed by New West Associates, J. C. Lomas Company, Cal Bay Builders or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of employment to use, manufacture, process, transport, or otherwise handle work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require the above-named employers or any other person engaged in commerce or in an industry affecting commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with Thornhill Construction Co., Construcion Trends, or The Osborn Company.

WE WILL NOT threaten, coerce, or restrain New West Associates, J. C. Lomas Company, Cal Bay Builders, or any other employers engaged in commerce or in an industry affecting commerce where an object thereof is to force or require the employers or any other persons engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, Thornhill Construction Co., Construction Trends, or The Osborn Company.

WE WILL NOT in any manner prohibited by Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, threaten, coerce, or restrain any person engaged in Commerce or in an industry affecting commerce, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce for a proscribed object.

CARPENTERS LOCAL 316, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO

Achilles Construction Co., Inc. *and* Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Case 29–CA–12015

26 February 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 26 August 1986 Administrative Law Judge Thomas D. Johnston issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Achilles Construction Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In adopting the judge's finding that the Respondent lacked a good-faith and reasonably grounded doubt that the Union enjoyed majority support when it refused to bargain with the Union on 8 August 1985, we emphasize that majority support is determined with reference to the unit's size at the time of the Respondent's refusal. There were then four employees in the unit.

Beatrice Kornbluh, Esq., for the General Counsel.
Stanley Israel, Esq., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS D. JOHNSTON, Administrative Law Judge. This case was heard at Brooklyn, New York, on 27 June and 22 July 1986 pursuant to a charge filed on 20 August 1985[1] by Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO (the Union) and a complaint issued on 9 April 1986.

The complaint alleges that Achilles Construction Co., Inc. (the Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act) by withdrawing its recognition of the Union as the exclusive bargaining representative of the unit employees and refusing to recognize and bargain with the Union.

[1] All dates referred to are in 1985 unless otherwise stated.

The Respondent in its answer filed on 21 April 1986 denies having violated the Act and asserts as an affirmative defense the Union is not the representative for the purposes of collective bargaining of any of the unit employees.

The issues involved are whether the Respondent unlawfully withdrew recognition of and refused to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees thereby violating Section 8(a)(5) and (1) of the Act.

On the entire record in the case and from my observations of the witnesses and after due consideration of the oral argument made by the General Counsel and the brief filed by the Respondent[2] I make the following[3]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New York corporation with its principal office and place of business located at Brooklyn, New York, is engaged in the manufacture, sale, distribution, and installation of various products made by iron, steel, and other metals and related products. During the 12-month period preceding 9 April 1986, a representative period, the Respondent in the course of its operations purchased and received iron, steel, metal products, and other goods and materials, valued in excess of $50,000, which was transported and delivered to its Brooklyn, New York facility in interstate commerce directly from States located outside the State of New York.

The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background and the Bargaining Unit*

The Respondent operates a facility located at Brooklyn, New York, where it is engaged in the manufacture, sale, distribution, and installation of various products made of iron, steel, and other metal and related products.

Mora Braunstein is the president of the Respondent and she has operated the Company since her husband died in 1983. Up until his death he was in charge of Respondent's operations.

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of Respondent, including plant clerical employees, em-

[2] The General Counsel and the Union did not submit briefs.

[3] Unless otherwise indicated the findings are based on the pleadings, admissions, stipulations, and undisputed evidence contained in the record which I credit.

ployed at the plant, exclusive of office clerical employees, guards and supervisors as defined in the Act.

On 30 September 1980 the Board issued its decision in *Kuno Steel Products Corp.*, 252 NLRB 904 (1980), in which it found the respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the union as the exclusive bargaining representative of the unit employees. It ordered the respondent to cease and desist from refusing, on request, to recognize and bargain with the union and ordered it, on request, to recognize and bargain with the union as the exclusive collective-bargaining representative of the unit employees. The Board, in finding the respondent violated the Act, reversed the administrative law judge's finding that the respondent had a rationally grounded belief that the union no longer represented a majority of respondent's unit employees at the time of the union's request to bargain in July 1978 because of the lapse of time, the lack of picketing, and the fact two of the seven employees retired on pension during the strike and two other employees had terminated their membership in the union.[4]

On 7 June 1982 the Board's decision was enforced by the United States Court of Appeals for the Second Circuit. *Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982).

Commencing in July 1982 and continuing thereafter including 1983, 1984, and 1985 the Union requested the Respondent to bargain collectively with it as the representative of the unit employees for a collective-bargaining contract covering those employees. During 1982 and 1983 the Respondent and the Union met at various times for purposes of negotiating the collective-bargaining agreement. These negotiations were unsuccessful. Union President William Colavito was the chief negotiator for the Union. Colavito's reasons given at the hearing for not having Respondent's employees present at the bargaining sessions were that they were working under conditions substandard to those in existence prior to the strike and having the employees present would not serve the purpose of bolstering negotiations because the employees were insecure and he did not know whether they would even come.

On 20 March the Board issued its Order in *Achilles Construction Co.* in Case 29–CA–10585 adopting the decision of Administrative Law Judge Raymond P. Green issued on 30 January, to which no exceptions had been filed, in which he found the respondent had violated Section 8(a)(1) and (5) of the Act by unilaterally granting wage increases to employees without prior notice to and consultation with the union during the collective-bargaining negotiations. The respondent was ordered to cease and desist from refusing to bargain collectively with the union by unilaterally granting wage increases to employees during the course of collective-bargaining negotiations, without prior notice to and consultation with the union, and in the event the respondent and the union resumed negotiations respondent was to notify the union as to all proposed wage increases to unit employees and not to implement such wage increases absent an impasse in negotiations or consent by the union.[5]

B. *The Respondent's Withdrawal of Recognition of the Union as the Exclusive Collective-Bargaining Representative of the Unit Employees*

About 29 March, Union President Colavito had a meeting with Respondent's attorney, Stanley Israel, who also represented certain other companies including Koenig Iron Works, Inc. (Koenig), Roman Iron Works, Inc. (Roman), and Peelle Company (Peelle). During this meeting, as described by President Colavito, Attorney Israel informed Colavito that he did not feel Roman, Koenig, or Peelle had any obligation to bargain with the Union. Upon Colavito asking Israel about a meeting with the Respondent, Israel said he would contact the Company and get back to them. Attorney Israel did not testify and I credit Colavito's undisputed testimony regarding this conversation.

Following this meeting Colavito stated Attorney Israel did not get back to him about a meeting with the Respondent as promised. Colavito then sent Israel a letter dated 24 July requesting Israel on receipt of the letter to call him to set up a negotiating session regarding the Respondent.

Colavito's explanation given at the hearing for the delay in sending this letter was because the Union had filed charges in April against Koenig and Roman for their withdrawing recognition of the Union and the Union was awaiting action on the charges which resulted in complaints being issued against those companies on 28 June by the Regional Office.

Attorney Israel responded to Colavito's request by letter dated 8 August advising Colavito as follows:

> In light of the recent decision of the Board and the further fact that all prior offers made by this Company have been rejected and are no longer applicable, and in fact have been revoked, and in light of the further fact that this Company does not believe that Local 455 currently represents the employees of the Company, I believe it would be inappropriate and indeed unlawful to schedule any new negotiating session.

President Colavito denied there was any further contact with Attorney Israel after receiving his letter.

C. *Respondent's Defense*

Respondent's president, Braunstein, testified she made the decision not to bargain with the Union. She stated it was made in July or August when Attorney Israel contacted her, informed her he had received a letter from the Union, and asked if she was interested in bargaining with the Union on behalf of the men in their shop. She informed Israel the Union was not representing them, there were no union members working there, and she was definitely not interested.

[4] Louis Douda was identified as one of the two employees who had terminated his union membership.

[5] An allegation alleging the Respondent bargained in bad faith with no intention of reaching an agreement was dismissed.

At the hearing Braunstein described that the basis for her decision was they had no representation of any union members and the employees were not interested in the Union. Her knowledge that the employees were not interested in the Union was based on statements made to her by Louis Douda that he felt no loyalty to the Union, wanted no part of the Union, and was not interested[6] and a statement by Charles Douda[7] that he was not interested in becoming or being a member of the Union. On being asked when these conversations with the Doudas occurred, Braunstein said it was an ongoing discussion with the Doudas since the beginning of the strike. According to Braunstein the Doudas initiated those conversations.

Braunstein, who stated that in the summer of 1985 the Respondent employed a maximum of five employees, acknowledged she did not have any discussions with any of the other three employees concerning the Union.

Although Braunstein stated Louis Douda was a union member prior to the strike and worked during part of the strike, she denied that Charles Douda, who started work after the strike began, was ever a union member. Union President Colavito denied knowing whether either Louis Douda or Charles Douda was a union member in 1985 or whether the Union collected dues from any of Respondent's employees in 1985.

Louis Douda stated he was a member of the Union when the strike started. However, he ceased paying dues and drew a pension from the Union, but his pension was stopped after he returned to work during the strike. Douda did not resume paying his dues while he worked for the Respondent.

Although Braunstein denied any of Respondent's employees were members of the Union in 1984, she acknowledged she had assumed this because no one spoke about the Union at all. Braunstein also claimed the only former employee of the Respondent who she had seen around the premises the last couple of years was Joe Chopko, who lived in the area and occasionally came in to say hello. Chopko had worked there up until the strike. Braunstein acknowledged Chopko's name was listed in a backpay specification hearing at which she testified. According to Braunstein, Chopko had been ill a number of years and had also stated he was not interested in working.

Respondent records reflect that in July the Respondent employed four unit employees. They were Louis Douda,[8] Charles Douda, Lancelot Brotherson, and Joseph Prusein. Louis Douda was hired during the early 1970s and his son, Charles Douda, was hired about 1976. Lancelot Brotherson began work in 1984 and Joseph Prusein started about June 1985. During August these same four unit employees worked there along with another unit employee, Ras Singh, who began work on August 26. From January to July there were four unit employees employed each week except for 6 weeks in May and June when there were only three. During August through November 1984 the Respondent also employed four unit employees each week except for 3 weeks in August 1984 when it employed five. After August 1985 the Respondent continued to employ five unit employees up through the week beginning 6 November except for 1 week in October when it employed seven. From 13 November up until the week beginning 19 March 1986 the number of unit employees varied from four to six, after which the number of unit employees dropped to three or four up until 25 June 1986.

The records also reflect Charles Douda last worked for the Respondent during the week beginning 18 December and Louis Douda last worked the week beginning 19 February 1986. According to President Braunstein, Joseph Prusein is also no longer working for the Respondent while Lancelot Brotherson is still employed there.

Respondent's attorney, Israel, in a letter to the Regional Office dated 18 September regarding the Respondent's position on the charge in the instant case stated as follows:

> As previously advised, we have absolutely no reason to believe that Local 455, in fact, represented the employees of the above-named company in August 1985. In *none* of the numerous bargaining sessions commencing in 1982, was a member of the bargaining unit present. Inquiries addressed to the Union on this point have been responded to with such comments as "the men don't have to be here" or "we represent the people" or "that is not a matter for your concern."
>
> While the Union is correct in asserting that no law requires the presence of bargaining unit members at negotiation sessions, it is nevertheless apparent to any objective observer that the Union has no contact with the employees, the employees do not regard the Union as their representative and most significantly the employees have not had any participation (or even say in the bargaining process). The Company even doubts that they know anything about the bargaining.
>
> Surely, at this point, the Region must realize that the Company has a good faith doubt of representation status. In light of the fact that this Company was not one which signed with Local 810 I.B.T. and has at the Administrative Law Judge level been absolved of the surface bargaining charges, the new charges should be dismissed.

Union President Colavito denied Attorney Israel ever informed him to the effect that because Respondent's employees were not present at the negotiating sessions it proved they did not want the Union.

The strike by the Union against the Respondent began on 1 July 1975. According to both Respondent's president, Braunstein, and Union President Colavito the last

[6] Louis Douda denied remembering whether he discussed the Union with President Braunstein after she took over the Company.

[7] Charles Douda did not testify.

[8] Although the General Counsel on rebuttal contended for the first time that Louis Douda was a supervisor under the Act, an earlier stipulation entered into by her at the hearing, which I find is binding, places him in the unit. Moreover, Douda stated he was a working foreman and "working foremen" were included in the unit.

time picketing actually occurred at Respondent's premises was 5 or 6 years ago.

D. *Analysis and Conclusions*

The General Counsel contends the Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully withdrawing recognition of and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees. The Respondent denies having violated the Act and asserts as an affirmative defense the Union is not the representative for purposes of collective bargaining of the unit employees. It argues in its brief that the evidence supports both a finding of a loss of majority status as well as a good-faith objectively based doubt of majority status.

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act. Section 8(a)(5) of the Act prohibits an employer from refusing to bargain collectively with the representative of its employees. The findings supra establish the Union represented Respondent's unit employees and had a collective-bargaining agreement covering them which had expired. On 30 September 1980 the Board issued its decision, enforced by the court on 7 June 1982, in which it found Respondent had violated the Act by unlawfully refusing to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees and ordered it to recognize and bargain with the Union as the exclusive collective-bargaining representative of its unit employees. The Board also rejected a finding that the Respondent had a rationally grounded belief the Union no longer represented the unit employees. Thereafter, the Respondent and the Union entered into negotiations for a new collective-bargaining agreement. These negotiations were unsuccessful. However, on 20 March the Board issued its Order adopting an administrative law judge's decision finding the Respondent during those negotiations violated the Act by refusing to bargain with the Union by unlawfully granting wage increases to the unit employees without consulting or bargaining with the Union. An allegation the Respondent also engaged in bad-faith bargaining was dismissed. It ordered the Respondent to cease and desist from such unlawful conduct and ordered that if the Respondent and the Union resumed negotiations the Respondent was to notify the Union as to all proposed wage increases to the unit employees and not to implement such wage increases absent an impasse in negotiations or consent by the Union. Although about 29 March, shortly after the Board's Order issued, the Union requested a bargaining meeting with the Respondent, but the Respondent did not respond as it had promised to do. Upon the Union renewing its bargaining request on 24 July the Respondent, by a letter dated 8 August, denied this request claiming it would be both inappropriate and unlawful. Its reasons contained in the letter were the Board's recent Order; the fact all prior offers made by the Respondent had been rejected, were no longer applicable, and had been revoked; and that the Respondent did not believe the Union currently represented the unit employees. Respondent in its 18 September response to the charge in the instant case claimed the Union did not represent the employees by asserting no employees were present at the negotiation sessions and claimed the Union had no contact with the employees, employees did not regard the Union as their representative, and the employees did not have any say in the bargaining process and it doubted the employees knew anything about the bargaining.

Respondent's president, Braunstein, who made the decision not to bargain with the Union, based her decision on statements made to her by Louis Douda that he felt no loyalty to the union and wanted no part of the union and was not interested, and statements made by Charles Douda that he was not interested in becoming or being a member of the union. Braunstein placed these statements as ongoing discussions with the Doudas since the beginning of the strike which was in July 1975.

When the Respondent questioned the Union's majority status on 8 August it employed four unit employees including Louis and Charles Douda. However, on 26 August it hired an additional employee, and its work force, which consisted of seven unit employees during the time of the initial Board Decision referred to above, varied in number from three to seven unit employees during 1985.

A union enjoys a rebuttable presumption of majority status upon the expiration of a collective-bargaining agreement. However, an employer who refuses to bargain with an incumbent union may rebut the presumption of majority status by establishing either (1) that at the time of the refusal to bargain the union in fact did not enjoy majority status, or (2) that the refusal was predicated on a good-faith and reasonably grounded doubt supported by objective considerations of the union's majority status. *Burger Pits, Inc.*, 273 NLRB 1001 (1984), enfd. 785 F.2d 796 (9th Cir. 1986). An employer may not question a union's majority status in the context of certain types of unfair labor practices. *Colonial Manor Convalescent & Nursing Center*, 188 NLRB 861 (1971). The principles applicable to those cases are set forth in *Celanese Corp. of America*, 95 NLRB 664, 673 (1951), as follows:

> And, secondly, the majority issue must *not* have been raised by the employer in the context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union.

Both the Board's decision and its most recent Order recognized the Union, which also enjoyed a presumption of majority status, as the collective-bargaining representative of Respondent's unit employees. The evidence presented here fails to show that at the time of Respondent's admitted refusal to recognize and bargain with the Union that the Union did not enjoy majority status or that Respondent's refusal was predicated on a good-faith and reasonably grounded doubt of the Union's majority status supported by objective considerations.

President Braunstein in questioning the Union's majority status relied on statements made by only two unit em-

ployees out of a work force that fluctuated between three and seven unit employees. One of those two employees only stated he was not interested in becoming or being a member of the Union. The Board has held that such statements by employees about their not wanting to join the union fail to distinguish between wanting to be a union member and desiring to have union representation. *Club Cal-Neva*, 231 NLRB 22, 24 (1977), enfd. 604 F.2d 606 (9th Cir. 1979). Thus, such statement cannot be relied on to support a good-faith and reasonably grounded doubt of the Union's majority status. Moreover, President Braunstein placed such statements as occurring since the beginning of the strike in July 1975, which would have included the period of the prior unfair labor practices found against the Respondent. As they were raised during and in the context of unfair labor practices and were of a nature sufficient to cause disaffection from or to undermine the Union, the Respondent cannot now rely on such statements to support its doubt of the Union's majority status. Insofar as the Respondent also hired new unit employees, they are presumed to support the Union in the same ratio as those employees whom they replaced. *W & W Steel Co.*, 232 NLRB 74, 75 (1977), enf. denied on other grounds 599 F.2d 934 (10th Cir. 1979).

The other reasons advanced by the Respondent for refusing to recognize and bargain with the Union also lack merit. The fact the Respondent was absolved of bad-faith bargaining in the most recent Decision adopted by the Board and the Union had rejected Respondent's prior contract offers would not relieve the Respondent of its legal obligation to continue to recognize and bargain with the Union. The claim no employees were present at the negotiation sessions showed the Union did not represent them is rejected. The general rule is the parties have the right to select their own representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party. *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980), enfd. 670 F.2d 663 (6th Cir. 1982). The Respondent's further assertion the Union had no contact with the employees and the employees did not regard the Union as their representative is unsupported by any probative evidence.

For those reasons stated I am persuaded and find the Respondent about 8 August unlawfully withdrew recognition of and refused to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees and thereby violated Section 8(a)(5) and (1) of the Act.

Additionally, even assuming the Union had lost its majority status I would find under the circumstances presented here the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees. The law is well settled that in cases involving certifications, Board orders, and settlement agreements the parties must be afforded a reasonable time to bargain. *Brennan's Cadillac, Inc.*, 231 NLRB 225, 226 (1977). Here the withdraw of recognition occurred without any bargaining although requested by the Union, only shortly after the Board had issued its Order adopting the administrative law judge's decision finding the Respondent had violated the Act by refusing to bargain with the Union by unlawfully granting wage increases to employees during the course of collective-bargaining negotiations and ordered that in the event negotiations resumed the Respondent shall notify the Union as to all proposed wage increases and not implement them absent an impasse in negotiations or consent by the Union. To now permit the Respondent to question the Union's majority status without first affording the Union a reasonable time to bargain would violate those principles of law and render the effect of the most recent Board's Order against the Respondent a nullity.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Achilles Construction Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of the Respondent, including plant clerical employees, employed at its plant, exclusive of office clerical employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union at all times material herein has been, and is now, the exclusive representative of all the employees in the above-described appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from the Union about 8 August 1985 and thereafter refusing to recognize and bargain with the Union as the exclusive bargaining representative of its unit employees, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

To remedy the Respondent's unlawful withdrawal of recognition and its refusal to recognize and bargain with

the Union, I shall recommend that the Respondent recognize the Union and, on request, bargain collectively with the Union as the exclusive representative of all the employees in the aforesaid appropriate unit and, if an understanding is reached, embody such understanding in a signed written agreement.

The General Counsel's request that the remedial order include a visitatorial clause authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure to enable it to monitor compliance with the Board's Order as enforced by the court of appeals is rejected on the grounds the Board does not provide for discovery procedures in its proceedings and there is no showing that under the circumstances presented here such a clause is necessary.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Achilles Construction Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition of and refusing to recognize and bargain collectively with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO as the exclusive representative of its employees in the following appropriate unit concerning wages, hours, and other terms and conditions of employment.

> All production and maintenance employees of the Respondent, including plant clerical employees, employed at its plant, exclusive of office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO as the exclusive representative of the employees in the above-described appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the terms of such understanding in a signed written agreement.

(b) Post at its facility located in Brooklyn, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is hereby dismissed insofar as it alleges unfair labor practices not specifically found herein.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition of and refuse to recognize and bargain collectively with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO as the exclusive bargaining representative of our employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL recognize and, on request, bargain with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, as the exclusive representative of our employees in the appropriate unit described below with respect to wages, hours, and other terms and conditions of employment and if an understanding is reached, embody such understanding in a signed written agreement. The appropriate unit is:

> All production and maintenance employees of the Respondent, including plant clerical employees, employed at its plant, exclusive of office clerical employees, guards and supervisors as defined in the Act.

ACHILLES CONSTRUCTION CO., INC.

Better Building Supply Corp., and Evergreen Roofing, Inc., its alter ego and Gerald R. Mylan and Verna A. Mylan, d/b/a Besco Coatings and Besco Roofing and Coating, Inc. and Besco Roofing, Inc. ***and*** **Local 54 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO.** Cases 19-CA-11908 and 19-CA-12035

26 February 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 15 September 1986 Administrative Law Judge George Christensen issued the attached supplemental decision. One of the Respondents, Besco Roofing, Inc., filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Better Building Supply Corp. and its alter egos, Evergreen Roofing, Inc. and Besco Roofing, Inc., Seattle, Washington, their officers, agents, successors, and assigns, shall pay to the 69 individuals the sums listed in the appendix attached to the judge's decision, with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977), less applicable withholding taxes to be remitted to the appropriate authorities.

[1] In adopting the judge's finding that Respondent Besco Roofing, Inc. (BRI) is an alter ego of Better Building Supply Corp. (BBSC) and its first alter ego, Evergreen Roofing, Inc. (ERI), Chairman Dotson relies on all the factors discussed by the judge, including his finding that BRI was established to avoid making whole the 69 employees who suffered financial losses as a result of the unfair labor practices of BBSC and ERI.

Catherine Roth, Esq., for the General Counsel.
Pat Gilliland, of Seattle, Washington, for Local 54.
Judd H. Lees, Esq. (Williams, Lanza, Kastner & Gibbs), of Bellevue, Washington, for Besco Roofing, Inc.

SUPPLEMENTAL DECISION

GEORGE CHRISTENSEN, Administrative Law Judge. On 25 March 1986 I conducted a hearing at Seattle, Washington, to try issues raised by a backpay specification issued on 25 April 1985 following the enforcement by the United States Court of Appeals for the Ninth Circuit on 10 May 1983 of a Decision and Order issued by the National Labor Relations Board (Board) on 3 December 1981 directing Evergreen Roofing, Inc. (ERI), as the alter ego of Better Building Supply Corp. (BBSC), to compensate employees who suffered wage and benefit losses by virtue of unfair labor practices committed by the common management of BBSC/ERI.

The Board and the court adopted Administrative Law Judge Pannier's findings and conclusions that: BBSC and ERI were family corporations controlled by Gerald Mylan; BBSC was party to a collective-bargaining agreement covering the wages, benefits, etc., of certain of its employees; after a dispute with two benefits funds over BBSC's failure to make payments required under the agreement on behalf of BBSC employees covered by the agreement and during the term of the agreement, Mylan ceased doing business under the BBSC name, activated ERI, and under the ERI name continued doing business (roofing) at the same location, using the same equipment, processes, and the same managers, supervisors and many of the same employees he utilized to conduct business under the BBSC name and serving the same customer area, but without recognizing Local 54 as the collective-bargaining representative of the employees or complying with the terms of the unexpired BBSC-Local 54 agreement; BBSC and ERI were alter egos within the meaning and application of the National Labor Relations Act (the Act); the conduct just set forth violated the Act; and ordered BBSC/ERI to make whole those employees who suffered wage and benefit losses by virtue of that conduct.

The General Counsel has determined 69 employees were affected by the violations; listed in the backpay specification opposite their names the amounts due to each of the 69 to make them whole under the headings "wages" and "benefits"; and requested the entry of a Board order directing Besco Roofing, Inc. (BRI), as the latest BBSC alter ego created and controlled by Mylan,[1] to pay the sums listed opposite the names of the 69, plus interest, less applicable withholding taxes.

BRI admitted the General Counsel's wage and benefit determinations are correct but contends BRI cannot be required to remedy the unfair labor practices committed by Mylan while he was operating under his previous corporate identities because BRI is not an alter ego thereof and, in any event, any obligation owed to the 69 employ-

[1] The parties stipulated after Mylan ceased to operate in the Seattle area under the corporate names of BBSC and ERI, he resumed operations under the corporate name Besco Roofing & Coating, Inc. (BRCI) and the name (as an individual, along with his wife) as Besco Coating (BC); ceased to operate under those names; resumed operations under the BRI corporate name; BBSC, ERI, and BRCI are in Chapter 11 bankruptcy and have no assets; the dischargeable debts of BC have been extinguished in a Chapter 7 bankruptcy; and that Mylan is currently operating under the BRI corporate name.

ees was extinguished by the 1984 court order discharging BC's debts.

The issues are: (1) whether BRI is BBSC's latest alter ego and, if so, (2) whether the bankruptcy court order discharging BC's debts prevents Board entry of an order directing BRI to make the 69 employees whole for the wage and benefits losses they suffered by virtue of the unfair labor practices Mylan committed while operating under his earlier corporate identities.

Findings were entered in the original proceeding to the effect: BBSC was engaged in business as a roofing contractor in the Seattle, Washington area from offices and facilities located at 3116 N.E. 133d; Gerald Mylan owned 51 percent of its stock, his wife, Verna, owned 10 percent, and his son, Gerald Mylan Jr. (Mylan Junior), owned the remaining 40 percent; Mylan and salesmen employed on a commission basis solicited customers for the work of installing new roofs and the repair or replacement of existing roofs (on both residential and commercial structures); Mylan, Mylan Junior, and other BBSC supervisors assigned crews (applicators) to perform the jobs secured by Mylan and the sales force; BBSC supplied vehicles,[2] materials, and equipment; Mylan (and his designees) collected moneys due, ordered and paid for all materials, equipment, supplies, labor, services, etc., and issued guarantees of the work; and Mylan exercised overall direction and control of the business.

Findings were also entered in the original decision: ERI was owned by the Mylan family in the same proportions as BBSC; controlled by Mylan; conducted the same business from the same location serving the same market,[3] utilized the same vehicles, materials, equipment, and methods employed by BBSC, but, in an effort to circumvent any claim by Local 54 to continue representation of its employees, characterized the individuals who directed and performed the work, as well as the salesman, "independent contractors" and employees of the alleged "independent contractors."

Mylan commenced his operations under the BRI corporate identity at the same location from which he operated BBSC, ERI, BRCI, and BC-3116 N.E. 133d, Seattle;[4] Mylan and his wife own 100 percent of the (unissued) stock; Mylan and commission-paid salesmen solicit prospects in the Seattle area for performance of the work of repairing or removing and replacing existing roofs, primarily on commercial structures; Mylan has the same "independent contractors" (and their alleged employees) perform the work he or his salesmen secure; to perform the work Mylan provides the applicators with a vehicle he built by cannibalizing two of the vehicles he owned and operated under his previous identities, still carrying the BeScO logo, plus necessary materials and equipment; the work is performed in the same manner it was performed by the previous entities controlled by Mylan; Mylan exercises overall control over terms for performance of the work, collection of receipts, disbursement of costs and expenses, issuance of guarantees, etc. (in the BRI name).

The Board (and reviewing courts of appeals) repeatedly have ruled an employer, whether operating as an individual or a corporate entity, for purposes of the Act will be considered the alter ego of another and responsible for remedying the unfair labor practices of the latter when the two were in substantially the same business under substantially the same ownership, control, and management, utilizing the same operational methods and equipment, and producing the same product for the same market or customer area.[5]

Mylan owned and owns a majority of the stock in BBSC and BRI; he was in overall control of BBSC and is in overall control of BRI; he was engaged in the roofing business in the Seattle area as BBSC and is engaged in the roofing business in the Seattle area as BRI; both BBSC in the past and BRI in the present used and use the same vehicle(s), materials, equipment, mode of operation to serve the same customer market utilizing some of the same personnel (and, certainly, personnel exercising the same skills and functions).

This identity readily supports a finding BRI is BBSC's current alter ego.

BRI contends it is not BBSC's latest alter ego because: (1) while Mylan and his wife own all of BRI's stock, Mylan Junior owned 40 percent of BBSC's stock; (2) since he commenced operations as BRI, Mylan has limited his structures in the Seattle area while Mylan, when operating as BBSC, worked on commercial and residential structures and, while operating as ERI, continued that broader line of work and expanded his operations to include the Portland, Oregon, and Littleton, Colorado areas; (3) Mylan Junior allegedly has continuously operated under the ERI name in the Portland area and (recently) expanded operations to compete with Mylan in the Seattle area; (4) while Mylan solely manages BRI, he shared management functions with Mylan Junior and Chuck Gordon while operating as BBSC; (5) as BRI, Mylan does not conduct operations from the same facili-

[2] While operating under the corporate names BBSC and ERI, Mylan used both a hot and a cold process in completing built-up roofs composed of alternating layers of material and either hot or cold applications; as he acquired tractor/tank-trailer rigs necessary for the cold applications, he phased out the use of equipment and materials for hot applications; the tractor/tank-trailers all carried the logo "BeScO."

[3] While operating under the ERI name, the business was expanded to the solicitation and performance of jobs in Portland, Oregon, and a city in Colorado, as well as Seattle.

[4] Forced to vacate those premises by foreclosure action, Mylan purchased land and buildings at 233 S. Holden Street, Seattle (in early 1985), and continued the same business from that address.

[5] *Commissary of Great Race Pizza Shoppes*, 277 NLRB 1175 (1985); *Rogers Cleaning Contractors*, 277 NLRB 482 (1985); *Edward Cooper Painting*, 273 NLRB 1870 (1985); *Watt Electric Co.*, 273 NLRB 655 (1984); *Advance Electric*, 268 NLRB 1001 (1984); *E. G. Sprinkler Corp.*, 268 NLRB 1241 (1984), enfd. 741 F.2d 10 (2d Cir. 1984); *William B. Allen*, 267 NLRB 700 (1983), enfd. 758 F.2d 1145 (6th Cir. 1985); *All Kind Quilting, Inc.*, 266 NLRB 1186 (1983); *Campbell Harris Electric*, 263 NLRB 1143 (1982), enfd. 719 F.2d 292 (8th Cir. 1983); *Custom Mfg. Co.*, 259 NLRB 614 (1981); *Whitehall Packing Co.*, 257 NLRB 193 (1981); *S. L. Industries*, 252 NLRB 1058 (1980); *J. M. Tanaka Construction*, 249 NLRB 238 (1980), enfd. 675 F.2d 1029 (9th Cir. 1982); *Southeastern Envelope Co.*, 246 NLRB 423 (1979); *Nelson Electric*, 241 NLRB 545 (1979), enfd. 638 F.2d 965 (6th Cir. 1981); *Patino, Victor & Nydia*, 241 NLRB 774 (1979); *Crawford Door Sales*, 226 NLRB 1144 (1976). Also see *Hot Bagels & Donuts of Staten Island*, 244 NLRB 129 (1979), enfd. 622 F.2d 1113 (2d Cir. 1980); *Asbestos Workers Local 53 Pension Fund v. Insul-Contractors*, 115 LRRM 2442 (D.C. La); and *Crest Tankers v. Maritime Union*, 605 F.Supp. 1270 (Mo. 1985), enfd. 122 LRRM 3237 (8th Cir. 1986).

ties he utilized while operating as BBSC; (6) Mylan as BRI conducts his operations with one tractor/tank-trailer and three trucks with title ownership of all four in the name of BRI while he operated as BBSC with six tractor/tank-trailers with title held in the BBSC name and the same three trucks, then leased under the BBSC name; (7) while operating as BBSC, Mylan employed six applicator crews and five salesmen, while as BRI he employs one applicator crew and an undesignated number of salesmen; (8) as BRI, he does not employ the same personnel he employed while operating as BBSC; (9) since commencing operations as BRI, Mylan has used the cold application process exclusively, while he used both the hot and cold application processes while operating as BBSC; (10) BRI did not complete any BBSC contract and is not performing work for the same customers as BBSC; and (11) the General Counsel failed to establish Mylan commenced operations as BRI to avoid making whole the 69 employees who lost wages and benefits as a result of the unfair labor practices he committed while operating as BBSC/ERI.

With respect to (1), the Board and the courts repeatedly have held that changes in the proportional ownership of a family corporation are irrelevant when the same individual has the controlling interest, as here.[6]

As to (2), a reduction in the scope of operations has likewise been held ineffective, i.e., when the alter ego conducts far less business, a portion of the former business, serves a smaller market, etc.[7]

With respect to (3), Mylan is caught in a seeming contradiction; Mylan testified Mylan Junior has continuously engaged in the roofing business under the ERI name since shortly after BBSC was deactivated and ERI was activated in its stead, in the Portland area; stipulated ERI is without assets and in Chapter 11 bankruptcy; testified while operating as ERI, he sold the equipment, assets, etc. he utilized in doing business as ERI *in Portland* to Mylan Junior prior to ERI's demise; and Mylan Junior currently competes against him for business in the Seattle area. The only reasonable inferences to be drawn from the foregoing are either: Mylan and Mylan Junior created a seperate entity in Portland to forestall claims against that portion of their assets held in the ERI name or the two parted ways and Mylan Junior purchased that portion of the equipment and business used to conduct the Portland operations and has since operated as sole owner of a separate entity from ERI. The latter inference is supported by the fact that the Mylans in their listing under the heading of "Lawsuits" attached to their Section 7 bankruptcy filing list the case of *Evergreen Roofing of Oregon, Inc.* and *Jay Mylan v. Besco Roofing & Coatings*, Circuit Court of Multnomah County, Oregon No. A8304–02310. In any event, I find and conclude whether or not ERI continues to exist and function, the Board is not precluded from seeking derivative liability for Mylan's unfair labor practices in one or more of his prior identities from his latest alter ego, BRI.

Turning to (4), the same principles as those controlling (2) are applicable; due to the reduced scale of his operations as BRI, Mylan necessarily employs fewer managers; this has no bearing on the issue of whether his majority ownership, control, and direction of two corporations engaged in the same business in the same area using the same equipment and methods, warrants a holding the later-created corporation is the alter ego of the earlier-created corporation.

Next, (5), I have entered findings Mylan commenced business as BRI at the same premises he conducted business under the BBSC and ERI names; the fact he was forced to later move his operations due to bank foreclosure to a new location has no bearing on the determination just stated.[8]

The short answer to (6) and (7) is that they are governed by the same principles set out in (2), i.e., Mylan's reduced operations as BRI of course do not necessitate ownership of the same number of vehicles or personnel he required to conduct his much larger business as BBSC and the fact he leased the three trucks as BBSC which he now owns as BRI are irrelevant to the alter ego issue.

As to (8), Mylan's reduced operations as BRI of course means a reduced staff and it is significant as part of that reduced staff Mylan employs the same crew chief he employed as BBSC to man his remaining tractor/-tank-trailer and direct his single crew (Chris Romel), the same repair specialist he employed as BBSC (Eric Youmans) and the same individual he employed as BBSC to assemble and mix materials, dispatch trucks, etc. (Ron Richart). Mylan's failure as BRI to employ the same individuals as applicators and salesmen as he employed as BBSC is readily explained by the fact he terminated the former during his various identity changes and the latter left as his business declined; this has no relevance to the alter ego issue, so long as it is established Mylan's latest creation, BRI, may be classified as BBSC's latest alter ego by Virtue of the fact it is owned, controlled, and managed by Mylan to conduct the same business serving the same customer base using the same equipment and mode of operation and employing persons exercising the same functions and skills.

Turning to (9), findings were entered by Judge Panniet in the original case Mylan as BBSC/ERI was phasing out his use of hot applications as he built or acquired tractor/tank-trailers; the fact he was still performing some jobs using hot appications is thus irrelevant, since it is undisputed Mylan completed his changeover to the cold application process between the time he ceased to operate as BBSC and commenced operations as BRI.

Concerning (10), of course, Mylan did not complete any jobs as BRI he contracted for as BBSC, since he had ample opportunity to do so in his numerous identities prior to his creation of BRI and it goes without saying as BRI he would not be removing and replacing the same roofs he removed and replaced as BBSC (or repairing them, unless earlier guarantees applied). The only relevant inquiry is whether as BRI he is serving the same class of customers in the same area or market he served

[6] *Rogers Cleaning Contractors, Edward Cooper Painting, Advance Electric, E. G. Sprinkler, Campbell Harris Electric, Crawford Door Sales*, ibid.

[7] *William B. Allen, All Kind Quilting, Customer Mfg., Whitehall Packing, J. M. Tanaka Construction, Crest Tankers*, ibid.

[8] *Custom Mfg.*, ibid.

as BBSC. The answer to that inquiry is positive, for as BRI he solicits and performs work he solicited and performed as BBSC—the repair, removal, and replacement of existing roofs on commercial structures.

As to (11), the Board and most reviewing courts have held proof a wrongdoer has created an alter ego to escape liabilities imposed for violations of the Act is only one of the criteria to be scrutinized in determining whether to impose derivative liability to remedy the violation, and is not determinative.[9]

In this case it is clear Mylan held the controlling ownership interest and exercised management control (including control of management labor relations) over a succession of entities starting with BBSC and ending (currently) with BRI doing business as a roofing contractor in the Seattle area employing the same methods, equipment, materials, supplies, supervision, and workers serving the same class of customers in the same area; i.e., Mylan has been "the common strand, linchpin, principal, operator, and guiding star of the business, as well as each of the 'enterprises' in question."[10] BRI easily satifies the criteria applied by the Board and reviewing courts in a determination of whether or not BRI is BBSC's latest alter ego,[11] i.e., I have determined BBSC and BRI were and are owned and controlled by Mylan, they were and are engaged in the same business (roofing) under the same dominant manager (Mylan), operating with the same vehicles and equipment using the same operational methods, and employees exercising the same skills (in some cases, the same individuals) to serve the same class of customers in the same area; in such cases the Board and reviewing courts have held the current alter ego entity (Mylan, as BRI) derivatively liable for the Act violations committed by the earlier entity (Mylan, as BBSC), whether or not it has been established the alter ego was created to avoid such derivative liability.[12] Even assuming it is incumbent on the Board to find Mylan established BRI to avoid making whole the 69 employees who suffered financial losses due to Mylan's attempted evasion (as BBSC and ERI) of the BBSC-Local 54 agreement, as the court in the *Asbetos Workers Local 54 Pension Fund* case, cited above, stated: "We cannot permit them (the defendants) to evade obligations to the plaintiff's by setting up what appears to be a new company, but is in reality a continuation of the old ones." 115 LRRM 2445. The history of Mylan's successive creations and dissolutions, culminating in his latest creation (BCI), demonstrates an intent to avoid satisfying his obligations to his creditors, including the 69 employees who suffered financial losses due to his manipulations under former identities, and I so find and conclude.

I therefore further find and conclude BRI is BBSC's latest alter ego derivatively liable for the moneys due the 69 former BBSC/ERI employees set forth in the specification.

Next addressing the bankruptcy issue, it was established that in July 1983 Gerald and Verna Mylan, as individuals doing business under the name Besco Coating, filed a petition under Chapter 7 of the Bankruptcy Code asserting they ceased doing business under that name in May 1983 and seeking release from the claims of creditors on the ground their liabilities exceeded their assets. The Mylans attached schedules to the petition listing the secured and unsecured debts they sought released. Under the scheduled headed "Lawsuits" the Mylans listed the case of *NLRB v. Better Building Supply Corp.*, No. 82-7199 (9th Cir.).[13] In January 1984, Bankruptcy Judge Kenneth S. Treadwell ordered the petitioners be "released from all *dischargeable* debts" and ruled "any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the *personal liability* of the debtor with respect to . . . *debts dischargeable under 11 U.S.C. 523.*" [Emphasis added.]

BRI contends that Order bars the Board, on behalf of the 69 employees who suffered monetary losses as a result of Mylan's unfair labor practices as BBSC/ERI, from seeking reimbursement of those losses from BRI.

The first negative to this contention arises from the fact the bankruptcy was a personal (Chapter 7) bankruptcy of the Mylans as individuals while the Board Order pending before the Ninth Circuit case involved BBSC and ERI as corporate entities and they were in Chapter 11 bankruptcy at that time (the parties so stipulated). On those facts, it appears the Ninth Circuit case was listed improperly, in the wrong proceeding.

Second, it has been established a corporate obligation may not be discharged by a personal bankruptcy petition.[14]

And in any event, the Board and reviewing courts have ruled the Board has sole authority to determine and enforce backpay awards to remedy violations of the Act,[15] irrespective of whether there was a hiatus between the time a wrongdoer ceased operations due to bankruptcy and the time he resumed operation under another identity.[16]

As the Board stated in the *International Technical Products* case, "To find otherwise would . . . be tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its

[9] *Allcoast Transfer*, 271 NLRB 1374 (1984), affd. 780 F.2d 576 (6th Cir. 1986); *E. G. Sprinkler Corp.*, ibid.; *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), affd. 725 F.2d 1416 (D.C. Cir. 1984); *J. M. Tanaka Construction* supra; *Trico Products*, 239 NLRB 65 (1978), affd. 636 F.2d 266 (10th Cir. 1980); *Nelson Electric*, supra; *Crawford Door Sales*, supra.

[10] *William B. Allen*, 267 NLRB 700, 705-706 (1983), quoted with approval by the Sixth Circuit, 758 F.2d 1145 (1985).

[11] See the cases cited in fn. 5 above.

[12] As the Second Circuit stated in the *E. G. Sprinkler* case cited above, "here the record bears very substantial evidence that EG and GPP (EG's alter ego) shared substantially identical management, supervision, customers, ownership and business purpose. The argument that the Board must find anti-union animus or an intent to evade union obligations before it can impose alter ego status is unpersuasive. The cases . . . show that anti-union animus *may be* 'germane' . . . or even a sufficient basis for imposing alter ego status . . . *they do not establish that anti-union motivation is necessary.*" 741 F.2d 10, 12. [Emphasis and material in parentheses added.] Also see *Hot Bagels & Donuts of Staten Island*, supra.

[13] BBSC/ERI's appeal from and the Board's cross-petition for enforcement of the Board's original Order in this case was pending before the Ninth Circuit at that time.

[14] Bankruptcy code sec. 727(a)(1).

[15] *International Technical Products Corp.*, 249 NLRB 1301 (1980), and cases cited; also see Secs. 10 and 15 of the Act.

[16] See cases cited in fn. 5.

authority . . . to proceed against a successor employer in furtherance of that obligation." 249 NLRB at 1303.

On the basis of the foregoing, I reject BRI's position that the Board is barred from entering an order directing that BRI as BBSC's latest alter ego make whole the 69 individuals named in the backpay specification for their losses caused by Mylan's manipulations as BBSC and ERI.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Better Building Supply Corp. and its alter egos Evergreen Roofing, Inc. and Besco Roofing, Inc., Seattle, Washington, their officers, agents, successors, and assigns, shall pay to the 69 individuals listed on the attached appendix the sums listed opposite each name under the headings "Wages" and "Benefits," plus interest on the sums due calculated in the manner set out in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and computed in accordance with the formula set out in *Florida Steel Corp.*, 231 NLRB 651 (1977) (also see *Isis Plumbing Co.*, 138 NLRB 716 (1962)), less applicable withholding taxes, to be remitted to the appropriate authorities.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX A

Employee	*Wages*	*Benefits*	*Total*
James Allen	$0.00	$98.00	$98.00
John Allen	23.04	230.31	253.35
Scott Bander	4.70	499.41	574.11
William Baxter	191.10	91.14	282.24
Bruce Beidliman	0.00	13.02	13.02
Don Bigelow	790.88	2977.64	3768.52
Daniel Bowers	1834.38	1634.65	3469.03
Terry Bucke	234.00	90.48	324.48
Robert Buhl	49.92	47.04	96.96
James Burg	491.04	91.15	582.19
Walter Campbell	0.00	35.28	35.28
Michael Christopherson	72.96	55.87	128.83
Douglas Coughtry	21.00	52.08	73.08
Jack Creswell	16.15	15.81	31.96
Thurston DeLano	74.25	246.45	320.70
Fred G. Dibble	1110.22	3405.09	4515.31
Dennis Ellis	499.59	356.74	856.33
William M. Evans	10.80	22.32	33.12
Eugene Fisher	0.00	397.88	397.88
Fred Fowler	141.36	60.76	202.12
Albert Gagnon	0.00	26.97	26.97
Greg Galcotti	249.16	119.56	368.72
James Genson	0.00	648.16	648.16
William Givler	0.00	0.00	0.00
Craig Golab	0.00	79.98	79.98
Alex Guillen	333.30	552.44	885.74
Mark Hammond	0.00	44.64	44.64
Dan Harrelson	0.00	0.00	0.00
Glen Harris	98.58	543.12	641.70
Todd Holein	130.65	277.15	407.80
Ron Howard	18.24	7.84	26.08
Scott Ingrahm	256.75	103.53	360.28
Richard Johnson	15.36	11.76	27.12
Kenneth Keith	111.30	2514.85	2626.15
Mark Kohovtek	76.80	58.80	135.60

APPENDIX A—Continued

Employee	*Wages*	*Benefits*	*Total*
Joe Lartz	828.51	1179.56	2008.07
Rob Lartz	510.81	957.63	1468.44
William Lindgren	0.00	2655.20	2655.20
Ron Loghry	77.05	45.57	122.62
Matthew Luke	0.00	304.12	304.12
Patrick C. Manus, Jr.	349.44	358.55	707.99
Richard Marshall	0.00	108.79	108.79
Blake McKinnon	85.00	2066.63	2151.63
Donald Mylan	353.70	730.99	1084.69
Walter Noshi	0.00	412.58	412.58
Timothy Pearson	11.20	14.88	26.08
Lonnie Plecher	1254.64	1193.99	2448.63
John Poffenroth	150.15	71.61	221.76
John Price	0.00	63.70	63.70
Fred Rach	38.72	170.52	209.24
David Ray	325.85	126.69	452.54
Steve Romei	144.43	2685.96	2830.39
Richard Russell	48.13	64.13	112.26
Ray Sambana	11.15	699.37	710.52
Larry Schaefer	54.60	26.04	80.64
Tim Speckman	39.75	1121.82	1161.57
James Stallman	39.15	25.11	64.26
Lark M. Stebbins	0.00	92.08	92.08
Larry Stenstad	154.79	585.83	704.62
Bill Stolze	32.20	42.78	74.98
Don Waddell	139.50	230.64	370.14
James Wagner	546.05	742.84	1288.89
Tedd Webb	379.72	758.76	1138.48
Glen Widermoth	6.25	5.55	11.80
Brett Wilson	89.16	70.56	159.72
David Wilson	359.10	1012.79	1371.89
Douglas Witham	254.87	733.90	988.77
Jeff Witham	57.60	280.86	338.46
Eric Yormans	430.85	527.59	958.44

Great Lakes Oriental Products, Inc. *and* Production Workers Union of Chicago and Vicinity, Local 707. Case 13–CA–25165

26 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 5 June 1986 Administrative Law Judge Thomas D. Johnston issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs and they each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Great Lakes Oriental Products, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

For the reasons stated by the judge, we agree that there were no unlawful interrogations of employee Martinez. We also agree with the judge that the two instances in which Supervisor Garcia asked employee Santana Hernandez about the Union did not constitute violations of Sec. 8(a)(1) of the Act. Garcia's question about 15 June 1985 concerning whether employees had signed cards for the Union was asked in passing, while the two men were out in the packing area; and Garcia did not press Hernandez for an answer when Hernandez failed to respond. As a result of a previous conversation on the subject of the Union, initiated by employee Martinez, Garcia had already been informed, in the presence of several employees, that some employees had gone to the Union and had signed cards. Finally, this isolated inquiry to Hernandez, by a supervisor fairly low in the management hierarchy, was unaccompanied by any statements that would give it coercive overtones. In the second incident, Garcia merely asked Hernandez in late July, "What happened about the Union?"; since this inquiry was made soon after the election (which the Union won), it apparently did not concern anything more than the results of the election. Under all the circumstances, we agree with the judge that neither question would reasonably tend to coerce employees in the exercise of their Sec. 7 rights. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

In sec. III,B of his decision, the judge states that "Galaviz denied mentioning any names." The record reflects that "Galaviz" should be "Garcia." Similarly, in sec. III,E the judge states that "Fang stated Bustamante used one curse word . . . ." The record reflects that Garcia, and not Fang, testified as indicated. Finally, in sec. III,E the judge states that Fang had shown Bustamante how to cut the meat against the vein. "Vein" should be "grain." We correct these inadvertent errors.

Alan M. Kaplan, Esq., for the General Counsel.
Bennett L. Epstein, Esq. (Coffield, Ungaretti, Harris & Slavin), of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS D. JOHNSTON, Administrative Law Judge. This case was heard at Chicago, Illinois on 12 and 13 March 1986 pursuant to a first amended charge[1] filed by Production Workers Union of Chicago and Vicinity, Local 707 (the Union) on 16 July 1985[2] and a complaint issued on 30 December.

The complaint as amended at the hearing alleges Great Lakes Oriental Products, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees regarding their union membership, activities, and sympathies and those of other employees, and threatening an employee with suspension because he engaged in union and/or protected concerted activity;[3] and violated Section 8(a)(1) and (3) of the Act by disciplining and thereafter discharging and failing to reinstate its employees Jose Martinez and Rodolfo Bustamante because they joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such activities.

The Respondent in its answer dated 9 January 1986 and amended at the hearing denies having violated the Act as alleged. Although it also asserts as an affirmative defense in its answer that Jose Martinez and Rodolfo Bustamante failed to mitigate their damages, if any, this defense is rejected on the grounds it is not a valid defense to their discharges and, if raised as a defense to the amount, if any, of backpay which might be due them as a remedy for a violation found, the proper procedure requires that it be raised at the compliance stage of the proceeding.[4]

Another defense first raised during the hearing was that both Jose Martinez and Rodolfo Bustamante were supervisors under the Act and therefore they were not protected under the Act from suspension or discharge for engaging in union activities.

The issues involved are whether Jose Martinez and Rodolfo Bustamante were supervisors under the Act and whether the Respondent violated Section 8(a)(1) and (3) of the Act as alleged by unlawfully interrogating and threatening employees concerning the Union and discriminatorily suspending, discharging, and failing to reinstate Jose Martinez and Rodolfo Bustamante because of the Union.

[1] The original charge was filed on 1 July 1985.

[2] All dates referred to are in 1985 unless otherwise stated.

[3] The concerted activity referred to in the amended complaint as described by the General Counsel relates only to union activity.

[4] The Respondent's request for fees raised in its answer was rejected in a prehearing Order dated 6 February 1986 issued by Associate Chief Administrative Law Judge John M. Dyer.

On the entire record[5] in this case, from my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent,[6] I make the following[7]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a corporation with an office and place of business located at Chicago, Illinois, is engaged in the business of producing and selling wholesale various food products. During 1985, a representative period, the Respondent in the course of its operations derived gross revenues in excess of $50,000 and it sold and shipped products, goods, and materials valued in excess of $50,000 from its Chicago, Illinois facility directly to points located outside the State of Illinois.

The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Production Workers Union of Chicago and Vicinity, Local 707 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

The Respondent operates a facility located at Chicago, Illinois, where it is engaged in the production and sale of food products. Included among its officials and supervisory personnel were Manager John Dai, Production Supervisor Chris Fang, Supervisor Juan Garcia,[8] Assistant Manager Vicki An, and Vice President of Operations Simon Lin.

During June the Respondent employed approximately 20 employees, including the discriminatees, Jose Martinez and Rodolfo Bustamante. About the early part of June the Union began an organizing campaign among the Respondent's unrepresented employees. The first union meeting was held on 8 June. On Monday, 17 June, Union Business Agent Juan Galaviz, who had filed a representation petition with the Board the previous week seeking to represent the Respondent's employees, contacted Manager Dai by telephone and informed him he had met with some of the Respondent's employees and they wanted a union in the Company. Galaviz refused Dai's request for those employees' names. Although they agreed to meet the next day pursuant to Galaviz' request, Dai canceled the meeting the next day. Manager Dai stated he received the petition that same Monday, which he claimed was his first knowledge about the union organizing campaign.

An election was held on 26 July and the Union was thereafter certified as the collective-bargaining representative of the Respondent's employees.

This proceeding arose out of conduct occurring during that organizing campaign.

B. *The Supervisory Status of Jose Martinez and Rodolfo Bustamante*

The Respondent's facilities and operations as described by Manager Dai consists of four departments, including the warehouse, packaging, meatcutting, and appetizers departments. During the period in issue here three employees, including a helper and two drivers, worked in the warehouse department; six employees worked in the appetizers department; one employee worked in the packaging department; and four employees worked in the meatcutting department. Manager Dai was over the facility and directly under him were Production Supervisor Fang and Supervisor Garcia, who both reported directly to Dai. Garcia was primarily responsible for overseeing the distribution and warehousing while Fang was primarily responsible for production, quality control, sanitation, maintenance, and making out the work schedules. However, their responsibilities overlapped and they both were over all the production employees. Besides the employees there was also one captain employed in each of the departments, except for the appetizers department, which had two captains.

Jose Martinez worked in the warehouse department. His job was dispatching things for delivery and receiving things coming into the facility. He worked under Supervisor Garcia's supervision. Effective 27 May, Martinez' position was changed from plant helper to shift leader or captain.[9] However, his hourly rate of pay of $3.90 remained the same.

Besides Martinez, two drivers, Fernando and Francisco, and a helper, Pablo Adan, worked in the warehouse department. Adan did not work there every day.

Martinez' responsibilities as captain as described by Manager Dai were to make sure the correct products called for on the tickets were taken out of the freezer and were in good condition. Martinez was also responsible for the operation of his department. According to Dai, the captains possess various types of authority. They can suggest or recommend to the supervisor that an employee be disciplined and the supervisor would uniformly follow the captain's recommendation. The captains can also allow employees to go home but they usually first talk to the supervisor. Captains also have input on bonuses given to employees and if employees make mistakes the captain can suggest to the supervisor and the bonuses are not given. They also report to the supervisor on the employee's performance for bonus purposes. Dai stated the captains and the supervisors inform him when mistakes are made and deductions in the amount of the bonuses are made for such mistakes. When employees are 3 to 4 minutes late to work captains notify the supervisors and for serious problems the supervisors notify Dai.

---

[5] The General Counsel's unopposed motion dated 30 April 1986 to correct the transcript is granted.

[6] The Union did not submit a brief.

[7] Unless otherwise indicated the findings are based on the pleadings, admissions, stipulations, and undisputed evidence contained in the record, which I credit.

[8] These three persons were supervisors under the Act.

[9] Manager Dai claimed he made Martinez a captain to motivate him.

The captains, like other employees, are hourly paid, except for Rodolfo Bustamante; punch timeclocks; work the same hours; and are assigned lunch shifts.

Supervisor Garcia, who stated he examines the work of both the captains and the employees, testified Martinez had the authority to let the employees leave work if they were ill and to tell employees to leave if they seriously violated company rules. On granting raises and bonuses Garcia stated captains are conferred with and denied there was ever a time Martinez had recommended a bonus which the employee did not get. However, Garcia acknowledged Martinez never recommended Adan or the two drivers for bonuses or raises or accompanied Garcia to Dai's office to talk about raises for them. Under cross-examination Garcia admitted if Adan wanted to leave work early he, himself, would check with Adan to see if Adan's reason was legitimate. Garcia denied Martinez ever told him the two drivers wanted to leave early and denied remembering whether Martinez ever told him Adan wanted to leave early. Garcia also denied remembering whether Adan or the drivers ever got raises and denied they ever talked to him about it. Contrary to Dai's testimony, Garcia stated if Martinez wanted to send employees home for violating company rules, endangering the Company, or illness Martinez would have to check with him first and he, himself, would decide whether the rules were violated, the Company was endangered, or the employees were ill before the employees would be sent home. Garcia further acknowledged if he, himself, was going to send an employee home for disciplinary reasons he would generally check it out with Manager Dai. Supervisor Fang also said if there were problems with employees he would talk to the employees. Garcia acknowledged Martinez spent 100 percent of his time by the freezer doing the same work as Adan.

Martinez described his duties as captain were to do the job well, fill the orders properly when he filled them himself, and be responsible for his own mistakes. Martinez stated he was also responsible for telling Adan, who only worked in his department when needed, what to do, but denied he was responsible for Adan's errors or teaching him what to do. Martinez was also responsible for keeping the place clean, making sure the products were shipped out correctly, and making sure that the products which could thaw out were put into the freezer quickly.

Martinez denied he ever allowed Adan or the drivers to leave early, recommended that they get bonuses or be disciplined, or that he ever talked to Supervisor Garcia about them wanting to leave work early. Martinez stated the only time Garcia asked him about the performance of any other employee was in May when Garcia asked him how Adan was doing his job. On telling Garcia that Adan was helping him well and could learn fast and do a good job Garcia said to continue teaching him.

Martinez denied he was ever told he had the authority to hire, fire, discipline, or transfer employees. He also denied ever hiring employees or interviewing employees to be hired, reporting employees for being late to work, checking Adan's timecard, or having the authority to assign Adan to work overtime.

Rodolfo Bustamante worked in the meatcutting department where he sliced meat. On 12 October 1984 his position was changed from butcher to butcher team leader or captain and his $780 monthly salary was raised to $800. Bustamante, who was the most experienced meatcutter and had worked there longer than the other meatcutters, was the highest paid employee working in the meatcutting department.

Manager Dai described Bustamante's responsibilities as a captain were to make sure the meat was cut in the fashion specified and to make sure the job was done properly and none of the employees were fooling around. Bustamante also trained a lot of the new meatcutters hired. According to Dai, there was a 3-month probationary period for new employees and in several instances when the new meatcutters hired did not perform their work properly Bustamante would report that to the supervisors with recommendations which the supervisors reported to Dai. Dai stated on those occasions they followed Bustamante's recommendations. Dai also stated if an employee was not properly performing his job Bustamante was responsible for disciplining the employee. The supervisors would give Bustamante instructions about preparing the products to meet the customers' needs, whereupon Bustamante was responsible for getting the meatcutters to prepare it in that fashion.

On granting bonuses to the meatcutters, as explained by Dai, the Company had records showing how fast the employees worked and those figures were calculated by Supervisors Fang and Garcia. However, as far as the quality of their work was concerned, Dai stated the captain informed the supervisor about what the employees were doing wrong and this was deducted from the employees' bonuses. Dai stated they uniformly followed the captain's recommendations on reductions from the bonuses.

Dai first stated because the captain was the person actually involved in the operation he and the supervisors would take the captain's opinion a lot on raises. Dai then said if they wanted to give an employee a raise he would have Garcia check with the captain about the employee's performance to decide the amount of salary increase which he uniformly followed.

According to Dai, if an employee was not feeling well or had an emergency Bustamante had the right to let the employee leave but he had to let Garcia know the employee was not feeling well. To dismiss an employee Bustamante would have to talk to the supervisors, who would report it to Dai, who would then make the decision to discharge.

Dai denied Bustamante ever hired employees without permission although he suggested employees be hired. The hiring procedure was for Dai or Fang to interview employees with Dai making the decision. Dai stated he would follow suggestions in making his decisions and said he followed Bustamante's recommendations on hiring because Bustamante was very good at it and they were experienced meatcutters and Bustamante would give him valuable suggestions.

Although Dai stated Bustamante transferred employees out of the meatcutting department he acknowledged he

and Fang agreed with the decision. Dai also acknowledged he sometimes investigated himself to see what employees were doing to make sure Bustamante's suggestions were correct.

Supervisor Garcia also described Bustamante's duties, responsibilities, and authority. According to him, Bustamante spent all of his time in the meatcutting department doing the same work as the other meatcutters. Bustamante was responsible for seeing that the other meatcutters cut the meat correctly for Garcia. Garcia also observed the other meatcutters and said if they were not doing it correctly he would either talk to them directly or to Bustamante. Garcia stated Bustamante had the authority to let sick employees leave work or to tell the employees to leave if they seriously violated company rules. Bustamante was conferred with regarding bonuses and raises given to the employees in his department. However, Garcia stated Manager Dai made the decisions on raises and would ask Garcia's opinion, which he would give with his recommendation based on the employee's performance as he viewed it. Garcia also said Bustamante never recommended bonuses for the meatcutters. Garcia also acknowledged if Bustamante wanted to send employees home for violating company rules, endangering the Company, or illness, Bustamante would have to check with him first and he, himself, would decide whether the rules were violated, the Company was endangered, or the employees were ill before the employees would be sent home. Garcia also acknowledged Bustamante would tell him when the meatcutters wanted to leave early, whereupon he would talk to them and check their reasons.

Bustamante denied he ever had any authority over the meatcutters or to hire employees or allow overtime work. Although Bustamante stated he was told to direct the other meatcutters he denied he was their boss and stated he did his work like any other meatcutter along with showing employees how to do the work correctly. Bustamante denied he ever recommended that employees be disciplined, fired, or given raises. Bustamante acknowledged he did ask Garcia to ask Dai about hiring his brother and Adan, who were both hired.

Not only was Manager Dai's claim Martinez and Bustamante could effectively recommend disciplining employees, grant them time off from work, and grant or deny them bonuses or raises refuted by Supervisor Garcia's testimony regarding the authority of Martinez and Bustamante, but both Martinez and Bustamante specifically denied possessing such authority or any other supervisory authority over the employees in their departments. I credit the testimony of both Martinez and Bustamante rather than that of Manager Dai and Supervisor Garcia, whom I discredit. Apart from my observation of the witnesses in discrediting Dai and Garcia, their testimony was contradictory and Garcia's testimony also tends, in part, to support that of Martinez and Bustamante concerning their alleged supervisory authority.

Section 2(11) of the Act defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." An individual need only to have one of the indicia enumerated to be a supervisor. *Research Designing Service*, 141 NLRB 211, 213 (1963).

Based on the testimony of Martinez and Bustamante, which I credit, I find neither Martinez nor Bustamante possessed any of the statutory authority enumerated to make him a supervisor within the meaning of Section 2(11) of the Act. Therefore, I find, for the reasons indicated, neither Martinez nor Bustamante was a supervisor within the meaning of Section 2(11) of the Act and they were employees of the Respondent accorded the protection of the Act. Moreover, to accept Respondent's contentions the captains were supervisors would mean that including Production Supervisor Fang, Supervisor Garcia, and the 5 captains there would be a total of 7 supervisors for the other 14 employees employed by the Respondent or a ratio of 1 supervisor for every 2 employees. The Board has held it will look to the ratio between supervisors and employees in determining the supervisory status of an employee. *Monarch Federal Savings & Loan Assn.*, 237 NLRB 844 (1978).

C. *Interrogations About the Union*

Several employees testified about conversations they had with Supervisor Garcia concerning the Union.

Jose Martinez stated about April he mentioned to Supervisor Garcia and Rodolfo Bustamante that in the factory "they treated them very badly and they had to see or find someone like a union, for example, who could help them." Either Garcia or Bustamante asked Martinez how it could be done and said it might be difficult to get it done. Martinez' response was once you proposed to do something it was simple. When Bustamante and Garcia remarked it could be difficult to do or accomplish, Martinez agreed, but told them he would try to do it.

Bustamante corroborated Martinez' testimony about the conversation and further stated Garcia told Martinez he was in agreement with the idea of putting in the Union.

Martinez also testified about several other conversations he had with Supervisor Garcia about the Union. No one else was present during the first two of these conversations. The first one occurred about 7 June, which was the day after Martinez had first talked to Union Business Agent Galaviz about organizing the Respondent's employees. Martinez stated he informed Garcia he was going to try to get the Union in but needed people to support it. On Garcia's asking who was going to go, Martinez said he did not know but he was going to try to get some people to go there one Saturday. Garcia then told him to see who could go.

Martinez helped arrange and attended the first union meeting held on Saturday, 8 June, at which Martinez and other employees of the Respondent signed union authorization cards. The following Monday, 10 June, Martinez testified, he told Garcia in the presence of other employees, including Fernando and Pablo Adan, he had gone to

the Union. On Garcia's asking him what happened, Martinez said they signed cards for the Union and showed Garcia one of the cards. Garcia then asked Martinez what he was going to do with them, whereupon Martinez said he was going to pass them out and had them in case other employees wanted to sign them.

On 12 June, Martinez stated, Garcia came over to where he was working and said he wanted to talk to the man from the Union. Martinez gave Garcia Business Agent Galaviz' name and telephone number so he could call and talk to him. No one else was present during the conversation.

Supervisor Garcia acknowledged having several conversations with Martinez about the Union. However, he denied anyone else was present. Garcia testified the first conversation occurred 1 or 2 months before Martinez' employment ended. On that occasion Martinez mentioned Garcia was not making enough money and told Garcia if Garcia wanted to help him that he had a friend working for the Union who could help them do something about it but Garcia had to help him. When Garcia asked why he had to help, Martinez said he was a supervisor and could talk to the rest of the people easier. Garcia refused, stating he did not want problems with his boss.

According to Garcia, during their next conversation, the date of which Garcia could not recall, Martinez mentioned he had called his friend and then asked Garcia whether he wanted to join the Union. Garcia again refused, saying he did not want any trouble with his boss. Martinez said his friend told him it was easy to do it and all they needed was to get the other people to sign a piece of paper. Garcia then told Martinez if he wanted to do it, to do it, but not give Garcia any troubles.

Garcia stated that later in another conversation, the date of which was not established, Martinez came to his desk with some union cards, showed him one, and asked him whether he wanted to sign it. When Garcia refused, Martinez gave him Business Agent Galaviz' telephone number and told Garcia to call Galaviz and ask him about the Union.

To the extent the testimony of Martinez and Garcia conflicts, I credit Martinez, whose testimony was corroborated in part by Bustamante rather than Garcia, whom I have previously discredited.

Having credited Martinez, I find Supervisor Garcia about 7 June asked Jose Martinez who was going to go to the Union; on 10 June asked Martinez in the presence of other employees what happened at the union meeting and what he was going to do with the union cards he had; and on 12 June told Martinez he wanted to talk to the man from the Union.

According to Supervisor Garcia, he then called Business Agent Galaviz and asked about the Union's benefits. However, on stating he was a supervisor Galaviz informed him the Union was only for regular workers. Galaviz denied mentioning any names.

Business Agent Galaviz acknowledged having such a conversation with Garcia and further stated, which I credit, that Garcia also told him he had talked to Martinez and Bustamante because they had the cards they were showing to the employees. Besides my observation of the witnesses in crediting Galaviz instead of Garcia, both Martinez and Bustamante had participated in getting other employees to sign cards and, as previously indicated, they had been involved in conversations with Garcia about the Union.

Employee Santana Hernandez, who attended the union meeting held on 8 June, testified about 1 week later while in the packing area Supervisor Garcia asked him if they signed cards for the Union. Hernandez also testified while he was in the packing area the last week in July, which was after the 26 July union election was held, Garcia also asked him what had happened about the Union, whereupon he denied knowing anything.

Supervisor Garcia acknowledged asking Hernandez right after the election what happened with the Union and stated he also asked if the guys won or what. Garcia did not specifically deny having an earlier conversation with Hernandez about the Union or asking him if they signed cards for the Union. Based on Hernandez' undisputed testimony and Garcia's admissions I find about 15 June Supervisor Garcia asked Santana Hernandez whether they signed cards for the Union and the later part of July asked Hernandez what happened about the Union.

D. *The Unlawful Threat and Suspension and Discharge of Jose Martinez*

Jose Martinez was employed by the Respondent from October 1984 until his termination in June. While employed there Martinez received raises effective 10 December 1984 and 1 April. Martinez also testified in May on asking Manager Dai for another raise Dai informed him he was a good worker and promised to give him another raise later. Dai acknowledged telling Martinez when he gave him his April raise that if he continued doing a good job he would think about giving him another raise later. Although Dai claimed after Martinez received his April raise his attitude changed and he did not do his job, no examples were given to support this assertion and Martinez credibly denied his work changed.

Martinez' union activities consisted of initially contacting the Union in early June about organizing the Respondent's employees; attending a union organizing meeting held on 8 June, at which time he signed a Union authorization card; and on 10 June soliciting other employees at the Respondent's facility to sign union authorization cards.

On Monday, 17 June, Martinez and helper Pablo Adan were filling tickets given to Martinez by Assistant Manager An for the deliveries scheduled that day. Production Supervisor Fang was checking the orders being loaded and discovered one of the boxes of shrimp, which Adan had loaded on a truck, was the wrong brand. Martinez, at Fang's instructions, returned the box of shrimp to the freezer. Fang went to the office and reported the incident to Assistant Manager An. Fang then returned and they continued loading the truck.

Martinez testified about 12 or 12:10 p.m. Supervisor Garcia instructed him to return boxes of appetizers, which had been removed from the freezer beginning about 10:30 a.m. to be loaded on the truck for delivery,

to the freezer because the truck had flat tires. Garcia confirmed giving such instructions to Martinez and claimed the appetizers had already been out for several hours in the hot weather.[10]

About 10 or 15 minutes later, Martinez stated, he also had a conversation with Manager Dai with another employee named Lupe acting as an interpreter.[11] Martinez stated Dai also instructed him to return the appetizers to the freezer because the truck had flat tires. Martinez denied it was his fault and said Dai should have told him before because now he had to do double work and Dai was not paying him double. When Dai insisted Martinez was going to have to do it Martinez responded it was his lunchtime and he had to go to lunch.

According to Martinez, about that time Adan was returning from lunch and he informed Adan what Dai had told Martinez to do. When Dai remarked they could go to lunch later Martinez reminded Dai that he would be coming back later and Dai did not like for people to come back from lunch late and gave points against them for doing so.

Manager Dai, who did not deny having such a conversation with Martinez, stated that morning he had instructed Supervisor Garcia about 11 a.m. to have four or five boxes of appetizers, which he saw, returned to the freezer to keep them from thawing while waiting for the truck.

Martinez acknowledged that, after putting some of the appetizers back into the freezer, he then went to lunch on the second shift from 12:30 to 1 p.m. because he was hungry. Before going, Martinez stated, he had put almost all the appetizers back into the freezer and Adan was continuing to do that when Martinez left for lunch.

On returning from lunch the truck was ready for loading and it was then loaded.

Martinez testified about 1:20 or 1:30 p.m., while loading the truck, Supervisor Garcia returned to the facility. Garcia asked Martinez why he had not put away the appetizers like he had told him. Martinez responded by saying he was filling the order and when he filled it he went to lunch after putting the things susceptible to defrosting in the freezer. Under cross-examination Martinez acknowledged when Garcia returned there were still some appetizers that had not been put back in the freezer and that he had ignored Manager Dai's orders to put the appetizers back and go to lunch later.

Supervisor Garcia testified, when he returned to the facility between 1 and 2 p.m., Manager Dai had gotten on him about not having the appetizers returned to the freezer as he had instructed him, whereupon he informed Dai he had told Martinez to do it and Martinez had not done it because Garcia saw some appetizers in the same place. Manager Dai corroborated Garcia's testimony and stated he instructed Garcia to find out why Martinez did not follow instructions.

About the end of that workday, Martinez testified, Supervisor Garcia came over to where he was working and told him he thought Manager Dai wanted to suspend Martinez because he had found out about the Union. On asking Garcia who told Dai, Garcia denied he did or knowing who had but said somebody must have told him and Dai was thinking of suspending Martinez. Martinez informed Garcia if Dai was going to suspend him to let him suspend him.

Although Supervisor Garcia acknowledged telling Martinez that Dai might give him a suspension, he stated he told Martinez it was for the appetizers because Martinez did not listen to Garcia. Garcia denied there was any mention of the Union during this conversation.[12]

I credit Martinez rather than Supervisor Garcia for reasons previously given and find on 17 June Garcia threatened Jose Martinez with suspension because of his union activities.

Manager Dai stated after instructing Supervisor Garcia to have the appetizers returned to the freezer he went to the office and informed Assistant Manager An what had happened. An told him Supervisor Fang had reported that morning Martinez had made a mistake by taking out the wrong brand of shrimp. She also told Dai the previous week a customer had complained he had received the wrong brand of shrimp. Assistant Manager An confirmed she had received a complaint about a week earlier from a customer who had received the wrong brand of shrimp. Although according to Dai Assistant Manager An had given Martinez an oral warning about the incident by telling him to be careful, An did not testify about such a warning and Martinez denied ever being told about the customer's complaint.

According to Manager Dai after Garcia talked to Martinez, Garcia reported Martinez' excuse for not putting the appetizers in the freezer was because he went to lunch. Dai then told Garcia they had to give Martinez some serious discipline, reminded Garcia of the regulations, and said to either dismiss Martinez or give him a very serious suspension. Garcia suggested suspension and Dai instructed Garcia to suspend Martinez for 1 month and to write it up. Garcia wrote a note stating he was going to suspend Martinez for 1 month for not following instructions. Dai stated the next day he had Assistant Manager An issue a memorandum and notice which was attached to Martinez' timecard. Supervisor Garcia corroborated Dai's testimony.

A rule contained in a memorandum from Manager Dai to Supervisors Fang and Garcia dated 15 February, which Supervisor Garcia stated he had previously translated and explained to employees, including Martinez, provided as follows:

> Effectively immediately, any kinds of meats should not be left outside of cooler or freezer more than 20 minutes.
>
> Violator of this rule will be dismissed.

Martinez, however, denied any knowledge of such a rule and Dai was not certain whether it was ever posted.

[10] The outside temperature that day was in the mid-seventies.

[11] Dai's primary language is Chinese and although he speaks English he does not speak Spanish, which is the language used by Martinez.

[12] Manager Dai also denied having any conversation with Supervisor Garcia prior to 17 June about suspending or disciplining Martinez and denied talking to Garcia about Martinez' union activities.

The Respondent also had rules and regulations in both English and Spanish dated 25 June 1984 which were distributed to the employees. It set out rules and the number of points employees would be assessed for violating such rules. The points assessed for violating a rule for not obeying the orders of a manager or supervisor ranged from 9 to 27 points. The regulations also provided employment should be terminated for employees with 27 points.

The next day, 18 June, Martinez on finishing work found a memorandum and notice with his timecard.

This memorandum from Manager Dai to Martinez, dated 18 June and entitled "*Punishment*," provided as follows:

> We regret that the Company decided to give you one month suspension as punishment since you do not obey the Company's regulations and Supervisor's instructions several times which mistakes reduced our reputation and caused the loss of the Company. According to our regulation, we can not keep you with the Company any more on the above mistakes, but for given you one more chance to do the good job, we decided to give you one month suspension instead of leaving the Company.
>
> This punishment shall be starting on June 19, 1985.

Attached to the memorandum was a punishment/-misconduct notice dated 18 June and signed by Dai. It gave as a reason for the punishment that Martinez made mistakes while distributing merchandise by distributing the wrong brand of shrimp on 17 June and by not keeping the frozen appetizers in the freezer before delivery on 17 June. Martinez was given 10 points for each of those two mistakes and the notice reflects those 20 points gave him an updated total of 23 points.[13]

Martinez then went to the office where he had a conversation with Manager Dai with Supervisor Garcia acting as interpreter. Present also were Assistant Manager An and Vice President Lin. Martinez testified he asked Dai what the memorandum was about and was told it was about his suspension. Martinez asked them to sign the memorandum, which they did, and asked Dai for his check. Dai refused to give him his check giving as a reason it was not a payday and told him if he received the check before payday it was like quitting his job. Martinez mentioned he had been suspended for a month and would not be working and asked where was he going to get the money to come there on the bus to get his check on payday. Dai, who had a check Assistant Manager An had made out for Martinez, then told Martinez if he wanted his check he was going to have him sign a paper and if he signed that paper he was fired and was not going to be working there anymore. Martinez denied signing the paper or getting his check. He informed Dai he was planning to come back to work there. Martinez then left the premises.

Manager Dai's version of this conversation was when Martinez questioned him about the memorandum he told Martinez that Martinez had made a mistake in distributing the products several times and had disobeyed the supervisor's instructions by not putting the appetizers back in the freezer as instructed and he had disciplined Martinez to let him remember what he had done. Martinez kept shaking his head in disagreement and insisted on getting his check. Dai told Martinez the only way an employee could get his check immediately when it was not a payday was by not working there anymore and quitting.[14] Dai also informed Martinez it was for a 1-month suspension and he should get his check like the other employees on the next Tuesday, which was payday. Martinez, however, said he wanted to quit and get his check.

Dai, who stated it was his decision to accept Martinez' resignation, stated he then instructed Assistant Manager An to make out Martinez' check as he requested. Dai claimed he had no knowledge of Martinez' union activities.

Supervisor Garcia, who denied discussing the Union with the Respondent's officials or supervisors, corroborated Dai's testimony and stated he signed Martinez' memorandum at Martinez' request. Although Garcia also stated Martinez used some curse words, he denied translating them to Dai and said employees always talked like that.

Assistant Manager An stated she got a paycheck hand drafted by the bookkeeper for Martinez that day. However, Martinez refused to take it claiming too much tax had been deducted and stated he wanted one made out by the company which normally made out their checks. According to An, Martinez' brother subsequently picked up Martinez' check for him.

Martinez, who stated he was supposed to return to the facility on a Friday, returned to the facility on a Monday morning, at which time he had a conversation with Manager Dai with a delivery driver, Fernando,[15] acting as interpreter. Present also were Assistant Manager An, Vice President Lin, and another employee. Martinez testified he asked Dai what Dai wanted to tell him.[16] Dai informed Martinez he was not to come back to work because there was no work for him anymore. About that time Supervisor Garcia came into the office where they were and Fernando left. Martinez then asked Garcia why they were not going to give him his job back, whereupon Garcia said he did not know and told him to ask them. Martinez replied he already had. Martinez, with Garcia acting as interpreter, then remarked to Dai that in other words the memorandum Dai had given him was not any good. Dai agreed it was not any good and Martinez then asked for another letter stating it was no good. Dai said he would give him another letter and

[13] The other three points were for being late for work on 26 October 1984 and on 25 January and 18 February.

[14] The payroll is handled by an outside company and for the Respondent to prepare an employee's check requires a lot of paperwork. According to Dai, the Respondent's policy was if an employee got his check early he was considered a quit.

[15] Fernando did not testify.

[16] According to Martinez, he had been told by Fernando the previous Thursday Dai wanted to talk to him on Monday.

asked him to wait outside. Although Martinez waited outside, he did not receive the letter as promised.

Manager Dai placed this conversation as occurring about 18 July and stated, using Fernando as an interpreter, he informed Martinez there was no job for him and to go home and that Martinez had already quit, his employment was terminated, and they did not have any jobs.

Since that time Martinez has not been contacted by the Respondent about returning to work.

Respondent's records contain a document signed by Manager Dai entitled "Termination Form" for Martinez which reflects he was terminated on 18 June for disobeying management directions.

I credit the testimony of Martinez concerning his conversations with Manager Dai on 18 June and with Manager Dai and Supervisor Garcia afterwards when he attempted to return to work, and find based on such testimony as well as Respondent's own records that Martinez was suspended and discharged on 18 June. Besides my observation of the witnesses and having previously discredited Manager Dai and Supervisor Garcia, the Respondent's own records reflect Martinez was terminated on 18 June allegedly for disobeying management directions rather than quitting his job on 18 June as Dai, Garcia, and Assistant Manager An claim.

E. *The Unlawful Suspension and Discharge of Rodolfo Bustamante*

Rodolfo Bustamante was employed by the Respondent from August 1982 until his termination in June.

His union activities consisted of signing a union authorization card on 10 June and helping Jose Martinez solicit other employees to sign union authorization cards. Bustamante signed his union authorization card on the Respondent's parking lot in the presence of several other employees. Supervisor Garcia at the time was about 10 meters away from Bustamante.

On 13 June Supervisor Fang showed Bustamante how he wanted some meat sliced for a customer. Bustamante, who stated he had previously sliced meat that way, testified he cut the meat the way Fang had instructed him. However, about 15 minutes later after slicing the meat, Fang returned and using Supervisor Garcia as an interpreter said he knew Manager Dai was going to ball Fang out and then accused Bustamante of not slicing the meat correctly saying he wanted it sliced a different way and thinner. Bustamante disputed this by saying he sliced it the way he was instructed. Bustamante also denied he could correct it because there was no other meat there.

Bustamante stated Fang then told him because he did not obey instructions he should go home, whereupon he informed Fang if Fang wanted him to go home then to pay him. Fang also told him to go to the office because Manager Dai wanted him.

Supervisor Fang claimed on that occasion he had shown Bustamante to cut the meat against the vein instead of with the vein. On using Supervisor Garcia to translate those instructions, Fang stated, Bustamante refused to do it giving as the reasons it was too troublesome to do things like that and he did not want to do it. Although Fang explained it was to meet a customer's special requirement, Bustamante still did not want to do it and then ignored them and did it his own way. Fang stated he then told Bustamante they had a problem and after ordering him out of the cutting room asked Bustamante why he did not obey the order. Bustamante's response again was that it was too troublesome and he was fed up with this because they wanted to do it differently on different days, it happened over and over, and he was getting tired of the whole thing. Fang explained this was the nature of the business and he hoped Bustamante would cooperate but said if he did not he was going to discipline him for 2 weeks. Bustamante responded by saying Fang would not do that to him and then said he just wanted to quit and get his paycheck that day.

Supervisor Garcia, who acted as the interpreter for Fang, stated on asking Bustamante why he did not do the job Bustamante replied he had been working for them a long time and already knew his duties and everything and how to cut meat. Bustamante said nobody was going to tell him what to do and he also said he wanted to do his job. On telling Fang what Bustamante had said Fang told Garcia to tell Bustamante he was going to give him a 1-week suspension because he did not listen to Fang. Garcia stated, on telling that to Bustamante, Bustamante said he was going to quit and went to change his clothes. Although Fang stated Bustamante used one curse word on that occasion, he stated employees always talked like that.

I credit Bustamante rather than Garcia and Fang, whom I discredit. The reasons for discrediting Garcia have been previously expressed and, apart from my observation of the witnesses in discrediting Fang I do not find his testimony, which is inconsistent with the Respondent's own records, plausible.

Bustamante stated after going to the office he had a conversation with Manager Dai with Supervisor Garcia acting as the interpreter. Bustamante testified Dai asked him why he did not cooperate with the other workers and accused him of being very stubborn. Although Dai mentioned Bustamante was a good worker and did more work than anybody else, he said Bustamante did not cooperate or listen to what Fang said. They said, because Bustamante did not obey Fang, Bustamante was being punished for 3 weeks[17] and they told him to go home. Bustamante said to pay him and he would go home. Dai told him they were going to pay him for the 3 days he had worked by giving him $11. When Bustamante questioned Dai about the amount, Dai mentioned there was certain deductions. Bustamante also asked about being paid for his vacation which was coming up, whereupon Dai agreed to give him his vacation check but told him to leave and not come back because there would not be anymore work for him. Bustamante claimed he did not get his check for the 3 days that day because Dai wanted him to sign a paper, which he refused to do. Under cross-examination, Bustamante said Dai also told him he could not give him the check until payday because there was no one there to sign it.

[17] Bustamante, in an affidavit given to a Board agent, stated Supervisor Fang told him he was being punished for 2 weeks.

Supervisor Fang denied firing Bustamante. According to Fang, Manager Dai using Garcia as an interpreter asked Bustamante whether he was sure he wanted to quit, whereupon Bustamante stated he was.

Supervisor Garcia testified while they were in the office Bustamante kept asking for his money and said he wanted to leave the Company. On telling Supervisor Fang that Bustamante wanted his money Fang said he was only going to give Bustamante a 1-week suspension, which Garcia explained to Bustamante. However, Bustamante said he wanted his money, he did not like his job anymore, and asked Garcia to tell them to give him his money. Garcia explained this to Fang, who then went to talk to Manager Dai. Garcia testified Dai using him to translate asked Bustamante why he wanted to leave the Company and said he was a good worker. Bustamante's response was he was tired of Fang always bothering him and he said he knew his job. Although Garcia said he thought they gave Bustamante a check on that occasion, he stated he did not know.

Manager Dai's version was Bustamante, who had already changed his clothes, came to the office with Fang and Garcia, and Fang informed him Bustamante did not want to work there anymore and wanted to leave. On asking Fang the reason Fang said Bustamante did not want to obey him and he wanted to give Bustamante 1 week's punishment. Bustamante did not want to take it and said he did not like his work and wanted to quit. Dai stated he then asked Garcia, who also told him Bustamante wanted to quit, did not want to work there anymore, and wanted his money. Dai stated he asked Garcia to ask Bustamante to see whether he really wanted to quit. After Garcia talked to Bustamante, Garcia told Dai that Bustamante did not want to work and wanted his money and to go home. Dai, who stated it was his decision to accept Bustamante's resignation, stated he then instructed Assistant Manager An to figure the amount owed and to write out a check for Bustamante.

Dai, however, stated Bustamante disagreed with the amount of the check claiming it was not right and said he was not going to take it, whereupon Dai stated he instructed An to tell him if he disagreed with the amount to come back tomorrow or some other time.

Assistant Manager An also testified Bustamante through Garcia said he wanted to quit and get his paycheck and Dai instructed her to prepare it. Although An stated she prepared the check, the person who could sign it was not there so she told Bustamante to come back the next day. Bustamante also claimed the amount of the check was not correct because they had taken out too much for taxes.

Both Dai and Fang claimed they had no knowledge of Bustamante's union activities.

I credit the testimony of Bustamante concerning this conversation instead of Manager Dai, Assistant Manager An, and Supervisors Garcia and Fang, whom I have previously discredited, and find based on such testimony as well as Respondent's records, as discussed infra, that Bustamante was suspended and discharged on 13 June allegedly for not cooperating with coworkers and for disobeying management directions rather than quitting his job as Dai, An, Garcia, and Fang claim.

Bustamante testified about 1 week later he returned to the facility accompanied by a friend, Angel Quesada, to get his check. According to Bustamante, he had a conversation with Manager Dai with Quesada serving as interpreter.[18] Bustamante stated Dai gave Quesada a paper saying they had not fired Bustamante and he had left of his own volition and that Bustamante was a good worker but very stubborn and did not obey orders. Bustamante, who denied signing the paper, asked Dai whether he was going to give him his job back, whereupon Dai said he was not and told him there was not anymore work for him there. When Bustamante asked how he was going to support his family, Dai told him to find a job someplace else but if he had not found one in 1 month he would call Bustamante. If Bustamante did not have a job he would call him back but as a new employee at $3.30 per hour.

Bustamante, however, denied the Respondent ever called him or that he ever worked there again.

Manager Dai acknowledged Bustamante returned to the facility with a friend, but stated this was the day after he had left, and said that they talked to Assistant Manager An in his presence about the check.

Assistant Manager An corroborated Manager Dai's testimony.

The Respondent's records, as explained by Assistant Manager An, reflect Bustamante was paid $11.55 for unused sick leave and $150.49 for vacation pay. According to An, Bustamante got his check on 15 June.

The Respondent's records also contained a document entitled "*Change of Status Authority*," signed by Manager Dai and dated 13 June, which reflects effective 13 June, Bustamante resigned. However, a termination form for Bustamante, also dated 13 June and signed by Dai reflects Bustamante was terminated on 13 June for not cooperating with coworkers and for disobeying management directions.

Supervisor Fang stated on one occasion in April or May Bustamante had initially refused his request to cut some meat according to a customer's requirements. However after several explanations from Fang, Bustamante agreed to do so. Although Fang claimed as he left the meatcutting room Bustamante threw a piece of chicken at the door for which he later apologized, Bustamante credibly denied such an occasion occurred. Although Fang subsequently claimed there were several other incidents involving Bustamante before this, those incidents were not identified and Fang acknowledged Bustamante was not given any points or suspended because of those alleged incidents.

The Respondent's records reflect a total of only six points had been assessed against Bustamante, including four points for being late for work on three occasions.

F. *Analysis and Conclusions*

The General Counsel contends the Respondent violated Section 8(a)(1) and (3) of the Act as alleged by un-

[18] Quesada did not testify and this conversation as testified to by Bustamante was not offered or received for the truth of what was actually said on that occasion.

lawfully interrogating and threatening employees concerning the Union and discriminatorily suspending, discharging, and failing to reinstate Jose Martinez and Rodolfo Bustamante because of the Union. The Respondent denies having violated the Act and asserts both Martinez and Bustamante were supervisors under the Act and voluntarily quit their jobs instead of accepting the suspensions imposed on them.

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act. Section 8(a)(3) of the Act provides in pertinent part, "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

The test applied in determining whether a violation of Section 8(a)(1) of the Act has occurred is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Electrical Fittings Corp.*, 216 NLRB 1076 (1975).

The interrogation of employees about the Union is not unlawful per se. The test for determining whether such interrogation violates the Act is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed in the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). This test is not limited to only open and active union adherents but applies to other employees as well. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

The findings supra establish Supervisor Garcia, about 7 June, asked Jose Martinez who was going to the Union; on 10 June asked Martinez in the presence of other employees what happened at the union meeting and what he was going to do with the union cards he had; on 12 June told Martinez he wanted to talk to the man from the Union; about 15 June asked Santana Hernandez whether they signed cards for the Union; and the latter part of July asked Hernandez what happened about the Union.

A consideration of the circumstances surrounding these acts of interrogation shows they were not accompanied by any threats, promises, or other unlawful conduct. Moreover, all of these conversations between Martinez and Supervisor Garcia, except for the one on 12 June when Garcia wanted to get information concerning how to contact the Union's representative, which he did, were initiated by Martinez, who volunteered information to Garcia about Martinez' efforts to organize the Respondent's employees. Under these circumstances and applying the above test for finding whether acts of interrogation are unlawful, I am persuaded and find that none of the acts of interrogation herein found are unlawful or violative of Section 8(a)(1) of the Act.

The above findings also establish on 17 June Supervisor Garcia threatened Jose Martinez with suspension because of his union activities. I find this threat of suspension by Supervisor Garcia, who subsequently participated in the suspension given to Martinez the next day, did interfere with, restrain, and coerce Martinez in the exercise of his rights guaranteed in Section 7 of the Act and the Respondent by engaging in such conduct violated Section 8(a)(1) of the Act.

The remaining issues are whether Jose Martinez and Rodolfo Bustamante were discriminatorily suspended, discharged, and denied reinstatement because of their union activities.

The law is well settled that to discriminate against employees in their employment because of union activities violates Section 8(a)(3) and (1) of the Act. When motivation for discharge is at issue in cases alleging violations of Section 8(a)(1) and (3) of the Act the General Counsel must make a prima facie showing sufficient to support the inference that protected activity by employees was a motivating factor in an employer's decision to discharge them, and the employer then has the burden of showing the employees would have been discharged absent the protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Direct evidence of discriminatory motivation is not necessary to support a finding of discrimination and such intent may be inferred from the record as a whole. *Heath International*, 196 NLRB 318 (1972).

The Respondent's contentions Martinez and Bustamante were both supervisors under Section 2(11) of the Act and therefore unprotected and quit their jobs instead of being suspended and discharged have already been resolved. For the reasons found above neither Martinez nor Bustamante was a supervisor under the Act and Martinez was suspended and discharged on 18 June and Bustamante was suspended and discharged on 13 June and neither of them has been reinstated. The Respondent's own records, which show they were discharged, clearly refute the Respondent's claim they quit their jobs.

The findings further establish both Martinez and Bustamante were active union adherents and the Respondent had knowledge of their activities as evidenced by their conversations about the Union with Supervisor Garcia and Garcia's statement to Union Business Agent Galaviz about Martinez and Bustamante having cards they were showing to the employees. Until their suspensions and discharges both Martinez and Bustamante, except for a few points assessed against them for being late for work, enjoyed good work records as demonstrated by their promotions to captain and the fact Martinez the month before his discharge was informed he was a good worker and promised another raise. Except for Supervisor Garcia's unlawfully threatening Martinez with suspension for his union activities the day before it occurred, which clearly establishes the Respondent's union animus, no prior warnings or notice had previously been given to either Martinez or Bustamante about suspending or discharging them. Moreover, their suspensions and discharges occurred shortly after the union organizing campaign began and Martinez was suspended and discharged the day after the Union informed Manager Dai the employees wanted a union.

Based on these factors discussed, including the union activities of both Martinez and Bustamante, of which the Respondent had knowledge, the Respondent's union animus, the timing of the suspensions and discharges of Martinez and Bustamante in relation to the advent of the union organizing campaign, the unlawful threat to suspend Martinez because of his union activities which occurred the day before his suspension and discharge, and the absence of any prior warnings or notice, except for the unlawful threat made to Martinez, to suspend or discharge either Martinez or Bustamante, who were considered to be good employees, and having rejected the Respondent's defenses that Martinez and Bustamante were supervisors and had quit their jobs, I am persuaded and find the Respondent discriminatorily suspended and discharged Jose Martinez on 18 June and Rodolfo Bustamante on 13 June and denied them reinstatement because of their union activities and thereby violated Section 8(a)(3) and (1) of the Act. I further find the reasons advanced by the Respondent for its actions taken against Martinez and Bustamante were mere pretexts to conceal its discriminatory reasons for suspending and discharging them.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Great Lakes Oriental Products, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Production Workers Union of Chicago and Vicinity, Local 707 is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening an employee with suspension because of his union activities, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act and has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By discriminatorily suspending and discharging Rodolfo Bustamante on 13 June 1985 and Jose Martinez on 18 June 1985 and refusing to reinstate them because of their union activities, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend it cease and desist and take certain affirmative action to effectuate the policies of the Act. Accordingly, the Respondent shall be ordered to offer immediate and full reinstatement to Rodolfo Bustamante and Jose Martinez to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings and other compensations they may have suffered as a result of the discrimination against them in their employment herein found by discriminatorily suspending and discharging Rodolfo Bustamante on 13 June 1985 and Jose Martinez on 18 June 1985 and refusing to reinstate them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

The Respondent shall be ordered to remove from its files any references to the discriminatory suspensions and discharges of Rodolfo Bustamante and Jose Martinez herein found and to notify them, in writing, this has been done and evidence of its unlawful conduct will not be used as a basis for future personnel action against them.

The General Counsel's request that the remedial order include a visitatorial clause authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure to enable it to monitor compliance with the Board's Order as enforced by the court of appeals is rejected on the grounds the Board does not provide for discovery procedures in its proceedings and there is no showing that under the circumstances presented here such a clause is necessary.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Great Lakes Oriental Products, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with suspensions because of their union activities.

(b) Discouraging membership in and activities on behalf of Production Workers Union of Chicago and Vicinity, Local 707, or any other labor organization, by suspending, discharging, refusing to reinstate, or in any other manner discriminating against employees in regard to hire and tenure of employment or any term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer immediate and full reinstatement to Rodolfo Bustamante and Jose Martinez to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings and other compensations they may have suffered by reason of the discrimination against them by discriminatorily suspending and discharging Rodolfo Bustamante on 13 June 1985 and Jose Martinez on 18 June 1985, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the suspensions and discharges of Rodolfo Bustamante and Jose Martinez herein found to be unlawful and notify them, in writing, this has been done and evidence of its unlawful conduct will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(d) Post at its Chicago, Illinois facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the amended complaint is dismissed insofar as it alleges unfair labor practices not specifically found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with suspensions because of their union activities.

WE WILL NOT discourage membership in and activities on behalf of Production Workers Union of Chicago and Vicinity, Local 707, or any other labor organization, by suspending, discharging, refusing to reinstate, or in any other manner discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Rodolfo Bustamante and Jose Martinez to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and WE WILL make them whole for any loss of earnings and other compensations they may have suffered by reasons of our discrimination against them, with interest.

WE WILL remove from our files any references to the suspensions and discharges of Rodolfo Bustamante and Jose Martinez herein found unlawful and WE WILL notify them, in writing, this has been done and evidence of our unlawful conduct will not be used as a basis for future personnel actions against them.

GREAT LAKES ORIENTAL PRODUCTS, INC.

Local 792, Allied Sales Drivers, Ambulance, Beer Brewery, Grain Elevator, Retail Liquor, Livery, Malt House, Spring Water, Soft Drink, Taxicab, Vending Drivers, Helpers, Inside Employees and General Workers Union, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Bryan Jamison, Attorney, for and on behalf of Johnson Bros. Wholesale Liquor Co. Case 18–CB–1590

26 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 8 October 1986 Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the General Counsel filed a Statement of Cross-Exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order[2] as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 792, Allied Sales Drivers, Ambulance, Beer Brewery, Grain Elevator, Retail Liquor, Livery, Malt House, Spring Water, Soft Drink, Taxicab, Vending Drivers, Helpers, Inside Employees and General Workers Union, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT impose fines or other discipline on employees who crossed or worked behind our picket line during the strike against Johnson Bros., Wholesale Liquor Co. in December 1985, in contravention of the strike-contract settlement agreement between the parties.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the fines imposed on Harold Edelman, Melvin Emerson, Larry DeSmith, Douglas Forester, Donald Johnson, James Reiter, and Richard Schneider, and remove all records of the disciplinary actions against them, and notify each of them in writing that this has been done.

WE WILL refund any such fines or part thereof that has been paid, with interest.

LOCAL 792, ALLIED SALES DRIVERS, AMBULANCE, BEER BREWERY, GRAIN ELEVATOR, RETAIL LIQUOR, LIVERY, MALT HOUSE, SPRING WATER, SOFT DRINK, TAXICAB, VENDING DRIVERS, HELPERS, INSIDE EMPLOYEES AND GENERAL WORKERS UNION, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Robert V. Johnson, Esq., for the General Counsel.
Richard Williams, Esq., of Minneapolis, Minnesota, for the Respondent.
Steven C. Miller, Esq., of Minneapolis, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Minneapolis, Minnesota, on 13 August

[1] The judge inadvertently used the word "Company" instead of "Union" in sec. III,B, L. 49. We correct this error.

[2] The General Counsel has requested that the Order include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

[3] We shall modify the judge's recommended Order and notice to contain the Board's standard language for narrow cease-and-desist orders against unions.

1986.[1] The charge was filed on 11 March by Bryan Jamison, attorney, for and on behalf of Johnson Bros. Wholesale Liquor Co. (Company). The complaint, which issued on 21 July, alleges that Local 792, Allied Sales Drivers, Ambulance, Beer Brewery, Grain Elevator, Retail Liquor, Livery, Malt House, Spring Water, Soft Drink, Taxicab, Vending Drivers, Helpers, Inside Employees and General Workers Union, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union or Respondent) violated Section 8(b)(1)(A) of the National Labor Relations Act. The gravamen of the complaint is that the Union allegedly imposed court collectible fines on seven company employees who crossed the Union's picket line and continued to work during an economic strike, notwithstanding that the Company and the Union entered into a strike settlement agreement that allegedly provided in pertinent part that the Union would not impose internal discipline on its members as a result of their conduct during the strike. The Union's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs.

On the entire record in this case[2] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by the General Counsel, the Company, and the Union, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, a Minnesota corporation with an office and place of business in St. Paul, Minnesota, is engaged in the wholesale and distribution of liquor and related products. In the operation of its business, the Company annually receives at its St. Paul facility goods and materials valued in excess of $50,000 directly from points outside of Minnesota, and annually ships from its St. Paul facility goods and materials valued in excess of $50,000 directly to points outside of Minnesota. I find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE RESPONDENT LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Union is the collective-bargaining representative of a unit of the Company's employees, including drivers and warehouse personnel, at the St. Paul facility. On Thursday, 19 December, the Union commenced a lawful strike and picketing at the St. Paul facility in support of its efforts to secure a successor collective-bargaining contract. The strike lasted throughout 3 workdays (19, 20, and 21 December). On Sunday, 22 December, the Company and the Union reached agreement on the terms of a successor contract. In the interim, seven unit employees (Harold Edelman, Melvin Emerson, Larry DeSmith, Douglas Forester, Donald Johnson, James Reiter and Richard Schneider), all union members, crossed the Union's picket line and continued to work.[3]

On Sunday, 22 December, the Company and the Union met in a lengthy session at the offices of the Federal Mediation and Conciliation Service (FMC), including both formal negotiations and so-called off-the-record or side-bar discussions, which culminated in agreement on the terms of a new contract. Company Attorney Martin Garden prepared a memorandum of agreement that was signed by representatives of both parties. The agreement specifically provided in item six of seven listed items in the memorandum: "Contract language as agreed to—and both parties agree that there will be no retaliation against anyone."

Donald Gerdesmeier, president and business agent of Teamsters Local 503, was a member of the Union's negotiating team, and actively participated in the negotiations. Gerdesmeier had recently negotiated a contract between his own local and another wholesale liquor firm, and the president of the area Teamsters' Joint Council requested him to participate in the Union's negotiations.[4] Gerdesmeier testified concerning an off-the-record or side-bar discussion between himself, Company Attorney Garden, and Federal Mediator Earl Smith, at which time they reviewed Garden's draft of the proposed memorandum of agreement. Attorney Bryan Jamison, Garden's associate, was also present. Gerdesmeier testified in sum as follows: He objected to Jamison's presence at what he considered to be an off-the-record conversation. Garden said that Jamison was present to take notes, whereupon Gerdesmeier replied that if he were quoted, he would stick the notes up Garden's nose. They reviewed the language of the proposed memorandum. After reaching agreement on wages, they discussed item 6. Garden said he was concerned that the Union would pursue pending unfair labor practice charges, and was also concerned about sabotage by returning strikers and "things of a get even nature." Gerdesmeier said that he was concerned about discipline of returning strikers for picket line activity, and possible reprisals against them, and that he would talk to the Union about the matter. Gerdesmeier went to speak to Union Secretary-Treasurer Bryant, and then returned to his conversation with Garden and Smith, telling them that the Union concurred in the memorandum, and that they could sign the document.[5]

---

[1] All dates herein are for the period from 1 December 1985 through 30 November 1986 unless otherwise indicated.

[2] Errors in the official transcript of proceedings have been noted and corrected.

[3] It is immaterial how the employees managed to cross the picket line. I assume, for the purpose of this case, that as contended by the Union, they hid in the back of a van that was driven across the picket line by a management employee.

[4] In its brief, the Union refers to Gerdesmeier as a "mediator." However, in its answer the Union admitted that Gerdesmeier was an intermediary "on behalf of" the Union, and that he personally handled negotiations of the clause at issue in this case.

[5] I excluded testimony by Gerdesmeier concerning his conversation with Bryant.

There was no further discussion about the "no retaliation" clause. Gerdesmeier was vague and equivocal about some aspects of the conversation. He testified that Garden gave specific examples of sabotage, such as breakage, but then qualified his testimony by saying that Garden said "words to that effect." Gerdesmeier testified that he could not recall whether Garden said there would not be any "shit" by either side, or whether the mediator said that the same went for the Union. Garden, who was present as a General Counsel witness, testified that prior to the conversation on 22 December, he expressed concern to Gerdesmeier that Secretary-Treasurer Bryant would be vengeful because seven of his members crossed the picket line, and that he could not agree to a final settlement unless there was a clear understanding that there would be no retaliation. Garden further testified that when they reviewed the proposed memorandum of agreement, Gerdesmeier did not object to the language of item 6. Garden testified that he said in effect that "we didn't want any shit from either party," adding that the Company would not be able to fire any strikers, that mediator Smith said "the union likewise," and that Gerdesmeier made no comment about the no-retaliation clause. Garden testified that at a later date, he telephoned Gerdesmeier and complained that the Union was disciplining the employees. Gerdesmeier stated, and Garden agreed, that there was no discussion at the 22 December meeting about whether the no-retaliation clause limited the Union's ability to apply internal discipline to its members. However, Garden asserted that "we had a broad no retaliation agreement" and that this meant there would be no fines against anybody. Gerdesmeier disagreed with this interpretation. Attorney Jamison, who was presented as a charging party witness, substantially corroborated Garden's testimony concerning the 22 December meeting. Jamison testified that the first time the parties had a side-bar meeting, Gerdesmeier questioned his presence, and told Garden that "if you ever try to use those notes, I'm going to shove them up your ass." However, Gerdesmeier did not again refer to Jamison's presence at such meetings. Jamison testified that when they discussed the proposed memorandum, Garden explained: "I've added a no retaliation clause. There is not going to be any shit going from either way. The Company may try to fire some strikers, they can't." Mediator Smith then commented, "The same goes for the Union." There was no further discussion of item 6. Jamison specifically testified that there was no mention of the pending charges or acts of sabotage. Jamison's testimony was corroborated by his notes at the meeting, which were presented in evidence by the Union.

I credit Garden and Jamison.[6] As indicated, Gerdesmeier's testimony was vague and equivocal in important respects. Gerdesmeier's version of the 22 December conversation was also improbable in one significant respect. If Garden, an experienced attorney, were concerned about the continuing pendency of unfair labor practice charges, then it is probable that he would have expressly provided in the memorandum of agreement that the Union request withdrawal of such charges. It is also probable that Garden would have conditioned the entire agreement on approval of such withdrawal by the Board's Regional Director. However, he did not request withdrawal of the pending charges (which concerned statements by the Company to its employees in correspondence and meetings) until 14 January, some 3 weeks after the parties reached agreement on a contract. Therefore, it is evident that at least in the Union's view, withdrawal of the charges was unrelated to its obligations under item 6 of the memorandum of agreement.

It is undisputed that by identical letters dated 25 February, the Union by its president, Steven Lucht, notified six of the seven employees who crossed the picket line (all but Larry DeSmith) as follows:

> On January 10, 1986, you were sent notice of a hearing to be held before the Executive Board on Wednesday, January 22, 1986. This hearing was to determine whether or not disciplinary action should be taken against you for crossing the picket lines and working during the recent strike at Johnson Bros. Liquors.
>
> The hearing was held and you did not appear. The Executive Board hearing committee, chaired by Vice-President Anthony Tiemann, examined the evidence and reached the following conclusions:
>
> On the basis of an investigation of the facts presented and signed affidavits submitted, you worked while a strike was in progress at your employers [sic] place of business. The Board assessed a fine against you in the amount of $1400.00. The Board however determined that one-half of the fine would be forgiven, therefore, you owe your union Local 792 the amount of $700.00 for working while a strike was in progress.

DeSmith appeared at the Union's executive board hearing, was assessed a fine in the amount of $1200, of which one-half was forgiven, and he paid the remaining $600. The other employees did not pay their fines. None of the fines were rescinded. Douglas Forester filed an appeal with Teamsters Joint Counsel No. 32, but received no reply. The Union admits that it imposed the fines because the employees crossed its picket line and worked for the Company while its strike was in progress.

B. *Concluding Findings*

I find that the Union negotiated and executed an agreement with the Company whereby it agreed that it would not impose internal discipline on its members as a result of their conduct during the strike. Therefore, the

[6] Their testimony, like that of Gerdesmeier, may properly be considered as evidence in this case. There is no Board policy that precludes an attorney from testifying in a Board proceeding concerning matters of which he has personal knowledge. Indeed, neither Garden nor Jamison participated as trial counsel in this case, although Board policy does not require such abstention. *Operating Engineers Local 9 (Fountain Sand)*, 210 NLRB 129 fn. 1 (1974). There is also no Board policy that precludes testimony concerning so-called off-the-record conversations during contract negotiations, or which precludes testimony by persons who heard such conversations, regardless of whether their presence was accepted or even known by the other participants. Indeed, it was the Union that sought to introduce testimony concerning the conversation on 22 December, over the objection of the General Counsel and the Company.

Company violated Section 8(b)(1)(A) by imposing such discipline. *Office Employees Local 129*, 267 NLRB 1017 (1983); *Hospital Workers Local 250 (Associated Hospitals)*, 254 NLRB 834 (1981); *Hospital Workers Local 250 (Dameron Hospital)*, 248 NLRB 1390 (1980); *Retail Clerks Local 1364 (Food Employers)*, 240 NLRB 1127 (1979); *Stationary Engineers Local 39 (San Jose Hospital)*, 240 NLRB 1122 (1979). The first two decisions cited above are particularly in point. In *Associated Hospitals*, which involved an arbitration decision in settlement of a strike, the administrative law judge specifically held that the phrase "no retaliation" applied to union discipline of its members for their conduct during the strike. *Office Employees* involved an oral agreement that provided that there would be "no reprisals by either side against strikers or nonstrikers." The parties never expressly referred to internal union charges. Nevertheless, the Board affirmed the administrative law judge's determination that in the context of a strike settlement agreement, the quoted language applied to such charges. The terms "retaliation" and "reprisal" are, insofar as pertinent, synonymous, i.e., they refer in sum to acts of putting or inflicting in return, as with an injury or wrong. *Webster's Third New International Dictionary (G & C Merriam Co., 1981)*. A no-retaliation agreement in the context of a strike settlement, as here, should be given its generally accepted meaning, in light of applicable Board precedent, unless extrinsic evidence indicates that the parties intended otherwise.[7]

The credited evidence adduced at the hearing confirms rather than contradicts the General Counsel's position. First, at no time did the parties say or agree that the no-retaliation clause would not apply to internal union discipline. Indeed, prior to writing up the memorandum of agreement, Attorney Garden made clear to the Union that the Company wanted a clear understanding that there would be no retaliation by the Union against employees who crossed the picket line. It is undisputed that nothing else was said between the parties on this subject at any other time during the negotiations and, specifically, that nothing was said when the parties went over the clause at issue. Therefore, as internal union discipline would constitute "retaliation" under both Board law and plain English, the clause should be so interpreted. Second, the agreement in context would make no sense unless it covered internal union discipline. At the hearing, the Union argued in sum that by the no-retaliation clause, the parties agreed that the Union would withdraw its charges against the Company, there would be no sabotage by employees, the Company would not retaliate against returning strikers, and the Company would not take disciplinary action against employees because of picket line misconduct. However, it is questionable at best whether the pendency of unfair labor practices would be regarded as an act of "retaliation." For the reasons previously discussed, the evidence indicates that the Company was not concerned about the pending charges, and the Union did not contemplate that they were covered by the agreement. In its brief (Br. 4) the Union attaches significance to the fact that the agreement referred to "both parties," i.e., the Company and the Union, and "does not incorporate, by its terms, individual union members." However, the agreement in *Office Employees* similarly referred to reprisals "by either side." If I were to carry the Union's argument to its logical conclusion, it would mean that the agreement might not apply to acts of sabotage because such acts might constitute individual rather than union action. However, internal union discipline would constitute union action, i.e., action by one of the parties to the agreement. Moreover, company discrimination against returning strikers and acts of sabotage by returning strikers would constitute, respectively, unlawful and unprotected conduct, whether the parties had an agreement. It is unlikely that the parties would be concerned that the other refrain from doing that which in any event would be unlawful. Rather, it is probable that the parties, in the interest of reaching a "settlement providing for industrial peace" agreed to refrain from doing that which they could or might lawfully do in the absence of an agreement. *Office Employees*, supra, 267 NLRB at 1021 (1981). Therefore, it is evident that the Company agreed to refrain from taking disciplinary action against employees because of picket line misconduct, and the Union agreed that it would not impose internal discipline on its members as a result of their conduct during the strike.[8]

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By imposing fines on Harold Edelman, Melvin Emerson, Larry DeSmith, Douglas Forester, Donald Johnson, James Reiter, and Richard Schneider, in contravention of a strike-contract settlement agreement between the Company and the Union, the Union engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

[7] I do not agree with the General Counsel's argument (Br. 3–4) that I am precluded by the parol evidence rule from considering any evidence of the parties' intent beyond the language of the agreement itself. The question presented is one of contract interpretation, which should be governed by the intentions of the parties. *NLRB v. Ortiz Funeral Home Corp.*, 651 F.2d 136, 139–140 (2d Cir. 1981). This is also a case involving the alleged relinquishment of a right protected by Section 7 and Section 8(b)(1)(A) of the Act. Compare *Indianapolis Power Co.*, 273 NLRB 1715 (1985), revd. and remanded sub nom. *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1986). Indeed, in *Office Employees*, the most recent decision relied on by the General Counsel, the administrative law judge expressly took into consideration the negotiations and other statements by the parties. This is not a case such as those cited by the General Counsel *Hawaii Teamsters Local 996 (Dairymen's Assn.)*, 111 NLRB 1220 (1955); *Seattle Bakers' Bureau*, 101 NLRB 1344 (1953); and *Peterson & Lytle*, 60 NLRB 1070 (1945), in which a party seeks to present evidence of a prior or contemporaneous understanding that would clearly be at variance with or supplemental to the written agreement. Rather the meaning of the written agreement itself is at issue, and therefore the parties may adduce evidence concerning their discussions, or lack of discussion, concerning the clause.

[8] I reject the General Counsel's alternative argument that the fines were unlawful at least in part because they were unreasonable in amount. In determining the lawfulness of union fines on members or former members, the Board does not consider whether the fines are reasonable in amount. *NLRB v. Boeing Co.*, 412 U.S. 67 (1973).

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Union has committed violations of Section 8(b)(1)(A) of the Act, I shall recommend that it be required to cease and desist therefrom and from like or related conduct, to post appropriate notices, and to furnish and give appropriate notices to the Company. I shall further recommend that the Union be ordered to rescind the fines imposed on the above-named employees, remove all records of the disciplinary actions taken against them, and to refund any such fines or part thereof that has been paid, with interest thereon to be computed in the manner and amount prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[9] I am rejecting the General Counsel's request for a visitatorial clause because the General Counsel has failed to demonstrate that there are circumstances in this case that warrant such a remedy. See *Rebel Coal Co.*, 279 NLRB 141 fn. 2 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Local 792, Allied Sales Drivers, Ambulance, Beer Brewery, Grain Elevator, Retail Liquor, Livery, Malt House, Spring Water, Soft Drink, Taxicab, Vending Drivers, Helpers, Inside Employees and General Workers Union, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Imposing fines or other discipline on employees who crossed or worked behind its picket line during the strike against Johnson Bros. Wholesale Liquor Co. in December 1985, in contravention of the strike-conduct settlement agreement between the parties.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the fines imposed on Harold Edelman, Melvin Emerson, Larry DeSmith, Douglas Forester, Donald Johnson, James Reiter, and Richard Schneider, remove all records of the disciplinary actions against them, and notify each of them in writing that this has been done.

(b) Refund any such fines or part thereof that has been paid, with interest, as set forth in the remedy section of this decision.

(c) Post at its offices and meeting halls, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Furnish to the Regional Director for Region 18, signed copies of the notice for posting, if Johnson Bros. Wholesale Liquor Co. is willing, at its St. Paul facility, in the places where notices to employees are customarily posted. Copies of the notice, to be furnished by the Regional Director for Region 18, after being signed by Respondent's representative, shall be forthwith returned to the Regional Director for posting.

(e) Notify the Regional Director in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply.

---

[9] See generally *Isis Plumbing Co.*, 138 NLRB 716, 717–721 (1962).

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

United Food and Commercial Workers International Union, Local Union 23, AFL–CIO–CLC *and* Vic's Markets, Inc. d/b/a Cranberry Mall Shop 'N Save. Case 6–CP–421

27 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 28 June 1985 Administrative Law Judge Russell M. King Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an opposing brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge found that the Respondent Union violated Section 8(b)(7)(C) of the Act by picketing at the Cranberry Mall Shop 'N Save (the Employer), primarily to obtain recognition, without a petition under Section 9(c) having been filed within a reasonable period of time from the commencement of such picketing. The Union in its exceptions contends, inter alia, that the judge erred by failing to conclude that a meritorious 8(a)(2) charge in an earlier case filed against the Employer, Case 6–CA–17666, served as a complete defense to the finding of an 8(b)(7)(C) violation in the instant case. The General Counsel, in her answering brief, contends that the Board has long held that the filing of meritorious charges under Section 8(a)—save those involving a meritorious 8(a)(5) refusal-to-bargain charge—do not excuse a picketing union from the obligation to a file representation petition under Section 9(c). *Hod Carriers Local 408 (Blinne Construction Co.)*, 135 NLRB 1153, 1166 fn. 24 (1962).

We agree with the General Counsel that *Blinne*, above, controls the instant case. In *Blinne*, the Board, after reviewing the legislative history of Section 8(b)(7), determined that Congress was unwilling to write an exemption into Section 8(b)(7)(C) dispensing with the need to file a representation petition whenever employer unfair labor practices were alleged. In this regard, the Board specifically noted that Congress rejected a proposed amendment to Section 10(l) that would have made any unfair labor practice under Section 8(a) a defense to a charge of an 8(b)(7) violation.[2] *Blinne* recognized only one situation in which a representation petition would not be required under Section 8(b)(7)(C): when a meritorious 8(a)(5) charge had been filed, which would moot the unresolved question concerning representation, and thereby result in dismissal of the petition.

Here, the credited evidence clearly establishes that the Union's many months of picketing at the store had *a* recognitional object, albeit it may also have had other objects of protesting alleged area standards violations or protesting the Employer's alleged 8(a)(2) violations. No timely election petition was filed, and no meritorious 8(a)(5) charge existed that would have mooted the underlying question concerning representation. Accordingly, under *Blinne*, Section 8(b)(7)(C) is applicable and a violation of Section 8(b)(7)(C) has occurred.

The judge also found that the outcome of the instant case was not affected by the Union's then pending appeal before the Third Circuit regarding the Regional Director's approval of informal settlement agreements in Case 6–CA–17666 as well as in other related cases filed by the Union against the predecessor employer and the allegedly assisted union.[3] Because the issuance of the judge's decision, the Third Circuit on 16 April 1986 vacated the informal settlement agreements and remanded the cases to the Board for an evidentiary hearing on the Union's objections to the settlement agreements.[4] The Board thereafter filed a petition for certiorari before the Supreme Court, which was granted on 12 January 1987. In our view, these subsequent events do not warrant a contrary result for the same reason, set forth above, that *even a meritorious* 8(a)(2) charge is not a defense to an alleged 8(b)(7) violation, *Blinne*, above. At most, a meritorious 8(a)(2) charge precludes application for a restraining order pursuant to Section 10(l). Thus, even if, as a result of a later Court ruling, the earlier unfair labor practice charges ultimately should go to a hearing and be found meritorious—and therefore a valid object of the picketing—the fact remains that the Union picketed the Employer's

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] *Blinne* at 1165. Sec. 10(l) merely provides, in pertinent part, that a Board "officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue."

[3] The judge relied on the approval of the settlements as having "removed any possibility that unfair labor practices could be a valid objective of picketing in this case, notwithstanding the fact that the [U]nion objected to the settlement[s]."

[4] 788 F.2d 178.

store with *a* recognitional object for more than 30 days without a representation petition having been filed and thereby violated Section 8(b)(7)(C).[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Food and Commerical Workers International Union, Local Union 23, AFL–CIO–CLC, its officers, agents, and representatives, shall take the action set forth in the Order.

[5] The judge concluded that the Union unlawfully picketed at the store between 24 September 1984 and 26 April 1985, the date a temporary injunction was obtained. We note, however, that the start of the 10(b) limitation period was 4 October 1984. Therefore, and in light of our decision, the finding of a violation dates from 4 October 1984. Accordingly, we amend Conclusion of Law 3 to read as follows: "That by picketing the Company's Mars, Pennsylvania store with picket signs between 4 October 1984 and 26 April 1985, the Respondent Union violated Section 8(b)(7)(C) of the Act."

Barton A. Myers, Esq., for the General Counsel.
Peter J. Ford, Esq., of Washington, D.C., and *James R. Reehl, Esq.*,[1] of Pittsburgh, Pennsylvania, for the Union. *Daniel Cooper, Esq.*, of Monroeville, Pennsylvania, for the Charging Employer.

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING JR., Administrative Law Judge. This case was heard by me in Pittsburgh, Pennsylvania, on 14 and 15 May 1985. The charge was filed by the Employer, Vic's Markets, Inc. d/b/a Cranberry Mall Shop 'N Save (the Store or Company) on 4 April 1985,[2] and the complaint was issued on 19 April 1985 by the Regional Director for Region 6 of the National Labor Relations Board on behalf of the General Counsel.[3] The complaint alleges that the United Food and Commercial Workers International Union, Local Union 23, AFL–CIO–CLC (the Union) unlawfully demanded that the Company recognize it as the exclusive collective-bargaining representative of its employees at its store in Mars, Pennsylvania, by unlawfully picketing the store with signs indicating that the Store had committed unfair labor practices and did not comply with area standards, all in violation of Section 8(b)(7)(C) of the National Labor Relations Act.[4]

The Union, in its answer, defends the complaint on four grounds. First, the Union contends the picketing was not for recognitional purposes. Second, the Union alleges that at the time of the picketing, there was a pending unfair labor practice charge by the union against the store that has not been remedied because of an invalid settlement agreement. Third, the union claims that the complaint alleges unfair labor practices barred by the limitation period contained in Section 10(b) of the Act, and thus the entire complaint should be dismissed. Last, the Union contends that the picketing the Union engaged in was protected by Section 8(c) of the Act and the first amendment to the United States Constitution.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and counsel for the union, I make the following

FINDINGS OF FACT[5]

I. JURISDICTION

The pleadings and admissions established the following jurisdictional facts. At all times material, the Company, a Pennsylvania corporation with facilities located in Pittsburgh, Gibsonia, and Mars, Pennsylvania, has been engaged in the retail sale of groceries. The Company's

[1] Reehl was not present on the second day of the hearing.

[2] The word "store," when used, will also and often refer to the actual facility involved in the case.

[3] The term "General Counsel," when used, will normally refer to the attorney in the case acting on behalf of the General Counsel of the Board through the Regional Director.

[4] 29 U.S.C. § 151 et seq. Sec. 8(b)(7) reads as follows:

It shall be an unfair labor practice for a labor organization or its agents—

. . . .

(7) to picket or cause to be picketed, or threatened to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized, in accordance with this Act [subchapter] and other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act [section 159(c) of this title].

(B) where, within the preceding twelve months a valid election under Section 9(c) of this Act [section 159(c) of this title] has been conducted, or

(C) where such picketing has been conducted without a petition under Section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of Section 9(c)(1) [section 159(c) of this title] or the absence of a showing of a substantial interest of the labor organization, direct an election in such a unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this Section 8(b) [this subsection].

[5] The facts found are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been derived from a review of the *entire* record, with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Regarding those testifying in contradiction of the findings, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses, or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether or not mentioned or alluded to, has been reviewed and weighed in light of the *entire* record.

store in Mars is the only facility directly involved in this case. The Company purchased and commenced operations at the Mars' store about 24 September 1984,[6] and in the course and conduct of its business operations at the Mars' store the Company has derived gross revenue in excess of $500,000. Also during that period the Company, in the course and conduct of its business operations, purchased and received at its Mars' store products, goods, and materials valued in excess of $50,000 directly from points located outside of the Commonwealth of Pennsylvania. Thus, I find, as alleged and admitted, that the Company has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Also, as alleged and admitted, I find that at all times material the Union has been, and is now, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Initial Facts*

Victor Wukits, the company's president, purchased the store in Mars on 24 September from Charlie Brothers Company, Inc. (Charlie's), and thus became a successor employer. In April Charlie's had granted recognition to the United Steelworkers of America, Local 23 (Steelworkers) as the exclusive collective-bargaining representative of its nonsupervisory employees, and in May Charlie's entered into a collective-bargaining agreement with the Steelworkers effective 29 April 1985 and expiring 30 April 1988. The Union in this case was apparently a competing union with the Steelworkers in the Spring of 1984 and after Charlie's recognized the Steelworkers, the Union in this case filed unfair labor practice charges against both Charlie's and the Steelworkers, alleging that Charlie's had unlawfully recognized and given aid and support to the Steelworkers in violation of Section 8(a)(2) of the Act, and that the Steelworkers had unlawfully accepted such recognition in violation of Section 8(b)(1)(A) of the Act. The Regional Director issued a complaint against Charlie's and the Steelworkers as a result of the charge. Wukit's knew of this fact when he purchased the store on 24 September and he also knew that the Union in this case had been picketing the store since at least July. However, when Wukits purchased the store he also recognized the Steelworkers as the collective-bargaining representative of the employees and adopted the contract that had been entered into between Charlie's and the Steelworkers effective 29 April. As a result thereof, the Union continued picketing the Store, continued to obtain its own signed union authorization cards from the employees, and continued to pursue organizing attempts at the Store. It was stipulated in the case that during the months of May, June, and July the union had obtained 73 signed union authorization cards from the Store's employees and further obtained an additional signed card in March 1985.[7] On 5 October the Union filed additional unfair labor practice charges against the Store and its new owner and on 14 November the Regional Director issued a complaint against the Store, which again charged the Store with unlawfully recognizing and rendering unlawful assistance and support to the Steelworkers, in violation of Section 8(a)(2) of the Act (Case 6–CA–17666). Throughout this period of time the Union continued to picket the Store with picket signs which included allegations that the store was guilty of unfair labor practices. On 26 November a settlement was entered into by the Store and the Steelworkers in the earlier case against Charlie's and the more recent case against the Store, and although the Union in this case was listed as a party to that settlement agreement, it refused to enter into the agreement. The Regional Director approved the settlement over the objections of the Union, and the Union appealed that approval to the General Counsel, who denied the appeal on 22 January.[8] The major thrust of the settlement was the rejection by the Store of the Steelworkers and their earlier contract. After this settlement the Union continued to picket the Store with signs alleging unfair labor practices, and continued its attempts to obtain recognition by the Store and its owner, Wukits. This picketing ceased on 6 March 1985 but again commenced on 18 March,[9] but with the picket signs alleging the failure of the Store to meet area standards. On 8 April the picket signs were again changed to allege unfair labor practices by the Store. Prior to the 26 November settlement, the Union had not filed a petition for representation with the Board, apparently because of the pending unfair labor practice charges by the Union both against Charlie's and the Steelworkers, and later against the Store's new ownership, and the Board's so-called "blocking policy," under which a labor organization could not obtain a Board-conducted election during the pendency of unfair labor practice charges. After the cases themselves were settled and the Union's appeal to the General Counsel of the settlement approval by the Regional Director was denied on 22 January, about 26 February the Union filed a petition for review of that approval in the United States Court of Appeals for the Third Circuit and the record in this case reflects as yet no final disposition of that petition for review.[10] As indicated earlier, the Union's picketing at the store continued with only a short interruption between 6 and 18 March. The Union to date has not filed a petition for representation with the Board pursuant to Section 9(c) of the Act. The Regional Director issued the complaint in this case on 19 April and pursuant to Section 10(l) of the Act, also obtained a temporary injunction against the Union and its picketing in the ap-

[6] All dates in July through December are in 1984, and all dates in January through June are in 1985.

[7] From the record in this case, it cannot be concluded that these 74 cards constituted a majority of the store's nonsupervisory employees.

[8] In his brief, counsel for the Union alleges that settlement negotiations were held and the settlement was reached without the Union's knowledge, and cites a statement to that effect in his letter of appeal to the General Counsel. That letter of appeal was admitted into evidence over the objection of the General Counsel. Other than the allegation in the brief and the statement in the letter of appeal, there is no other record evidence or testimony to support the contention.

[9] The Union claims the picketing again commenced on the 25 March. This dispute will be discussed later.

[10] Throughout all the appeals the Union has requested an evidentiary hearing on its objections to the settlement agreement.

propriate United States District Court on 26 April. That temporary injunction presumably will remain in effect until final disposition of this case.

B. *The Specific Acts of Picketing and Organizational Attempts of the Union*

As indicated earlier, picketing at the store commenced in July 1984, and except for a short period in March 1985, the picketing continued on a daily basis until the Union was legally enjoined from such picketing on 26 April. This picketing normally consisted of two individual picketers and at least one picket sign, and except for the period between 18 March and 8 April, the picket signs alleged that the store was guilty of unfair labor practices. Victor Wukits purchased the store on 24 September but prior thereto, and sometime in early to mid-September, Union trustee Carl Huber telephoned Wukits and indicated that he wanted to talk to Wukits about "accreting" the collective-bargaining contract which the Union had recently negotiated and entered into with the other two stores that Wukits owned. At that time Wukits essentially rejected any such conversations.[11] Sometime in mid-October two individuals identifying themselves as representing the Union came into the store, one of which was Black. Wukits testified that the black individual identified himself as one "Gregory Hazlett" or something similar.[12] Wukits testified that the black man gave him "a card," which he has since lost, and that this individual also indicated that he wanted to speak to him about getting rid of the pickets in front of the store, and further indicated that he wanted to discuss a collective-bargaining agreement with him. Wukits referred both individuals to a firm named Human Resources Management, Inc. (HRM), a labor consulting firm that represented Vic's Markets, Inc. In late January union business agent Patrick Monaco, who was assigned by the Union to administer the two contracts at the company's other stores, telephoned the store's roving Supervisor James Maccaglia and asked him to speak to Wukits about accreting the other two contracts to the Mars Store.[13] Maccaglia testified that he related his conversation to Wukits, who never responded to Monaco's request. Thus, and approximately 2 weeks later, Monaco again telephoned Maccaglia with the same request, and again Wukits never responded. In approximately mid-February Monaco talked with Wukits in person at the Gibsonia store and according to Wukits, Monaco stated, ". . . if you sit down and talk to him [Union trustee Huber] about accreting the contract, he'll get the pickets out of there." Wukits then indicated his desire not to discuss the matter of accretion and that he did not think it would be legal to engage in such discussions, and again referred Monaco to his labor consultant HRM, indicating that he should specifically contact one Richard Goclano of HRM. Goclano testified that Monaco did telephone him in late February about attempting to set up a meeting with himself, Union Trustee Huber and Wukits to discuss recognition of the Union and the implementation of a contract at the Mars store. According to Goclano, Monaco also related that he had attempted to set up such a meeting directly with Wukits and Maccaglia, but had been unsuccessful. Goclano's reply to Monaco's request was negative at that time, and Goclano met in person with Monaco the first week of March 1985, whereupon Monaco renewed his request for a meeting to discuss recognition and a contract at Mars, and Goclano firmly indicated that at that time that he did not think such a meeting and discussions would be appropriate.

On 6 March 1985 the pickets at the Store were removed and two staff organizers for the Union came to and entered the store and had conversations with at least two employees and also handed them cards. Supervisor Maccaglia was in the Store at that time and after watching this activity he asked both organizers to leave, and after a short confrontation both organizers left.[14] Maccaglia indicated that later on that afternoon one of the organizers returned and approached employee John Peterman who was outside of the Store collecting shopping carts in the parking lot. Peterman testified that he was approached by organizer Krampert while in the parking lot and that Krampert suggested they both meet in a local bar after work. Peterman did meet Krampert in the bar after work and Peterman testified that Krampert asked him to sign a union authorization card, which he did, but using a false last name. The two staff organizers continued to solicit employees outside of the Store and in the parking lot for a period of time after March 6 but according to Kean, their attempts to solicit the support of the store's employees were unsuccessful.[15] According to Maccaglia and Wukits, the pickets reappeared in front of the Store on 18 March and the picket signs then alleged that the Store violated area wage and other standards, as opposed to alleging that the Store was guilty of unfair labor practices.[16]

---

[11] Carl Huber did not testify in the case.

[12] It was stipulated in this case that one Gregory C. Hamblet was an employee of the United Food and Commercial Workers International Union and was assigned to assist the Union (Local 23) in the Pittsburgh area in organizing activities during the period from 6 October to the end of October 1984, and that he was a black man. No individual by the name of "Hazlett" or Hamblet testified in the case.

[13] Patrick Monaco also did not testify in the case.

[14] One Ronald Kean testified on behalf of the Union in this case. His position was the director of organizing for the union. Kean admitted that he sent the two staff organizers to the store on 6 March and identified them as Sandra Thompson and Douglas Krampert.

[15] Store Supervisor Maccaglia indicated that the two staff organizers remained outside for a 2-week period after 6 March, but Kean testified that they remained only 1 week. Other than Kean, the director of organizing, only one other witness was called on behalf of the Union in the case and that was the Union's bookkeeper, Rita Nist.

[16] There is a dispute in this case about whether the pickets reappeared on 18 or 25 March. Bookkeeper Rita Nist was called for the purpose of proving that the picketing resumed on 25 March, through certain records that she kept. All of the pickets at the Store had been hired, outside pickets. Nist was responsible for the union's payroll and thus for making payment to these pickets. Certain of Nist's payroll records were admitted into evidence that did tend to indicate that payments did not resume until 25 March. However, she also conceded that the information in her records were derived from reports she had received and both she and Kean conceded that they never visited the Store at any time relevant in this case. On the other hand, Wukits and Maccaglia were definite and certain in their testimony that the pickets reappeared on March 18, and I so find that such was the case.

The Union's attorney James Reehl sent a letter to the store which was received on 25 March. In that letter a demand was made that the store meet the minimum standards of wages, hours, and working conditions for all retail store employees in the area. The letter also contained the following statement: "This letter is not intended as a demand upon you to sign a contract with Local 23 . . . . " The store's attorney, Daniel W. Cooper, replied to Attorney Reehl's letter on 3 April and that letter indicated the store's intention to file unfair labor practices charges with the Board if the union's picketing continued. On 4 April the Store did file such charges that eventually led to the issuance of the complaint in this case on 19 April. About 8 April the picket signs were again changed alleging the Company to be guilty of unfair labor practices, and on 26 April 1985 the Union was legally enjoined from picketing the store.

C. *Evaluation of Evidence and Law and Initial Conclusions*

Sometime prior to 24 September, the date the Company purchased the Mars store, Union Trustee Carl Huber approached the Company's President Victor Wukits and requested that Wukits recognize the union as the sole representative of the Store's nonsupervisory for employees the purposes of collective bargaining. Huber also asked Wukits to extend the existing contracts at the Company's other two stores to the Mars' store by "accretion." Wukits refused.[17] In mid-October two union representatives came to the store and talked to Wukits about getting rid of the pickets and discussing a collective-bargaining agreement. In late January and early February Union Business Agent Monaco telephoned Store Supervisor Maccaglia and asked him to talk to Wukits about extending or "accreting" the union contracts with those existing at the Company's other two stores. In mid-February Monaco talked personally with Wukits at the Company's Gibsonia store about accreting the contract and getting rid of the pickets at the Mars store. In late February and early March Monaco talked the Company's labor consultant, Goclano, about the same subject.[18] From 6 to 18 March the pickets were removed and on 6 March the Union admittedly sent two organizers to the store to solicit support for the union and signed Union authorization cards. Although they actually entered the store on 6 March they continued their organizing activities outside of the store until 18 March, when pickets reappeared with picket signs then alleging the store's failure to follow area standards. Some 21 days later, on 8 April, the picket signs were changed back to allege unfair labor practices by the store. The pickets and signs remained until the temporary injunction was obtained on 26 April.

Section 8(b)(7) of the Act was added by Congress to the Act in 1959 to proscribed picketing by an uncertified Union when "an" object of such picketing is recognition or organization. *Laborers Local 840 (Blinne Construction*, 135 NLRB 1153 (1962). If either recognition or organization is found to be "an" object of the picketing, the limitations of Section 8(b)(7) will apply despite the existence of other legitimate objectives. *Machinists Local 1173 (Alabama Motors)*, 266 NLRB 91 (1983); *Electrical Workers IBEW Local 265 (R P & M Electric)*, 236 NLRB 1333 (1978), enfd. 604 F.2d 1091 (8th Cir. 1979); *Houston Bldg. Trades Council (Everett Construction)*, 136 NLRB 321 (1962).[19] More specifically Section 8(b)(7) makes unlawful organizational or recognitional picketing by an uncertified union when another union has been lawfully recognized by the employer under Section 9(c) of the Act (8(b)(7)(A)), when a valid election had been held within the preceeding 12 months (8(b)(7)(B)), or when no petition for an election had been filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing (8(b)(7)(C)), as alleged in this case. The object of the picketing must be ascertained from the union's overall conduct. *Operating Engineers Local 4 (Seward Construction)*, 193 NLRB 632 (1971); *Teamsters Local 618 (S & R Auto Parts)*, 193 NLRB 714 (1971). This may include events which precede as well as those that accompany the picketing. *Retail Clerks Local 345 (Gem of Syracuse)*, 145 NLRB 1168, 1172 (1964). Other factors that tend to show a recognitional or organizational objective include oral requests to employees to join the Union and an indication that pickets will be removed only when recognition is received. *Gem of Syracuse*, supra; *Retail Clerks Local 212 (Maxam Buffalo)*, 140 NLRB 1258, 1265 (1963).

I find and conclude in this case that the Union's picketing at the Mars' store after 24 September was primarily (if not solely) to obtain recognition, and thus violative of Section 8(b)(7)(C) of the Act as alleged in the complaint. I find that the Union's temporary change to claims of violations of area standards by the store is in no way inconsistent with the above conclusion. *Electrical Workers IBEW Local 265 (R P & M Electric)*, supra. I further find that the pending appeal before the Third Circuit regard-

[17] This conversation, among others, were alleged as specific violations in the complaint. Because it was definitely outside the 6-month limitation period contained in Sec. 10(b) of the Act, at the hearing the Union moved to dismiss the entire complaint, or in the alternative, to strike any reference to the conversation in the complaint, citing *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960) (also cited in the Union's brief). I ruled the reference to the conversation could remain in the complaint although indicating it could not, and would not constitute any violation of the Act, and that I would consider it, if at all, only as background evidence, and then only if supported by testimony in the case. Huber did not testify in the case. Wukits did creditably testify in the case, and about this and other conversations. Accordingly, I accept the conversation and the reference to it in the complaint only as background evidence. I note also that *Bryan Mfg.* supra, also held that when occurrences within the 10(b) limitation period in and of themselves constitute unfair labor practices, earlier events may be utilized to shed light on the true character of the matters occurring within the limitation period. I thus find the Union's 10(b) limitation defense to be without merit.

[18] The settlement agreement in the earlier unfair labor practice case was admitted into evidence. It was approved by the Regional Director on 27 November and contained an immediate 60-day posting provision and a notice that was extensive and complete. Thus, a considerable part of the timeframe involved was also a posting period for the Store. Both Wukits and Goclano testified that they had doubts about the legality of even talking to any of the Union's representatives during the posting period.

[19] In its brief, the Union curiously avoids headon the issue of "organizational" picketing, although the record reflects there was organizing attempts or activity by the Union after the Company purchased the store on 24 September.

ing approval of the settlement of the earlier cases does not affect the outcome of this case. The administrative determination by the General Counsel to dispose of those cases removed any possibility that unfair labor practices could be a valid objective of picketing in this case, notwithstanding the fact that the Union objected to the settlement. *Waiters & Bartenders Local 500 (Mission Valley Inn)*, 140 NLRB 433 (1963).[20] In its brief, the Union cites two cases as contrary authority, *Hotel & Restaurants Employees Local 274 (Warwick Caterers)*, 269 NLRB 482 (1984), and *Mistletoe Express Service*, 268 NLRB 1245 (1984). In my opinion, those cases are distinguishable from this case. In *Warwick* the Union had filed 8(a)(5), (3), and (1) charges against the employer claiming representation under the successorship or alter ego theory. The Regional Director dismissed the charges and the General Counsel approved the dismissal. The union then picketed the employer, who thereafter filed 8(b)(7)(C) charges against the union and the Regional Director issued a complaint based on those charges. The judge found a violation after refusing to consider the union's representation defense, which was the basis of its earlier 8(a)(5) charge. The Board reversed and remanded the case to the judge with instructions to consider the union's defense. In the instant case there was no representation issue or 8(a)(5) issue, and no incumbent or intervenor union after the earlier settlement. See *Blinne Construction Co.*, supra. *Mistletoe* was a representation case. The petitioning union filed a representation petition with the Board and thereafter Sections 8(a)(2) and 8(b)(1)(A) unfair labor practice charges against the Employer and intervenor Union. The Regional Director ultimately decided to grant the petitioning Union's request to waive the Board's blocking rule and proceed with the representation case, including both Unions. The Employer appealed the Regional Director's decision to the Board, alleging that the pending 8(a)(2) charge should block the representation proceeding, and the Board agreed. Again, in the instant case there is no representation issue. The Union's fourth defense in its answer alleged that the Union's picketing was protected by Section 8(c) of the Act and the first amendment to the Constitution, i.e., a freedom of speech assertion. I also find this defense to be without merit, and I note further in this regard that the defense was not mentioned or discussed in the union's brief.

On the foregoing findings of fact and initial conclusions, and on the entire record, I make the following

CONCLUSIONS OF LAW

1. That the Charging Company is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. That the Respondent Union is a labor organization within the meaning of Section 2(5) of that Act.

3. That by picketing the Company's Mars, Pennsylvania store with picket signs between 24 September 1984 and 26 April 1985, the Respondent Union violated Section 8(b)(7)(C) of the Act.

4. That the violation found in paragraph 3 above, affected commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Union, United Food and Commercial Workers International Union, Local Union 23, AFL–CIO–CLC has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action that we find necessary to effectuate the policies of the Act, as set forth below.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, United Food and Commercial Workers International Union, Local 23, AFL–CIO–CLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from picketing, or causing to be picketed, the premises of the Employer, Vic's Market Inc. d/b/a Cranberry Mall Shop 'N Save, with an object of forcing or requiring the Employer to recognize or bargain with the Union as the representative of its employees or to force or require the employees of the Employer to accept or select the Union as their collective-bargaining representative, the Union not being currently certified as the representative of such employees, and a petition under Section 9(c) of the Act not having been filed within a reasonable period of time from the commencement of such picketing.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business offices copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[20] The Union's appeal is based on the Third Circuit's holding in *Leeds & Northrup Co. v. NLRB*, 357 F.2d 529 (1966), wherein the court held that a charging party is entitled to an evidentiary hearing on its objections to an informal settlement agreement. The circuits are split on the issue, and as counsel well knows, I am duty bound to follow Board law in the absence of a clear U.S. Supreme Court mandate. I note again, however, that the posted notice included in the settlement is lengthy and appears to be complete.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Grady Delling, Individually and Country Boy Mr. "D" Corp. d/b/a Country Boy Markets; Grady Delling, Individually and Glenwood Inc. d/b/a Country Boy Markets; Grady Delling, Individually d/b/a Country Boy Markets *and* Mark Reed, Attorney. Case 16–CA–12544

27 February 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, STEPHENS, AND CRACRAFT

On 24 September 1986 Administrative Law Judge Thomas D. Johnston issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a brief in support of her exceptions and of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Sec. III,A, of the opinion refers to Store Manager Lonnie Tomlinson as female. We correct this inadvertent error of the judge. We also correct the opinion to reflect the correct spelling of "perjure," and to indicate that the accurate citation of *NLRB v. Transportation Management Corp.* is 462 U.S. 393. None of these errors affects our decision.

[2] We agree with Judge Johnston that the Respondents violated Sec. 8(a)(1) of the Act by discharging Store Manager Kelley because of his refusal to commit an unfair labor practice. The credited testimony establishes that Kelley was ordered by the Respondents to terminate the employment of all employees who had signed union authorization cards. After the discharges, Kelley was discharged for refusing to fill out termination slips showing pretextual reasons for the discharges of five employees who actually had been fired, on instructions from General Manager Dibler, for signing union authorization cards. Although those discharges are not before us in this proceeding, on the record before us there can be no doubt that we would find them unlawful if called on to decide the issue. Thus, when Dibler instructed Kelley to prepare the termination slips, he was trying to persuade Kelley to act in furtherance of the Respondents' unlawful activities by preparing false documentation to support the Respondents' position. In declining to go along with Dibler's repeated requests for the termination slips, Kelley was refusing to take part any further in the Respondents' unfair labor practices. It is well settled that an employer violates the Act by discharging a supervisor for refusing to commit an unfair labor practice. See *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), enfd. 711 F.2d 383 (D.C. Cir. 1983). Accordingly, Kelley's discharge violated Sec. 8(a)(1).

[3] The General Counsel requests that the remedy include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondents under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause and we deny the General Counsel's request.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Grady Delling, Individually, Country Boy Mr. "D" Corp. and Glenwood Inc. d/b/a Country Boy Markets, Midwest City, Oklahoma, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

Wayne A. Rustin, Esq., for the General Counsel.
Charles W. Ellis, Esq. (Lawrence, Ellis & Harmon, P.A.), of Oklahoma City, Oklahoma, for the Respondents.
Mark L. Reed, Esq., of Del City, Oklahoma, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS D. JOHNSTON, Administrative Law Judge. This case was heard at Oklahoma City, Oklahoma, on 8 through 10 July 1986[1] pursuant to a first amended charge filed on 29 April 1986[2] in Case 16–CA–12544 by Mark Reed, attorney, and a sixth consolidated complaint[3] issued on 26 June.

The sixth consolidated complaint, as amended, alleges Grady Delling, Individually and Country Boy Mr. "D." Corp. d/b/a Country Boy Markets; Grady Delling, Individually and Glenwood Inc. d/b/a Country Boy Markets; and Grady Delling, Individually d/b/a Country Boy Markets (the Respondents) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by discharging Store Manager Everett O.V. Kelley for refusing to falsify termination slips in order to establish a pretext for terminating employees as an integral part of a pattern of conduct directed towards employees because of their union activities and other concerted activities for the purpose of collective bargaining or mutual aid or protection.

The Respondents in their answer as amended deny having violated the Act.[4]

The issue involved is whether the Respondents violated Section 8(a)(1) of the Act by unlawfully discharging Store Manager Kelley for his refusal to commit unfair labor practices by falsifying termination slips in order to establish a pretext for terminating employees because of their union activities.

On the entire record in this case and from my observations of the witnesses, and after due consideration of the

[1] All dates referred to are in 1986 unless otherwise stated.

[2] The original charge was filed on 20 March.

[3] Certain other cases, including Cases 16–CA–12454, 16–CA–12476, 16–CA–12525, 16–CA–12568, 16–CA–12586, 16–CA–12617, and 16–CA–12670, which were originally consolidated for hearing with the instant case, were settled and severed from the instant case, and another case, 16–CA–12495, was severed, the charge was withdrawn, and the case was closed.

[4] While the answer pleads certain affirmative defenses, they do not pertain to the instant case.

briefs filed by the General Counsel and the Respondents[5] I make the following[6]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

Grady Delling, Individually d/b/a Country Boy Markets, a sole proprietor with an office and place of business located at Midwest City, Oklahoma, is engaged in the retail operation of a chain of supermarket stores.

Country Boy Mr. "D" Corp., an Oklahoma corporation with an office and place of business located in Midwest City, Oklahoma d/b/a Country Boy Markets, is engaged in the retail operation of a chain of supermarket stores.

Glenwood, Inc., an Oklahoma corporation with an office and place of business located in Midwest City, Oklahoma d/b/a Country Boy Markets, is engaged in the retail operation of a chain of supermarket stores.

During the 12-month period preceding 26 June, Grady Delling, Individually, Country Boy Mr. "D" Corp. and Glenwood, Inc., d/b/a Country Boy Markets in the course of their operations each derived gross revenues in excess of $500,000 and each purchased and received goods and supplies, valued in excess of $5000, at their supermarket stores located in the State of Oklahoma directly from sources located outside the State of Oklahoma.

Grady Delling, Individually, Country Boy Mr. "D" Corp., and Glenwood Inc. d/b/a Country Boy Markets are affiliated business enterprises with common officers, ownership, directors, management, and supervisors; have a common labor policy affecting employees; have common premises and facilities; hold themselves out to the public as a single-integrated business enterprise; and are a single employer under the Act.

Grady Delling, Individually, Country Boy Mr. "D" Corp., and Glenwood Inc. d/b/a Country Boy Markets each separately and together are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Food and Commercial Workers Union, Local 1680 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondents are engaged in the business of operating a chain of supermarket stores located at Midwest City, Oklahoma, and vicinity. Included among their official and supervisory personnel are Owner Grady Delling, General Manager over all the stores Wayne Dibler, Store Manager Lonnie Tomlinson, and former Store Manager Everett O. V. Kelley.[7]

Although several employees, including Tom Moran, David Link, and Donna Shields, testified Wayne Stevenson held the position of assistant store manager at store 2 under Store Manager Kelley and assigned them duties, approved schedule changes for some of them, allowed employees to leave work early, and made sure employees were doing their jobs, Wayne Stevenson described his authority over the employees as being only similar to that of the office clerical employees who worked there. Stevenson, who referred to his position as "sort of assistant manager" or "night manager," denied he ever hired or effectively recommended hiring employees, made the decision to fire employees, or recommended employees be fired. Store Manager Kelley, whom I credit, denied Stevenson held the title of assistant store manager, which is consistent with Stevenson's testimony, and stated when Stevenson closed up the store at night he would instruct Stevenson on what to do.

Absent as here any showing Stevenson possessed the statutory indicia of a supervisor within the meaning of Section 2(11) of the Act,[8] I find, contrary to the General Counsel's contention, that Stevenson was not a supervisor under the Act.

About the latter part of 1985 the Union began an organizing campaign among Respondent's employees. Some of the employees who signed union authorization cards were Tom Moran, David Ray, David Link, Donna Shields, and Sharmane Black. These employees all worked at Country Boy Markets store 2 under Store Manager Kelley. Moran signed his card on 29 December 1985 and on 5 January he accompanied Union Organizer Karen Wade to a couple of Respondents' other stores where they passed out union fliers. According to Wade while she and Moran were at the Glenwood Store she identified herself as a union organizer to Tim Dibler[9] who she believed was either the store manager or assistant store manager. Wade overheard Tim Dibler, who she also talked to about the Union, talking to his father General Manager Dibler on the telephone telling him they had a union organizer in the store and that he would keep her there until Dibler arrived. Afterwards General Manager Dibler came to the store and saw both Moran and Wade who spoke to him. However, General Manager Dibler only looked at them without saying anything and they left the store.

General Manager Dibler did not dispute the testimony of either Wade or Moran, which I credit regarding this incident.

Besides signing a union authorization card David Link also solicited another employee at work to sign a card.

The Respondents were admittedly opposed to the Union's organizing campaign.

Donna Shields stated General Manager Dibler in a meeting held with employees in Store Manager Kelley's

[5] The Charging Party did not submit a brief.

[6] Unless otherwise indicated the findings are based on the pleadings, admissions, stipulations, and undisputed evidence contained in the record, which I credit.

[7] The four individuals are supervisors under the Act.

[8] Sec. 2(11) of the Act defines a supervisor as a person "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if . . . such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[9] Tim Dibler did not testify.

office told the employees not to talk about the union in the store. Shields, who I credit, denied this was limited to while employees were on duty. General Manager Dibler acknowledged telling employees not to talk about the Union in the store but said he told them not to do it on company time.

Wayne Stevenson testified about late December 1985 or early January General Manager Dibler, during a meeting at which Dibler spoke to Stevenson and another employee with Store Manager Kelley present, mentioned there had been a bunch of cards being passed around about the Union and he did not care or want to know whether they signed them. However, Dibler said unless Owner Delling wanted to go union they were not going union. Dibler mentioned they all knew what happened to Humpty[10] and Safeway was about to go out of business in Oklahoma because of the Union so unless Delling wanted to sign the bottom line they were not going union. Under cross-examination Stevenson said when Dibler made the statement Dibler was talking about signing a contract.

General Manager Dibler did not deny the testimony of Wayne Stevenson or Store Manager Tomlinson and I credit their undisputed testimony along with that of Donna Shields and find Dibler made the alleged statements that they attributed to him.

Store Manager Tomlinson testified that about the end of February, shortly after she became store manager, she was present at one of the meetings General Manager Dibler held with small groups of employees at which Dibler spoke about the Union. Tomlinson stated when one of the employees present asked if they would be terminated if they signed a union card, they said sign and find out.

Store Manager Tomlinson, whom I credit, also stated that shortly after she became a store manager, she held a meeting with employees during which she mentioned if the store did go union they would probably end up closing the store because their store in particular probably would not be able to afford it.

Tomlinson also acknowledged about the end of February or early March when two employees asked her if the statement Tomlinson had made about closing the store if the Union came in was true she informed them it was. According to Tomlinson she had been informed they would probably close the store down if the Union came in and she admitted passing that information on to employees.

B. *The Discharge of Store Manager Kelley*

Everett Kelley was employed by the Respondents from 22 October 1984 to 31 January and held the position of store manager of store 2.

Store Manager Kelley stated he first learned about the union organizing campaign from General Manager Dibler, who came to his store and inquired whether Kelley had any extra employees Dibler could send to the Glenwood store to work. Dibler gave as the reason he had just fired two employees there, whose names he did not mention, for signing union cards. Dibler instructed Kelley not to tell the employees the reason they were being transferred. Kelley, as a result of this conversation, transferred employee Jimmy Carr to the Glenwood store.

Kelley also stated Dibler on one occasion told him that every store they found out were signing union cards, they were all going to be fired.

According to Kelley in December 1985 Wayne Stevenson informed him employees Tom Moran, David Link, David Ray, Keith Thompson, Donna Shields, and Katherine Johnson had signed union authorization cards. Later Stevenson told him Sharmane Black and a part-time employee named Brian had also signed cards.

Wayne Stevenson acknowledged informing Kelley which employees had signed cards.

Kelley testified that in January General Manager Dibler came to his store and inquired which employee was Tom Moran. Dibler then asked Kelley whether he had anything on Moran he could fire him for. Kelley denied having any reason and stated Moran was one of his best employees. Dibler, who had a list of names of employees to get rid of, then instructed Kelley to fire everybody who signed a union card. Dibler also told Kelley on one occasion that Oleen Dunn, who worked in the office at store 2, had informed Owner Delling and himself about the employees who had signed union cards.

General Manager Dibler denied telling Kelley he had fired employees at other stores because of the Union or telling Kelley to fire Tom Moran, Donna Shields, David Ray, or David Link. According to Dibler, as far as he knew it was Kelley who decided to let them go. I credit Kelley rather than Dibler, whom I discredit, and find Dibler did instruct Kelley to discharge those employees who had signed union authorization cards. Apart from my observations of the witnesses in discrediting Dibler, I find his testimony was contradictory and implausible.

Kelley, acting on Dibler's instructions to fire those employees who had signed union authorization cards, stated he personally fired Tom Moran, David Ray, and Donna Shields for signing union authorization cards. Kelley also instructed Wayne Stevenson to fire David Link and Sharmane Black for signing union authorization cards and Stevenson did. Kelley also stated that instead of firing Katherine Johnson for signing a card, he moved her to a job in the bakery because she was the sole support of a large family.

Wayne Stevenson acknowledged Kelley had informed him that General Manager Dibler had instructed Kelley to fire the employees who had signed union cards.

Tom Moran testified he was fired by Kelley on 6 January. The reason Kelley gave was Moran had gotten into an argument with a checker 3 or 4 weeks ago. When Moran denied it and told Kelley that was not the real reason he was firing him, Kelley replied all he knew was what he was being told and indicated Owner Delling and General Manager Dibler had told Kelley to fire Moran.

David Ray testified he was fired by Kelley on 6 January. The reason Kelley gave for firing him was the big

[10] Humpty Dumpty was the name of another chain of food stores and some of its stores were purchased by the Respondents after they closed.

men, whom he did not name, were mad because Ray did not come in to work the previous Friday. According to Ray he had been called to come in to work the previous Friday by Wayne Stevenson. However, it was his scheduled day off and he had already made plans. On informing Stevenson he could not come in and the reason, Stevenson told him it was okay. Ray denied he had ever been reprimanded about his work attendance.

Donna Shields stated on 15 January when she reported to work Kelley informed her she had been laid off. The reason Kelley gave was he had been in a meeting and he had to lay some employees off because business was slow. Although Kelley asked her whether she wanted to go to work in the bakery and she said she did, Kelley never contacted her.

David Link testified that about 7 January, shortly after he began work, Wayne Stevenson informed Link he was going to have to let him go because he had called in sick a couple of times and he was too slow. Stevenson also said it was not his idea to let Link go.

Link acknowledged he had called in sick a couple of times but denied he had been reprimanded for it or warned he would be terminated. Link also admitted that on a couple of occasions when General Manager Dibler previously managed the store Dibler had told both Wayne Stevenson and himself they needed to speed up. However, Link was not warned he would be terminated if he did not speed up.

Sharmane Black stated on 15 January she was informed by Wayne Stevenson she was fired. The reason Stevenson gave was because Black had burned the cookies. Stevenson also said Store Manager Kelley had told Stevenson to fire Black.

About a week and a half later Black credibly stated without denial that she called Owner Delling and informed him she had not signed a union card because she needed a job. Delling then asked Black whether she was sure she had not signed a card. After Black assured Delling she had not, Delling told Black he would see what he could do about getting her job back and he would contact her. Delling then asked Black if she knew who was giving out names for the people. Black denied knowing who was giving out names so the union people could contact them. Black was rehired a few days later.

Both Store Manager Kelley and Wayne Stevenson, who said he acted on Kelley's instructions in firing David Link and Sharmane Black, admitted the reasons they gave to Tom Moran, David Ray, Donna Shields, David Link, and Sharmane Black for firing them were false reasons and that the real reasons for their discharge were because they had signed union authorization cards.

Immediately following a meeting of the store managers at the Tradewinds Motel, at which Respondents' attorneys informed them how to conduct themselves during the union organizing campaign that had already started, Owner Delling and General Manager Dibler held a separate meeting with the store managers. During this second meeting Store Manager Kelley stated Delling said they were his stores and he would run them as he wanted to and it was just like the old saying that the basketball player that did not foul was not a very good player and they were going to foul a lot and carry on as usual. Store Manager Tomlinson, who attended the meeting, also said Delling explained what they could or could not do, during which he made a statement to the effect it was going to be like basketball players and to be a good basketball player you had to foul, and if need be he would foul. Tomlinson denied Delling was just saying they were going to be aggressive.

Owner Delling acknowledged mentioning a basketball player fouling. However, Delling's version was he mentioned even the professional basketball players foul and said while they may occasionally, but not intentionally, do it themselves, they were still going to run their stores and manage them as they knew how to manage them. According to Delling he also said they were going to play by the rules.

I credit the testimony of Store Managers Kelley and Tomlinson rather than Delling concerning the statements made by Delling. Besides my observations of the witnesses in discrediting Delling, his testimony was both implausible and contrary to that of other supervisory personnel of the Respondents.

Store Manager Kelley testified that after the meeting ended, General Manager Dibler instructed him to fill out termination slips on the people he had fired. Kelley refused telling Dibler he was not going to fill them out and perjure himself in front of the National Labor Relations Board. Kelley acknowledged Dibler did not tell him what to put on the termination slips; however, he knew Dibler did not want him to put on there it was because they signed a union card.

According to Kelley, prior to that time the Respondents did not require termination slips for discharges and he had never prepared any previously or been asked to. General Manager Dibler acknowledged instructing Kelley to prepare termination slips listing the reasons why he fired Tom Moran, David Ray, and David Link, but denied telling Kelley to falsify the information. Dibler admitted that the use of termination slips did not begin until sometime in January. This occurred on advice of counsel after a charge had been filed about the middle of January regarding Tom Moran's discharge.

About 2 days later Dibler asked Kelley in person whether he had filled the termination slips out and Kelley informed Dibler he had not.

According to Kelley, every 2 or 3 days on about a dozen occasions, including both on the telephone and in person, Dibler asked him whether he had the termination slips ready whereupon he informed Dibler he had not and said he was not going to fill them out.

The last time Kelley stated he was asked for the termination slips was on 30 January. On that occasion a girl from the office named Jeannie came to the store that morning and informed Kelley that Dibler had sent her there to see if Kelley had filled out the termination slips and told Kelley if he had not she was supposed to call Dibler right back. Kelley told her to tell Dibler he was not going to fill them out and perjure himself in front of the National Labor Relations Board.

Wayne Stevenson also stated there were several telephone calls from Respondents' office asking for the termination slips from Kelley and, on one occasion, an

office girl came to the store and asked for them. Stevenson also stated Kelley had told him Dibler wanted termination slips for the discharged employees but Kelley told Stevenson he did not want to write them because if the cases ever came to court he would have to perjure himself on the stand because the letter would be a lie.

General Manager Dibler acknowledged requesting Kelley on 6 to 10 occasions to deliver the termination slips to him. However, he stated Kelley always replied he did not have time or to check with Kelley in a day or two. Dibler denied Kelley ever said he was not going to furnish them until the day he discharged Kelley.

To the extent the testimony of Kelley and Dibler conflicts, I credit Kelley for reasons previously stated.

On 31 January Kelley was discharged by Dibler. Kelley stated on that occasion Dibler first reminded him of a conversation they had about a month ago in which Kelley had asked Dibler whether he was going to be fired.[11] Dibler then said he finally remembered to ask Delling about it and Delling had said to go ahead and terminate Kelley and let them make a change. The reason Dibler gave Kelley for discharging him was poor inventory.

Dibler's version of the discharge conversation was when he went out to discharge Kelley that day he first asked Kelley whether he had the termination slips. Kelley's response was he had them but in a safe deposit box and would produce them when the time was necessary. Dibler then said he and Owner Delling had talked and decided to make a change because Kelley had asked Dibler previously if he was going to be fired and had mentioi moving into a house and had heard rumors and knew he was going to get fired.

I credit Kelley's version of the discharge conversation rather than Dibler, whom I have previously discredited.

Following Kelley's discharge he was replaced by Jeff Holmquist who was manager of store 7.

C. *Respondents' Defense*

General Manager Dibler testified the reasons Store Manager Kelley were given for being discharged were because he was overstocked on inventory and operating at a loss. While these were the reasons that led to the decision Dibler stated, there were other reasons including Kelley did not come up and sack groceries when he was supposed to, he would not work in the office or run a register, and his inability as a store manager.

The reasons Owner Delling gave for Kelley's discharge were he was continuously overbuying and was not making any progress in cutting inventory down and they just had too much excess inventory.

General Manager Dibler stated that in November 1985 he and Owner Delling first talked about discharging Kelley and made the decision to do so but then decided to wait until after the holidays were over because Kelley's wife was ill. While Owner Delling testified he first considered discharging Kelley in October or November 1985 but did not act then because Kelley's wife was ill and the holidays were coming up he, unlike Dibler, stated he was hoping Kelley would come around and do a better job, which he denied Kelley did.

Delling testified that beginning about August or September 1985 he talked with Kelley on several occasions about Kelley's excess inventory and how much overbuying Kelley was doing. According to Dibler, carrying a high inventory makes it hard to make a profit and results in damages.

Dibler also stated on different occasions he counseled Kelley about his inventory. During June 1985 Dibler said the inventory was $30,000 to $35,000 too high and he informed Kelley that Kelley needed to cut it down. However by October 1985 instead of decreasing the inventory it had increased another $30,000 for a total of $185,000.

Both Delling and Dibler stated that about October 1985 they met with Kelley at which time Delling took away Kelley's right to make purchases for the store without Dibler's approval.

According to Dibler after this meeting at Delling's suggestion approximately $35,000 to $40,000 worth of inventory at Kelley's store was then returned between 5 October 1985 and 4 January to the Flemming Company or transferred to other stores of the Respondents.

Respondents' records, as indicated by a summary taken from them, reflect store 2's average weekly sales were approximately $29,147 and the inventory on hand there was approximately $155,713 on 22 June 1985; $185,587 on 5 October 1985; $142,968 on 4 January; and $134,962 in February.[12]

The summary also reflects the inventory for store 6, which is the only other store with comparable average weekly sales of approximately $28,335, was approximately $123,290 on 5 October 1985 and $110,659 on 4 January. However, the record does not reflect what the inventory was on 22 June 1985 or February.

General Manager Dibler acknowledged inventory is normally higher around holidays such as Thanksgiving and Christmas in order to meet customers' demands.

The Respondents presented several employees who previously worked under Store Manager Kelley. Barbara Conley, who previously managed a store for the Respondents, stated while she worked in the office under Kelley, Kelley would not do anything that needed to be done such as checking, carrying out groceries, taking care of the front end, or scheduling, and caused friction among employees by telling one employee something about the other employee. Conley also described the back room as being so full of inventory a person could hardly get through it.

Jimmy Carr claimed while working under Kelley at store 2, as compared with periods he worked under other store managers there, the back stock was growing and Kelley was overordering because it was piling up in the back. Carr also said Kelley would not help out with checking when it was needed. Carr acknowledged he had never been a store manager or ordered inventory.

[11] According to Kelley about a month earlier he wanted to move into a house but first talked to Dibler to make sure he was not going to be discharged because of a rumor he had heard about his being discharged, which Owner Delling had already denied.

[12] General Manager Dibler stated this inventory was conducted 1 February.

Eric Russell claimed under Manager Kelley the back room was overstocked with inventory whereas under Store Manager Holmquist it is now way down. Although Russell stated he ordered inventory for his frozen foods department, he acknowledged he did not order inventory for the entire store.

Neva Moseley, who worked as assistant store manager at store 2 under several managers, including Larry Wilder, Wayne Dibler, and Kelley, stated while Kelley was manager there was a lot of stock in the back room, the shelves were stocked from the floor to the ceiling, and when trucks came in they did not have anywhere to put the stock. Under Dibler and Wilder, however, they did not get stuff in they did not need and what merchandise they got in it went right to the shelf or on the floor. Moseley acknowledged the store manager was the person responsible for ordering inventory for the entire store.

Both Owner Delling and General Manager Dibler admitted having knowledge about the Union's attempt to organize Respondents' employees and they were concerned and took actions to prevent it. However, Delling, on being asked whether Kelley's involvement or conduct in the union organizing drive had anything to do with his decision to discharge Kelley, responded by denying he had any knowledge of Kelley having anything to do with it in any way. Neither Delling nor Dibler specifically denied that Kelley's refusal to fill out termination slips on those employees Kelley discharged for signing union authorization cards had anything to with his discharge.

Store Manager Kelley admitted he had been counseled by General Manager Dibler for carrying too high an inventory and Dibler wanted it down before the end of the year. However, Kelley denied his inventory was high during the latter part of December 1985 through his discharge in late January, and stated in fact by 4 January it was down $40,000. Kelley also stated a lot of inventory had been taken out of his warehouse by Owner Delling and General Manager Dibler and he never saw where he had been given credit for it. Kelley denied his store was losing money on the inventory.

Kelley also denied he had ever been reprimanded for his job performance or ever warned he would be discharged because of a bad inventory.

Besides having a charge on his behalf filed with the Board, Kelley also filed a charge with the Equal Employment Opportunity Commission against the Respondents alleging his discharge was based on age discrimination.

D. *Analysis and Conclusions*

The General Counsel contends the Respondents violated Section 8(a)(1) of the Act by unlawfully discharging Store Manager Kelley, a supervisor under the Act, for refusing to falsify termination slips in order to establish a pretext for terminating employees because of their union activities and in effect discharged Kelley for his refusal to commit unfair labor practices. The Respondents deny having violated the Act and assert Kelley was discharged for overstocking on inventory and operating at a loss, not performing his duties, and his inability as a store manager. The Respondents in their brief denied the General Counsel had proved Kelley was fired because he refused to author a false record intended for Respondents personnel file.

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

The law is well settled that an employer violates Section 8(a)(1) of the Act by discharging a supervisor for refusing to commit unfair labor practices because such discharge interferes with the exercise of employees' Section 7 rights coupled with the need to ensure that even statutorily excluded individuals may not be coerced into violating the law. *Parker-Robb Chevrolet*, 262 NLRB 402, 404 (1982); and *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986).

Where motivation[13] for discharge is at issue in cases alleging violation of Section 8(a)(1) of the Act the General Counsel must make a prima facie showing sufficient to support the inference that protected activity by employees was a motivating factor in an employer's decision to discharge them and the employer then has the burden of showing the employees would have been discharged absent the protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 459 U.S. 1014 (1982). Direct evidence of discriminatory motivation is not necessary to support a finding of discrimination and such intent may be inferred from the record as a whole. *Heath International*, 196 NLRB 318 (1972).

The findings supra establish that Store Manager Kelley, a supervisor under the Act, acting on specific instructions from General Manager Dibler to discharge all the employees at his store who had signed union authorization cards, discharged employees Tom Moran, David Ray and Donna Shields and had Wayne Stevenson discharge David Link and Sharmane Black all because they had signed union authorization cards. Dibler and Owner Delling had been told which employees had signed cards. Both Kelley and Stevenson orally gave those employees false reasons for their discharges in order to conceal the real discriminatory reasons for discharging them. Following their discharges, which occurred during 6 through 15 January, Dibler instructed Kelley to fill out written termination slips on the employees he had discharged. Kelley refused, informing Dibler that he was not going to purger himself in front of the National Labor Relations Board. While Dibler did not instruct Kelley what reasons to put on the termination slips, it was obvious Dibler was not seeking to have the records show the employees were actually fired because they signed union authorization cards. Moreover, when Kelley told Dibler he refused because he was not going to purger himself, Dibler did not assure him he did not have to. Despite repeated requests by Dibler up until the day before Kelley's discharge for Kelley to furnish Dibler with the termination slips for the discharged em-

[13] The motivation at issue here is whether Kelley was discharged for refusing to commit unfair labor practices as contended by the General Counsel or for cause as the Respondents argue in their brief.

ployees, Kelley steadfastly refused to furnish them saying he was not going to fill them out or purger himself in front of the National Labor Relations Board. It is clear that Dibler, by his demands to get Kelley, who refused to prepare falsified records to conceal the fact the Respondents had discharged five employees for signing union authorization cards, sought to have Kelley commit further unfair labor practices.

The Respondents' claims that Kelley was discharged because of overstocking inventory and operating at a loss, not performing his duties, and his inability as a store manager are unpersuasive, not supported by the evidence, and are rejected. Although Kelley's store did have a high inventory and Kelley was counseled about it, Respondents' own records reflect it substantially decreased between 5 October 1985 and 1 February. While some of the decrease was attributed to shipping and transferring stock elsewhere, this occurred before the further decrease in inventory between 4 January and 1 February. Moreover if, as Respondents assert, Kelley's right to make purchases without Dibler's approval was revoked in October 1985 it appears from that time on Dibler was aware of and approved Kelley's actions in ordering inventory for the store. Insofar as the other reasons given for Kelley's discharge are concerned no probative evidence was presented to support them. The required duties of a store manager for the Respondents were never fully defined and Kelley denied that his store, which Respondents' own records show had average weekly earnings of approximately $29,147, was operating at a loss.

Based on the foregoing findings as discussed and having rejected Respondents' defense, I am persuaded and find the Respondents violated Section 8(a)(1) of the Act by discriminatorily discharging Store Manager Kelley, a supervisor under the Act, on 31 January because he refused to commit unfair labor practices under the Act by preparing termination slips showing false reasons for the discharges of five employees who were discharged for signing union authorization cards. I further find the reasons given by the Respondents for discharging Kelley were mere pretexts to conceal the discriminatory reason for his discharge.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents set forth in section III, above, found to constitute unfair labor practices occurring in connection the operations of the Respondents described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Grady Delling, Individually, Country Boy Mr. "D" Corp., and Glenwood Inc. d/b/a Country Boy Markets are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local 1680 is a labor organization within the meaning of Section 2(6) and (7) of the Act.

3. By discharging Everett Kelley, a supervisor under the Act, on 31 January 1986 for refusing to commit unfair labor practices thereby interfering with the exercise of employees' rights under Section 7 of the Act, Respondents violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. Accordingly, the Respondents shall be ordered to offer immediate and full reinstatement to Everett Kelley, or if that job no longer exists, to a substantially equivalent job without prejudice to his seniority and other rights and privileges and make him whole for any loss of earnings and other compensations he may have suffered as a result of his discriminatory discharge on 31 January 1986. Backpay shall be computed in accordance with the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

The Respondents shall be ordered to remove from their files any references to the discriminatory discharge of Everett Kelley herein found and to notify him, in writing, this has been done and evidence of their unlawful conduct will not be used as a basis for future personnel actions against him.

The General Counsel's request that the remedial order include a visitatorial clause authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure to enable it to monitor compliance with the Board's Order as enforced by the court of appeals is rejected on the grounds the Board does not provide for discovery procedures in its proceedings and there is no showing that under the circumstances presented here such a clause is necessary.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondents, Grady Delling, Individually, Country Boy Mr. "D" Corp., and Glenwood Inc. d/b/a Country Boy Markets, Midwest City, Oklahoma, their officers, agents, successors, and assigns, shall

1. Cease and desist from

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging supervisors for refusing to commit unfair labor practices thereby interfering with the exercise of employees' rights under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Everett Kelley immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job without prejudice to his seniority and other rights and privileges and make him whole for any loss of earnings and other compensations he may have suffered by reason of his discriminatory discharge on 31 January 1986 in the manner set forth in the remedy section of the decision.

(b) Remove from their files any references to the discharge of Everett Kelley herein found to be unlawful and notify him, in writing, this has been done and evidence of their unlawful conduct will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backay due under the terms of this Order.

(d) Post at all of their stores located at Midwest City, Oklahoma, and vicinity copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that with respect to Case 16–CA–12544 the sixth consolidated complaint, as amended, is dismissed insofar as it alleges unfair labor practices not specifically found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge our supevisors for refusing to commit unfair labor practices thereby interfering with the exercise of employees' rights under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Everett O. V. Kelly immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job without prejudice to his seniority and other rights and privileges and WE WILL make him whole for any loss of earnings and other benefits he may have suffered by reason of our discrimination against him, with interest.

WE WILL remove from our files any references to the discharge of Everett O. V. Kelley herein found unlawful and WE WILL notify him, in writing, this has been done and evidence of our unlawful conduct will not be used as a basis for future personnel action against him.

GRADY DELLING, INDIVIDUALLY, COUNTRY BOY MR. "D" CORP., AND GLENWOOD INC. D/B/A COUNTRY BOY MARKETS

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mo's West *and* Dora A. Nichols, Petitioner, and Hotel Employees Local No. 9

Mo's Enterprises, Inc. *and* Kay A. Shafer, Petitioner and Hotel Employees and Restaurant Employees Local No. 9. Cases 36–RD–1097 and 36–RD–1098

27 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 12 August 1985 the Acting Regional Director for Region 19 issued a Decision and Order in the above-entitled proceeding in which he dismissed the two decertification petitions on the basis that the petitioned-for units were not coextensive with the existing contractual bargaining unit. In so finding, the Acting Regional Director concluded that the Employers were part of a multiemployer bargaining group.

In accordance with Section 102.67 of the Board's Rules and Regulations, the Employers filed a timely request for review of the Acting Regional Director's decision. The Employers contended that the Acting Regional Director erred in finding that the Employers were part of the multiemployer bargaining group.

By telegraphic order dated 11 October 1985 the request for review was granted.

The Board has reviewed the entire record in this case and has decided to affirm the Acting Regional Director's Decision and Order, attached as an appendix hereto.

The record supports the Acting Regional Director's finding that the Employers were members of a multiemployer bargaining group called the Presidents' Council of Food, Beverage, and Lodging Industries of Oregon (Presidents' Council) and had not timely withdrawn therefrom. Accordingly, we find that the Acting Regional Director correctly applied the Board's longstanding rule that a petitioned-for unit in a decertification petition must be coextensive with the certified or recognized unit.[1]

The Chairman in his dissent contends that because the decertification petitions here were filed at a time when the Union and the Employers could have withdrawn from the multiemployer bargaining group under the rules set forth in *Retail Associates, Inc.*,[2] the Board should process the decertification petitions in order to preserve the employees' right of self-determination. The Chairman raises an issue, however, that was not raised by the Employers in their request for review. Such issue is therefore not properly before the Board and unnecessary to comment on in the instant case.

CHAIRMAN DOTSON, dissenting.

Contrary to my colleagues, I would reverse the Acting Regional Director's Decision and Order dismissing the petitions. Rather, I would reinstate the petitions and remand the case to the Region for further appropriate action, including scheduling of the elections and resolution of the outstanding issues.[1]

The petitions in Cases 36–RD–1097 and 36–RD–1098 seek decertification elections among certain employees employed by Mo's West and Mo's Enterprises, Inc. (MEI), respectively.[2] Both Mo's West and MEI are members of a multiemployer bargaining group called the President's Council of Food, Beverage, and Lodging Industries of Oregon (Council). The Employers are signatories to a multiemployer bargaining contract between the Council and the Union, which was in effect from 1 August 1982 through 31 July 1985. This contract covered those employees in the petitioned-for units. The Acting Regional Director found that since there was no evidence that the Employer had withdrawn from the Council, the petitioned-for units were not coextensive with the existing contractual multiemployer unit, and the petitions must therefore be dismissed. I disagree.

The Board has long recognized that the basic element necessary to create a multiemployer bargaining unit is an unequivocal agreement from the employers and the union to be bound by group negotiations rather than individual bargaining.[3] Withdrawal from the multiemployer group may be achieved by an employer or the union simply by giving "written notice . . . prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations."[4] Once actual multiemployer negotiations have begun, a unilateral attempt to withdraw from the multiemployer group is untimely, absent unusual circumstances. Neither the formation nor the dissolution of the multiemployer bargaining unit,

[1] *Campbell Soup Co.*, 111 NLRB 234 (1955).

[2] 120 NLRB 388 (1958). *Retail Associates* states that in order to timely withdraw from a multiemployer bargaining unit, a party must give adequate written notice prior to the date set by the contract for modification or to the agreed-upon date to begin the multiemployer negotiations. Once negotiations have begun, a party cannot withdraw unless there is mutual consent, absent unusual circumstances. 120 NLRB at 395.

[1] In his decision, the Acting Regional Director found it unnecessary to pass on the issues of Petitioner Nichols' supervisory status and of the chowder manufacturing employees' inclusion in or exclusion from the bargaining unit.

[2] Mo's West is a restaurant operating seasonally in Otter Creek, Oregon. MEI is a corporation which operates two restaurants in Portland, Oregon: Mo's and Mo's Annex.

[3] See *Retail Associates*, 120 NLRB 388, 393 (1958).

[4] Id. at 395.

however, takes into account the desires of the group most directly affected by these actions—the employees.

I have recently stated my strong opposition to Board policies which put to one side employees' free choice in favor of so-called stability in bargaining relationships.[5] In my opinion, such decisions fail to strike the proper balance between the statutory *right* to refrain from collective bargaining, guaranteed to employees by Section 7 of the Act, and the more general statutory *policy* of industrial stability. In *Gibbs & Cox*, the Board held that a group of employees which constituted a separate appropriate unit at the time it sought representation was later "merged" into a much larger, geographically distant, group of employees by the agreement of the employer and the union. This "merger" later prevented the smaller group of employees from expressing its desires in a representation election. Former Member Dennis and I dissented from this result, stating our belief that "[t]he appropriateness of [a] unit cannot be extinguished merely by mutual intent on the part of an employer and a union to conduct collective bargaining on the basis of some other unit."[6]

Here, as in *Gibbs & Cox*, the employees in two existing appropriate units were included in a much larger bargaining unit by the action of the employers and the union.[7] The employees of Mo's West and MEI have petitioned for decertification elections in the smaller units covering only these Employers' employees. The petitions were filed at a time when either the Union or the Employers could have timely withdrawn from the multiemployer bargaining unit. In these circumstances, I believe that the employees should be given the same opportunity as the Union and Employers to "withdraw," in effect, from the multiemployer unit for the purpose of determining whether the employees wish to reject or change bargaining representatives. As former Member Dennis and I stated in *Gibbs & Cox*, we believe that the appropriate accommodation between the conflicting goals of employee free choice and bargaining stability is that "absent unusual circumstances, any unit which was appropriate for the purpose of selecting a bargaining representative remains appropriate for the purpose of rejecting that bargaining representative or obtaining a new one."[8] The Board's insistence that once an employer and a union have agreed to include a separate unit of employees in a multiemployer bargaining unit, those employees cannot make changes in their bargaining representative except through that larger unit, is yet another example of the majority's willingness to sacrifice rights guaranteed employees by the Act to its views of statutory policy. Allowing an employer and a union effectively to disenfranchise employees by including them in a much larger unit because it meets the need or convenience of the employer and union is contrary to the employees' statutory Section 7 right to refrain from collective action. Stability in bargaining relations is a positive goal, but we must not elevate that goal above the basic principles of employee self-determination which are guaranteed in Section 7. Our primary purpose in effectuating the Act should be that of protecting employee rights, especially the right freely to choose or reject a bargaining representative. Accordingly, I dissent.

[5] See former Member Dennis' and my dissent in *Gibbs & Cox*, 280 NLRB 953 (1986) (involving the Board's "merger" doctrine) and my dissent in *Central Soya Co.*, 281 NLRB 1308 (1986) (involving the Board's accretion policy).

[6] 280 NLRB 953, 959.

[7] Although the record is devoid of any evidence indicating in what units the employees were originally organized, the parties' bargaining history reveals that prior to the negotiations for the 1982–1985 collective-bargaining agreement, Mo's West and MEI had been treated as separate bargaining units not included in the multiemployer unit. From this, one can logically infer that the selection of the bargaining representative occurred in these separate units, rather than in the overall multiemployer unit.

[8] Id.

APPENDIX

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

[2] The parties' briefs have been considered. As more fully explained in my Order Reopening Hearing and Notice of Further Hearing in this matter, dated June 26, 1985, the Union's request to strike Employers' Exhibits 1 and 3 was granted; accordingly, these exhibits have not been considered.

[3] In light of my decision regarding the unit scope, to be discussed more fully, the question of jurisdiction with respect to these Employers is moot. However, I note that the purchase by Mo's Enterprises, Inc. of Mo's West was finalized prior to the July 17, 1985 hearing date and that the purchasing corporation, during its last fiscal year, had gross revenues in excess of $500,000 and purchased in excess of $50,000 worth of goods directly from sources outside the state of Oregon. Thus, Mo's Enterprises, Inc., which is in the business of operating restaurants and of manufacturing chowder for wholesale distribution, meets the Board's jurisdictional standards for a retail business. Inasmuch as Mo's West is now an

Continued

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

The Union contends that both petitions must be dismissed inasmuch as the petitioned-for units are not coextensive with the existing bargaining unit. Case 36-RD-1097 seeks an election among certain employees employed at Mo's West, and Case 36-RD-1098 seeks an election among certain employees employed at Mo's and Mo's Annex. The Union asserts that Mo's, Mo's Annex and Mo's West all are part of a multiemployer bargaining unit through the multiemployer bargaining group called the President's Council of Food, Beverage and Lodging Industries of Oregon (hereafter Council).[4] The Employer denies the Union's claim, contending that neither Mo's Enterprises, Inc. (hereafter MEI) nor Mo's West prior to its purchase by MEI ever delegated its bargaining authority to that or any other multiemployer group.

MEI is in the business of operating restaurants. Mo's and Mo's Annex in Newport, Oregon, have been owned and operated by MEI for several years. The most recent contract covering certain employees at these establishments was effective from August 1, 1982 through July 31, 1985. The contract, which was the area agreement between the Council and the Union with certain modifications set forth in an Addendum, was signed on behalf of MEI by Mohava Niemi, a shareholder and corporate officer, in April 1983. Although the Addendum was not offered into evidence, it appears that Niemi executed that document on behalf of MEI in March 1983, at the same time that she signed the Addendum to the Mo's West agreement, which Addendum was offered into evidence. Prior to its purchase by MEI, Mo's West, a restaurant in Otter Rock, Oregon, was a sole proprietorship owned by Niemi; however, at the time that the most recent contract covering certain Mo's West employees was executed, it was a partnership in which Niemi was one of the partners. The contract covering the Mo's West employees ran from August 1, 1982 to July 31, 1985 and was the area agreement between the Council and the Union with certain modifications set forth in an Addendum. The Addendum was signed in March 1983 on behalf of Mo's West by Niemi; the contract was signed in April 1983 by Niemi. Both the MEI contract and the Mo's West contract contained the following language on the signature page directly above Niemi's signature:

> The undersigned employer agrees to be bound by all the terms and conditions of the attached "Contract and Agreement Between Presidents' Council of Food Beverage and Lodging Industries of Oregon (Restaurants of Oregon Association, Portland Hotel Association, Oregon Hotel and Motel Association, Food Services Executives Association and Independent Operators) with Hotel Employees, Restaurant Employees Union Local 9 of the Hotel Employees, Restaurant Employees, International Union, AFL-CIO," and of the Health & Welfare and Pension Trusts formed pursuant to the terms of this Agreement, and to accept as their representatives the employer trustees presently serving on said Trust and their duly elected or appointed successors. By agreeing to join the said Presidents' Council as an Independent Operator, the employer is bound to the Presidents' Council agreement and becomes a member of the multi-employer bargaining group, but does not waive its right to join any other member groups of the Presidents' Council, and may withdraw from the Presidents' Council by giving the Presidents' Council and Union written notice of withdrawal as provided by law.

The language clearly and unequivocally indicates the intention of the signatory employer to be a part of the multiemployer bargaining group and there is no dispute that Niemi did in fact sign the page containing this language on behalf of both MEI and Mo's West. However, the Employers' counsel contends that the Employers never intended to become part of the multiemployer bargaining group or to execute contracts containing such language. Gordon MacPherson, an attorney involved on behalf of both MEI and Mo's West in their contract negotiations with the Union in 1982 and 1983, testified that the Council area contract which the Union had provided to him during negotiations contained the following language on the signature page:

> The undersigned nonmember of the Presidents' Council of Food, Beverage and Lodging Industries of Oregon agrees to be bound by all the terms and conditions of this Agreement, and of the Health and Welfare and Pension Trusts formed pursuant to the terms of this Agreement, and accept as their representatives the Employer Trustees presently serving on said Trusts and their duly elected or appointed successors.

This is the same language as that which had been contained in the predecessor contracts between the parties and which is contained in the copy of the 1982-1985 Council agreement which the parties entered as Joint Exhibit 2. MacPherson testified that some of the negotiations were conducted outside his presence directly between Niemi and Union representatives. MacPherson stated that at those sessions at which he was present, the issue of the multiemployer bargaining group never was discussed. However, MacPherson was not present at the April 1983 session at which Niemi executed the contracts and thus is unable to testify as to how it came about that Niemi signed the documents containing the critical language. The Employers also produced as a witness Cindy McEntee, who was and is MEI's manager and corporate secretary. McEntee testified that she was present at some of the negotiation sessions in 1982 and 1983 and that at none of those sessions was the topic of the multiemployer bargaining group raised. She further testified that she

integral part of the corporation, jurisdiction may be asserted over it as well as over Mo's and Mo's Annex. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958).

[4] The parties stipulated that the Council meets the Board's jurisdictional standards.

was present during a portion of the April 1983 meeting at which Niemi executed the contracts and that there was no discussion regarding the topic of multiemployer group bargaining while she was present. Finally, the Employer presented as a witness an official of the Council who testified that neither MEI nor Mo's West is considered by the Council as an official member of that association.

Despite the fact that the Employers had the opportunity to proffer Niemi as a witness on three different hearing days over a two-month period, and after repeated notice, including that set forth in the Order Reopening Hearing and Notice of Further Hearing, that the multiemployer bargaining unit issue was an issue to be litigated at the hearing, the Employers failed to present Niemi. The Employers assert that, despite the clear and unambiguous contractual language regarding their becoming part of the multiemployer bargaining group, that language must be ignored; yet, they failed to call Niemi, a witness under their control, to give evidence which might mitigate the weight to be accorded to the critical language in the documents she signed. While McEntee testified that the multiemployer bargaining group issue was not discussed during that portion of the April 1983 meeting at which she was present, her testimony in this regard proves nothing affirmatively inasmuch as she was absent during a portion of the critical meeting. Thus, no evidence was presented which might convince me that there is some reason why the clear and unambiguous language of the signed documents is not to be accorded controlling weight. While the Employers' counsel does not allege that the Union committed fraud by presenting for signature the documents which Niemi signed, but rather asserts that the presentation of the critical language was a mistake on the Union's part and Niemi's signing the documents containing that language was another mistake, the Employers, by failing to call Niemi as a witness despite ample notice and opportunity, have failed to adduce evidence to rebut the clear and unambiguous contractual language. Thus, I cannot do otherwise but conclude that the objective evidence shows that MEI and Mo's West, through Niemi's execution of the contracts, clearly and unequivocally expressed their intention to forthwith be a part of the multiemployer bargaining group and, derivatively, a part of the multiemployer bargaining unit. *The Kroger Co.*, 148 NLRB 569 (1964); *Morgan Linen Service, Inc.*, 131 NLRB 420 (1961). Moreover, the Employers produced no evidence to show that either or both MEI and Mo's West have withdrawn from the multiemployer group in a timely and proper fashion. Having concluded that the unrebutted objective evidence establishes that both MEI and Mo's West are part of the multiemployer bargaining group and that neither has withdrawn from the group, I find that the petitioned-for units are not coextensive with the existing contractual bargaining unit and that the petitions therefore must be dismissed.[5] *W. T. Grant Company*, 179 NLRB 671 (1969). Accordingly, I shall grant the Union's motion to dismiss the petitions and I shall, and hereby do, dismiss both petitions.

IT IS HEREBY ORDERED that the petitions filed herein be, and they hereby are, dismissed.

[5] Having so concluded, the issues of petitioner Nichols' supervisory status and of the unit inclusion or exclusion of chowder manufacturing employees are moot and need not be addressed.

Super Valu Stores, Inc., Denver Division *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 435. Case 27–UC–89

27 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

Upon a petition filed under Section 9(c) of the National Labor Relations Act by the Employer, a hearing was held before Hearing Officer Wayne L. Benson on 12 and 13 March 1986. Subsequent to the hearing, the Regional Director transferred this proceeding to the National Labor Relations Board for decision pursuant to Section 102.67 of the Board's Rules and Regulations. Both the Union and the Employer have filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the hearing officer and finds that they are free from prejudicial error. The rulings are affirmed.[1]

On the entire record in this case, including the briefs, the Board makes the following findings:

1. The Employer is a wholesale distributor of grocery and household products to retail stores in Colorado. The Denver division operates a wholesale grocery warehouse on Brighton Boulevard in Denver, Colorado (Brighton warehouse) and operates a general merchandise warehouse approximately 10 miles from the Brighton warehouse in Aurora, Colorado (Aurora warehouse). The parties stipulated that the Employer during any 12-month period receives goods in excess of $50,000 directly from suppliers located outside the State of Colorado. On these facts, we find that the Employer is engaged in commerce with the meaning of Section 2(6) and (7) of the Act. We also find that, as stipulated by the parties, the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Union has represented employees at the Brighton warehouse since 1940. The Employer has recognized the Union as the collective-bargaining representative of the driver and warehouse employees at the Brighton warehouse since it purchased that facility in October 1982. The parties have entered into two collective-bargaining agreements during that time, and the current agreement is effective from 16 September 1984 through 12 September 1987. The Brighton unit is described in the most recent collective-bargaining agreement's recognition clause as follows:

> The Employer agrees to recognize and does hereby recognize the Union as the exclusive bargaining agent, for the purpose of collective bargaining, as provided by the National Labor Relations Act, for all employees as listed in this Agreement. . . .

The employees listed in the agreement appear in Addendum "A" as follows:

> warehouse persons and/or helpers; checker or shipping and/or receiving clerk; frozen food warehouse person; city drivers; over-the-road drivers; pre-wrapping, pricing or cigarette stamping; janitors; tiremen, parts person, greaser and washers; lead person; garage leadperson; journeymen mechanics; and apprentice mechanics.

The Brighton warehouse has historically stocked grocery items and general merchandise items to fill customer orders. Until 1982 the facility carried a complete line of general merchandise and the Union represented those employees handling that merchandise. At that time, however, the company from which the Employer purchased the Brighton warehouse sold the vast majority of its general merchandise inventory and eliminated most of the general merchandise aspect of its Brighton operation because of the loss of a major customer. Therefore, when the Employer purchased the Brighton warehouse in October 1982, the general merchandise aspect of the Brighton operation did not exist except for a few items.

In mid-1983, the Employer secured the business of a major customer after agreeing to supply that customer's grocery and general merchandise needs. The Employer therefore had to increase its general merchandise operations dramatically and arranged to have most of its general merchandise orders supplied from its facility in Omaha, Nebraska. The general merchandise shipments from Omaha were integrated with grocery orders at the Brighton warehouse where they were then shipped to customers. After several months, the Employer decided to establish a major general merchandise operation within the Denver division because inconsistent delivery schedules and late deliveries had made the Omaha arrangement unsatisfactory. After securing a lease on a warehouse in Aurora, Colorado, approximately 10 miles from the Brighton

[1] The Union renews its contention, initially raised at the hearing, that the hearing officer improperly proceeded with the hearing on the petition in light of certain pending unfair labor practice charges without receiving advice from the office of the Executive Secretary whether to proceed. We note, however, that on 11 February 1986, by direction of the Board, the Regional Director was granted permission to proceed with the hearing. Accordingly, we find the Union's contention without merit.

warehouse, the Employer opened the Aurora warehouse in June 1984.

When the Employer opened the Aurora warehouse under the name "Preferred Merchandising," it did not hire any Brighton employees to staff the facility. The Employer also refused to apply the existing collective-bargaining agreement at the Brighton facility to the Aurora warehouse. Consequently, the Union filed a grievance and an unfair labor practice charge. The Regional Director deferred this charge to the agreement's arbitration procedure on 21 September 1984. On 22 May 1985 the arbitrator sustained the Union's grievance and ordered the Employer to apply the collective-bargaining agreement to the Aurora warehouse.[2]

Between 1 and 14 June 1985 the Employer complied with the arbitrator's award and posted Aurora jobs at the Brighton warehouse. The Employer released its Aurora employees and transferred several Brighton bargaining unit employees to the Aurora warehouse. On 14 June 1985, however, the Employer decided to contest the arbitrator's award; returned the earlier transferred bargaining unit employees to the Brighton warehouse; and rehired the Aurora employees it had released.

On 17 June 1985 the Employer filed the instant petition seeking to clarify the existing Brighton bargaining unit to exclude all the employees at the Aurora warehouse.[3] The Employer argues that the Aurora employees constitute a separate appropriate unit and do not constitute an accretion to the existing Brighton unit. In opposing the petition, the Union argues that (a) unit clarification is inappropriate to disturb the parties' agreement as interpreted by the arbitrator; (b) unit clarification is inappropriate because the Employer expanded an existing operation; and (c) assuming, arguendo, that the Aurora warehouse is a new facility, the Aurora employees constitute an accretion to the existing Brighton unit.

We have carefully considered the Union's and the Employer's arguments. For the following reasons, we grant the Employer's petition and clarify the existing Brighton unit to exclude the Employer's Aurora warehouse employees.

We first consider whether unit clarification is inappropriate because of the parties' agreement. The Board does not permit clarification of a unit in midcontract when that unit is clearly defined by the parties' agreement. See *Wallace-Murray Corp.*, 192 NLRB 1090 (1971). The facts here, however, refute the contention that the parties have agreed to include the Aurora employees under the existing collective-bargaining agreement. Indeed, the Employer has refused to apply the agreement to the Aurora employees except for a 2-week period following the arbitrator's award. Nonetheless, the Union argues that in light of the arbitrator's interpretation of the parties' collective-bargaining agreement, the parties agreed that the agreement applies to the Aurora employees. In essence, the Union asks us to defer to the arbitrator's interpretation of the agreement and therefore find clarification of the unit inappropriate. We refuse to do so.

The appropriateness of deferring to an arbitrator's award depends on the nature of the dispute involved. Deferral is obviously appropriate when resolution of the dispute turns on the proper interpretation of the parties' contract. Questions involving clarification of a bargaining unit, however, are ones that the Board alone must resolve. As the Board stated in *Marion Power Shovel Co.*, 230 NLRB 576, 577–578 (1977):

> The determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than an arbitrator [footnote omitted].

In the instant situation, the issue presented is whether we should clarify an existing unit to exclude employees at a newly opened facility. Accordingly, this determination is solely one for the Board to make. Our determination whether or not to clarify the unit is not precluded by an arbitrator's decision on this issue. See *Magna Corp.*, 261 NLRB 104, 105 fn. 2 (1982), enf. denied on other grounds 734 F.2d 1057 (5th Cir. 1984).

The Union further argues that unit clarification is inappropriate in this case because the Employer has simply expanded an existing operation. To support this contention, the Union has cited *Richfield Oil Corp.*, 119 NLRB 1425 (1958); *Great Atlantic & Pacific Tea Co.*, 140 NLRB 1011 (1963); and *Goodyear Tire Co.*, 195 NLRB 767 (1972), enfd. 474 F.2d 1336 (2d Cir. 1973). In each of these cases the Board found that the additional operation in question was an accretion to the existing unit. As we reject the Union's contention that the Aurora warehouse constitutes an accretion to the existing Brighton unit, infra, we conclude that these decisions are distinguishable and do not require us to

[2] The Regional Director subsequently refused to issue a complaint based on the Union's charge in light of the arbitrator's decision to which he deferred.

[3] After the Employer filed this petition, several unfair labor practice charges were filed during 1985. An Aurora employee filed 8(a)(3) and (2) charges against the Employer, and the Union filed 8(a)(5), (3), and (1) charges against the Employer. The Employer also filed 8(b)(2) and (1)(A) charges against the Union, but these latter charges are no longer pending. The Union has also filed suit in Federal district court seeking enforcement of the arbitration award.

dismiss the Employer's petition. We find that the other two cases cited by the Union are also distinguishable from this case. In *Rice Food Markets*, 255 NLRB 884 (1981), and *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982), enfd. 721 F.2d 187 (7th Cir. 1983), the Board adopted the judge's finding of an 8(a)(5) violation when the employer refused to apply the existing collective-bargaining agreement to employees previously included in the unit. These cases did not involve the opening of a new facility or the hiring of additional employees to staff that facility. By contrast, the Employer in this case has opened a new facility in Aurora to handle general merchandise and has hired additional employees to handle that merchandise. These employees are not previous unit employees separated from either the Brighton or Omaha warehouse. We therefore do not agree with the Union that in opening the Aurora warehouse, the Employer has simply expanded an existing operation. Whether the employees at this new warehouse constitute an accretion to the existing Brighton unit is the issue we must, therefore, next address.

The Board has followed a restrictive policy in finding accretions to existing units because it seeks to insure that the employees' right to determine their own bargaining representative is not foreclosed. We thus will find a valid accretion "only when the additional employees have little or no separate group identity . . . and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted [footnotes omitted]." *Safeway Stores*, 256 NLRB 918 (1981). To establish that the Aurora employees share such a requisite community of interest with the Brighton employees and therefore should be accreted, the Union points to several factors. These factors include, inter alia, the integrated operation of the two warehouses to fill customer orders; the similarity in working skills and functions of the employees at both warehouses; the contact between the Brighton unit driver and the Aurora warehouse employees; the bargaining history whereby the bargaining unit employees historically handled general merchandise; and the close proximity of the two facilities.

Those factors are relevant. See *Universal Security Instruments v. NLRB*, 649 F.2d 247, 253–254 (4th Cir. 1981), cert. denied 454 U.S. 965 (1981), and cases there cited. Nevertheless, although the factors of integration of operations, similarity of employee skills, functions, and working conditions, and the contact between the Brighton driver and the Aurora warehouse employees arguably weigh in favor of an accretion, other factors are either neutral or weigh in the other direction. Thus, given the distance of 10–12 miles between the two warehouses, the geographic proximity factor does not weigh in favor of accretion. Although we have found accretions in cases where facilities were 10 miles or more apart,[4] those accretion findings had strong support from other factors. In fact, a distance of that extent between facilities has, on at least one occasion, been treated as weighing slightly against finding an accretion. *Bryan Infants Wear Co.*, 235 NLRB 1305, 1306 (1978). The Union's reliance on bargaining history is also misplaced here. Although the Union had, in the past, represented employees who handled general merchandise, that work ceased, for the most part, in 1982 before the present Employer purchased the Brighton operation. That hiatus substantially weakens bargaining history as a factor in the Union's favor. Cf. *Hall's Super Duper*, 281 NLRB 1116 (1986) (little weight accorded bargaining history in unit determination when separate representation of two groups of employees had ended 2 years before the election petition was filed). The Employer's brief, 2-week acquiescence in the arbitration award is similarly insubstantial.

Two other factors—degree of employee interchange and common supervision—strongly militate against a finding of accretion, and we do not find that the factors discussed above outweigh them in this case. In arriving at this outcome, we follow *Towne Ford Sales*, 270 NLRB 311 (1984), a case in which, in the absence of bargaining history favoring accretion, the Board identified two factors as critical:

> One of these elements is the degree of interchange of employees between the affiliated companies. *Mac Towing*, 262 NLRB 1331 (1982). No weight is assigned to the fact that interchange is feasible when in fact there has been no actual interchange of employees. *Combustion Engineering*, 195 NLRB 909, 912 (1972). Another important element is whether the day-to-day supervision of employees is the same in the group sought to be accreted. *Save-It Discount Foods*, 263 NLRB 689 (1982); *Weatherite Co.*, 261 NLRB 667 (1982). This element is particularly significant, since the day-to-day problems and concerns among the employees at one location may not necessarily be shared by employees who are separately supervised at another location. *Renzetti's Market*, 238 NLRB 174, 175 (1978). [Id. at 311–312.]

[4] *Arizona Public Service Co.*, 256 NLRB 400 (1981); *Retail Clerks Local 870 (White Front Stores)*, 192 NLRB 240 (1971).

Chairman Dotson did not participate and does not rely on these cases for any precedential value.

In the instant case, the record reveals a total lack of interchange of employees between the two facilities except for the 2-week period in which the Employer complied with the arbitrator's award. We also find that common day-to-day supervision does not exist between the two facilities. Although the Union questions the validity of Sherry Rupp's status as a supervisor at the Aurora warehouse, we find the uncontradicted testimony establishes that Rupp has the authority to set work hours and to assign work, and to hire, fire, and discipline employees. The record further establishes that she has exercised this authority. Although Denver Division Distribution Manager William Merciers retains managerial control over the Denver division which encompasses both the Brighton and Aurora warehouses, we have noted that this type of control "does not detract from the significance of either the independent supervision of the employees on daily matters and concerns or the lack of interchange among the two groups of employees." *Towne Ford Sales*, 270 NLRB at 312. Accordingly, we find that the Aurora employees do not constitute an accretion to the existing Brighton unit.

We find, based on the record as a whole, that the parties have never agreed to include the Aurora warehouse employees in the existing Brighton unit. Furthermore, we find that the Aurora warehouse employees do not constitute an accretion to the existing unit. Accordingly, we shall grant the Employer's petition and clarify the existing Brighton unit to exclude the Aurora warehouse employees.

ORDER

The unit of warehouse employees and drivers represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 435, at the Employer's Brighton warehouse in Denver, Colorado, is clarified to exclude all employees at the Employer's Aurora, Colorado warehouse.

Artcraft Ornamental Iron Co., Inc. and Rich-Morrow Insurance Agency, Inc. and William B. Logan, Jr., Trustee in Bankruptcy for Artcraft Ornamental Iron Co., Inc. *and* Shopmen's Local Union No. 626 of the International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO. Case 9–CA–19591

27 February 1987

SUPPLEMENTAL ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

A controversy having arisen over the amount of backpay due six discriminatees under the terms of the Decision and Order issued by the National Labor Relations Board on 31 July 1984[1] and enforced by a judgment entered by the United States Court of Appeals for the Sixth Circuit on 29 May 1985,[2] the Regional Director for Region 9 issued a backpay specification and notice of hearing on 26 March 1986 and on 16 May 1986 an amended backpay specification and order rescheduling hearing alleging the amounts of backpay due the discriminatees.

Thereafter, on various dates during September and October 1986, William B. Logan Jr., the trustee in bankruptcy for Respondent Artcraft Ornamental Iron Co., Inc.; Respondent Rich-Morrow Insurance Agency, Inc.; the Charging Party; and the General Counsel entered into a stipulation and motion to transfer case to the Board in resolution of the backpay owed pursuant to the terms of the Board's Order. The stipulation provides for the entry of a supplemental order and, on application by the Board, a consent judgment by the United States court of appeals for any appropriate circuit. The parties waived all further proceedings before the Board to which they may be entitled under the National Labor Relations Act and the Board's Rules and Regulations, and the Respondent waived all defenses to the entry of a judgment by the court of appeals enforcing the Board's Order.

Additionally, the parties stipulated that assets of Respondent Artcraft Ornamental Iron Co. and Respondent Rich-Morrow Insurance Agency are subject to the jurisdiction of the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division, pursuant to the United States Bankruptcy Code. They further agreed that any moneys stipulated to be due and payable to the backpay claimants in this case shall be subject to further determination by the bankruptcy court regarding amounts payable from the bankruptcy estate of Respondent Rich-Morrow. The stipulation also provides that:

> Any determination by the Bankruptcy Court regarding the claims filed on behalf of the claimants shall be binding upon the parties to this stipulation and upon the claimants, after the expiration of any applicable appeal time, or after any appeal has been completed, and neither the bankruptcy estate nor the trustee individually or in his capacity as trustee shall have any further liability or obligation to pay any additional amounts or to take any additional action with regard to the judgment after distribution in accordance with the provisions of the Bankruptcy Code.

The stipulation is approved and made a part of the record, and the proceeding is transferred to and continued before the Board in Washington, D.C., for the entry of a supplemental order pursuant to the provisions of the stipulation.

ORDER

Upon the basis of the stipulation and the entire record in this case, the National Labor Relations Board orders that the Respondent, Artcraft Ornamental Iron Co., Inc. and Rich-Morrow Insurance Agency, Inc., Columbus, Ohio, its trustees in bankruptcy, officers, agents, successors, and assigns, shall make the discriminatees whole for the loss of earnings and other benefits they suffered as a result of the discrimination against them by paying the discriminatees the amount set forth opposite their respective names below, plus interest as set forth below to the date of[3] payment.

Robert William Deal	$11,266
William M. Diederich	17,334
Wilson Ford	3,594
	plus 1,980
Steve R. Friley	18,899
Ronald Lee Monroe	14,925
Jeffrey F. O'Hara	17,344
	plus 1,980

The annual interest rates to be applied to the backpay are 16 percent for the period ending 30 June 1983; 11 percent for the period 1 July 1983 through 31 December 1984; 13 percent for the period 1 January through 30 June 1985; 11 percent for the period 1 July through 31 December 1985; 10 percent for the period 1 January through 30 June 1986; and 9 percent for the period 1 July through 31 December 1986.

[1] 271 NLRB 829.

[2] Civil No. 85-5214.

[3] These figures are the amounts of backpay due Ford and O'Hara for the period beginning in mid-February 1984 and ending 29 April 1984 which, pursuant to the terms of the Board's Order, are a separate and distinct obligation solely of Artcraft Ornamental Iron Co.

LDM Roofing, Inc. d/b/a Acme Roofing Company and Acme Roofing of Eugene, Inc. *and* United Union of Roofers, Waterproofers & Allied Workers, Local Union No. 156, AFL-CIO. Case 36-CA-4402

27 February 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 10 November 1986 Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Acme Roofing of Eugene, Inc., Eugene, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The judge concluded, and we agree, that the record clearly supports the finding that Respondent Acme Roofing of Eugene, Inc. is the alter ego of LDM. With respect to the judge's reference to certain factors as "heighten[ing] the presumption of alter ego status," we note that we base our agreement with his alter ego finding on the record evidence and not on any presumption.

Chairman Dotson finds no need to rely on the judge's alternate successorship finding as a basis for imposing backpay liability on Acme Roofing of Eugene, Inc.

Eduardo Escamilla, Esq., for the General Counsel.
E. Scott Lawler, Esq., of Eugene, Oregon, for the Respondents.
Theodore R. Kulongoski, Esq., of Portland, Oregon, for Charging Party Local 156.[1]

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. This is a proceeding brought to determine whether Acme Roofing of Eugene, Inc. (Acme) is liable for remedying the unfair labor practices of LDM Roofing, Inc. d/b/a Acme Roofing Co. (LDM).

This is pertinent procedural history:

On 12 July 1984 an administrative law judge found that LDM had committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act when it refused to honor or be bound by certain terms in the 1982-1984 labor agreement negotiated between United Union of Roofers, Waterproofers, and Allied Workers, Local Union No. 156, AFL-CIO (Union) and Association.[2] Having so found the judge recommended that the Board order LDM to cease and desist from such unfair practices and to make whole its employees (and the benefit trusts established under the governing labor agreement) for losses they incurred as a result of LDM's unlawful acts. On 13 August 1984, after LDM had failed to take exceptions from the judge's decision, the Board adopted, pro forma, the judge's findings and recommendations in their entirety.

On 26 November 1984 the United States Court of Appeals for the Ninth Circuit entered on an order enforcing the Board's Order.

Thereafter, a controversy arose over the amounts of backpay that LDM must pay to certain employees pursuant to the Board's Order, as enforced by the Ninth Circuit. On 20 November 1985 the Board issued a Supplemental Decision and Order fixing those backpay amounts. On 18 April 1986 the Ninth Circuit enforced the Board's Supplemental Decision and Order.

Thereafter, another controversy arose over the liability of Acme for the fixed backpay amounts that the Board had ordered LDM to pay to certain employees. In order to place this controversy before the Board for resolution, the Regional Director for Region 19 subsequently issued a "Notice of Hearing Without Specification" on 30 July 1986.[3] In that notice of hearing the Regional Director averred in substance that, although LDM had formally ceased operations in "November and December 1984," its owners had formed Acme in November 1984 and thereafter had operated Acme as a "disguised continuance" of LDM, that Acme was LDM's "alter ego," or, alternatively, was a "successor" to LDM and that, under either of those characterizations, Acme was legally responsible for remedying the unfair labor practices committed by LDM.

Pursuant to that notice of hearing, the parties appeared before me on 18 September 1986, in Eugene, Oregon,

[1] The caption page of the hearing transcript mistakenly identified Kulongoski as the representative of Western Oregon Roofing Contractors Association (Association). The Association was a named party to the underlying proceedings described elsewhere below as a "party to the contract" and was also so named in the instant notice of hearing, although it did not appear here and it would not appear to have any standing in the instant proceeding. For this reason I have omitted the Association's name from the case caption as it appears on the instant notice of hearing.

[2] *LDM Roofing, Inc. d/b/a Acme Roofing Co.*, Case 36-CA-4402, JD(SF)-129-84.

[3] Authority for this procedural device appears to stem from Sec. 102.54(d) as read together with Secs. 102.52 and 102.53(b) of the Board's Rules and Regulations.

where they litigated fully all the issues raised by the Regional Director's averrals, as summarized above.[4]

On the whole record, including the parties' arguments as set forth in their posthearing briefs, I find and conclude as follows

FINDINGS OF FACT

Most of the relevant factual details are contained in the parties' stipulations. I summarize the most significant facts here.

LDM, the corporate entity that was the subject of the underlying unfair labor practice and backpay proceedings, is now an essentially defunct corporation that still retains nominal title, subject to liens, of certain trucks and equipment. It was engaged in mostly commercial roofing work. Its owners are brothers, Michael X. Maher and Richard Maher, respectively, LDM's corporate president and vice president. LDM did business under the name "Acme Roofing Company." The Maher brothers controlled the labor relations of that business operation. The roofing business is generally conducted outside the winter months. LDM essentially discontinued operations qua LDM in November or December 1984, when the winter lull set in.

In January 1985 the Maher brothers formed a new corporation, Acme Roofing of Eugene, Inc. and thereafter continued in the roofing business, this time focusing on smaller-scale residential work, operating initially out of the same office location on McDougal Avenue from which LDM had operated.[5] It also continued to use—and still does use—the trucks, equipment, office supplies, and telephone number that LDM had used. Indeed its trucks are still registered under the LDM corporate name.

When Acme began operation in 1985 its startup complement of roofing employees consisted of persons who had been similarly employed under LDM's operation; so far as this record shows, those former LDM employees still constitute a majority in the full complement of employees regularly used as roofers. The Maher brothers also hold the same corporate offices for Acme as they did for LDM and they still control Acme's labor relations and personnel policies.

The creation of corporate Acme had virtually nothing to do with independent business considerations. Rather, as Michael Maher admitted several times, echoed by Respondent's counsel on brief, the formation of the new corporation stemmed from the Maher brothers' desire to operate "nonunion." This desire, they believed, could be effectuated by the simple device of a change in corporate identity, together with a declaration to the employees whom they took on in 1985 that henceforth the Company would be nonunion.[6]

There is general agreement that Acme's operation now differs in scale and focus from LDM's. It is clear, however, that this is not so much related to the reasons for forming a new corporation than to the failure of the Maher brothers to stay afloat economically as roofers. Thus, in better times, the Mahers' business focussed on securing larger-scale commercial contracts, many of them from governmental bodies. This business focus allowed them to maintain a larger crew of roofers during the 9-month fair weather construction season, as well as a small cadre of intermediate supervisors. As long as this business was good, the Mahers were able to devote much of their time to pursuit of other, independent, business interests.

Eventually, however, for reasons that were not the subject of litigation in this hearing, the business under corporate LDM fell into financial decline, leaving LDM with many creditors, bank lienholders, state and Federal tax authorities, the United States Department of Labor, and the Board itself, all pursuing to judgment various claims against it. Particularly as a result of its defaults on payments to the bank that held liens on its trucks and equipment, the Mahers faced certain loss of their ability to continue in the roofing business. To prevent truck and equipment foreclosure, the Mahers negotiated arrangements with the bank whereby the bank would exercise forbearance in exchange for the Mahers' pledging of their personal assets and credit. And although this arrangement allowed them to continue in business, LDM's financial situation was still bad enough to make it impossible for the Mahers to obtain performance bonds, insurance, and to meet other typical requirements for large-scale commercial and governmental contract work. It was this fact of life, rather than any independent desire on the part of the Mahers to start a "new" business, which accounts for the fact that they now focus on residential work (operating under corporate Acme), using a substantially reduced complement of employees, and only occasionally perform commercial and governmental work—and then, only on a smaller scale.

ANALYSIS; CONCLUSIONS OF LAW

The General Counsel argues that Acme is merely a disguised continuance, or alter ego, of LDM; alternatively, the General Counsel would have the Board find Acme to be LDM's successor, with knowledge of LDM's liability under the Board's backpay order, and therefore liable itself for that backpay.[7]

---

[4] The evidentiary record thus made consists of three elements: The written answers made on 22 May 1986 by Michael X. Maher, a coowner of both LDM and Acme, to certain written interrogatories propounded by the General Counsel (G.C. Exh. 2), a series of stipulations of fact adopted by all parties and read into the hearing record, and the testimony of Michael X. Maher.

[5] In May 1985, Acme moved a half-block down McDougal Avenue to a new office location.

[6] It is not before me to judge or decide whether in doing so Acme committed unfair labor practices, nor whether Acme assumed the obligation to continue recognizing the Union as the representative of its employees. So far as this record shows, neither the Union nor the General Counsel has pursued those questions, but seek merely to hold Acme liable, to the extent of its assets, for the liquidated backpay obligations incurred by LDM.

[7] Conspicuously lacking in the General Counsel's position at this stage is any attempt to have the Board perform an ultimate piercing of corporate veils by seeking to hold the Mahers personally liable for the liquidated backpay amounts. I, therefore, do not independently consider that question.

It is easy to find merit in either theory. As to alter ego, see for example *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984). And compare the Board's recent decision in *Gilroy Sheet Metal*, 280 NLRB 1075 fn. 1 (1986), and authorities cited (finding no alter ego), stressing that "the evidence does not establish that hostility towards the Union was a motive for terminating Heating & Air or for founding Sheet Metal." It is clear that the Maher brothers, under corporate Acme, are continuing to operate a roofing business with the same equipment that they used under corporate LDM and with a cadre of employees drawn from the former LDM complement. And nothing in this record explains why the Mahers formed corporate Acme except their desire to break away from "union" obligations and, perhaps, to confuse creditors whose judgments ran only to LDM. Thus, but for those considerations—which heighten the presumption of alter ego status (*Fugazy*, supra; *Gilroy Sheet Metal*, supra)[8]—the Mahers could have and would have continued as corporate LDM, even though LDM's precarious financial condition would have forced a change in their business focus and in their scale of operations of the same type as they now engage in under corporate Acme.

Where there is a direct basis for finding that Acme is no more than a disguised continuance, or alter ego, of LDM, it seems needlessly attenuated to reach the further conclusion that Acme also satisfies all pertinent tests for successorship, even though it operates on a smaller scale and with a different business focus than did LDM.[9] Nevertheless, where Acme satisfied those tests, and assumed the business with knowledge of LDM's outstanding liabilities under the Board's Order, Acme may be held liable for the liquidated backpay at issue even if it were not an alter ego of LDM. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); see also *Perma-Vinyl Corp.*, 164 NLRB 968, 969 (1967), enfd. sub nom. *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968); *Bell Co.*, 243 NLRB 977 (1979).

[8] In *Goodman Piping Products v. NLRB*, 741 F.2d 10 (2d Cir. 1984), enfg. *E.G. Sprinkler Corp.*, 268 NLRB 1241 (1984), the Second Circuit suggested that antiunion animus may be "sufficient" in itself to find alter ego status, 741 F.2d at 12, citing the Supreme Court's decision in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942).

[9] See and compare, e.g., *Stewart Granite Enterprises*, 255 NLRB 569 (1981), also involving a successor who took over only a portion of a larger union-represented business and who thereafter operated in a narrower market than had its predecessor.

Conclusions of Law

1. Acme Roofing of Eugene, Inc. is a disguised continuance, and the alter ego, of LDM Roofing, Inc. d/b/a Acme Roofing Company.

2. Acme Roofing of Eugene, Inc. is a successor to LDM Roofing, Inc., which continued LDM's operations with knowledge of—and therefore assumed—LDM's liability for backpay under the Board's order.

3. Acme Roofing of Eugene, Inc. is liable for the liquidated backpay amounts that the Board found were owed to former employees of LDM.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

To the extent LDM Roofing, Inc. d/b/a Acme Roofing Company has not done so, Acme Roofing of Eugene, Inc. shall immediately pay to the employees named in the Board's liquidated backpay order in Case 36–CA–6832 the amounts set forth in that order.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

BMD Sportswear Corp. and Suzan Knitwear Corp., as alter egos and as a single employer *and* Knitgoods Workers Union, Local 155, International Ladies Garment Workers Union, AFL–CIO *and* Marcia Garcia *and* Mercedes Paz. Cases 29–CA–11824–1, 29–CA–11824–2, 29–CA–11929, 29–CA–12213, 29–RC–6390, 29–CA–12146–1, and 29–CA–12146–2

DECISION AND ORDER

4 March 1987

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 21 August 1986 Administrative Law Judge Steven Davis issued the attached decision. The Respondents filed exceptions and supporting briefs, the General Counsel filed cross-exceptions and a supporting brief, and the Respondents filed briefs in answer to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified, and to adopt the recommended Order as modified[3] and set forth in full below.

The General Counsel excepts to the judge's failure to find that the layoffs of employees Bertha Meija and Amalia Paredes violated Section 8(a)(3) and (1) of the Act. The judge found that the General Counsel did not establish a prima facie case of discrimination with respect to these individuals because there was no evidence that the Respondent BMD had knowledge of their union activities. He therefore recommended that the relevant complaint allegations be dismissed.

In her exceptions, the General Counsel argues that, inter alia, the evidence of Respondent BMD's animus toward the Union, the timing of the layoffs, the employees' union activities, and its other unlawful conduct are a sufficient basis from which to infer that the Respondent knew of Meija and Paredes' union activities. For the following reasons, we find merit in the General Counsel's exceptions.

On 19 April 1985 employees Paz and Garcia contacted the Union. During the next several days, both women took an active role in speaking to their fellow employees regarding the Union, and on 22 April they assisted the Union's agents in distributing cards outside the plant. As found by the judge, Paz and Garcia, in addition to other employees, were the subjects of unlawful interrogations regarding their union sympathies during this period. Paz and Garcia were unlawfully laid off on 23 and 25 April, respectively.

On five separate occasions between the advent of the union campaign and 23 April, when Meija and Paz were laid off, Meija was observed by Supervisor Milkenvoic having lunch with Paz. Meija signed an authorization card on 22 April. Similarly, Paredes was observed by Milkenvoic having lunch with Paz on 23 April, the same day she signed a card away from the plant. Subsequent to her lunch with Paz, Paredes was twice approached by employee Otero, who asked her if she had signed a card, and then told her that Dordevic would fire or lay off employees who signed cards.[4] Paredes was laid off on 3 May.

It has long been held that where there is no direct evidence, knowledge may be proven by cir-

[1] In adopting the judge's finding that Respondents BMD and Suzan are alter egos, we emphasize, as did the judge, that such a finding is not based solely on the familial relationship between Bora Dordevic and his brother Jovo Milosevic. Rather, we note the Respondents' failure, in light of the indicia of alter ego status addressed by the judge, to offer any evidence that would support a finding that an arm's-length relationship existed between the two companies. Moreover, the credited testimony establishes that Dordevic told Suzan employee Lopez that, in the event of unionization at BMD, he would close BMD to expand operation at Suzan, which statement further supports the alter ego finding.

We grant Respondent Suzan's motion to amend its answer to conform to "a defense raised before the judge." In this motion, Suzan asserts that Sec. 10(b) bars its addition as a party after the hearing was in progress and after evidence was taken. It is well settled, however, that the interests of alter egos are identical, and therefore Suzan was present at the entire hearing and defended itself through the representation of BMD. See, e.g., *Sturdevant Roofing Co.*, 238 NLRB 186, 187 (1978), enfd. 636 F.2d 271 (10th Cir. 1980) (where two companies are found to be alter egos, service on one company is sufficient to initiate proceedings within limitations of Sec. 10(b)). Thus Sec. 10(b) has been complied with insofar as Respondent Suzan is found to be liable for the violations alleged against BMD. With respect to the amended complaint allegations relating only to Respondent Suzan, the charge was filed 7 January 1986 and the alleged violations occurred in late July or early August 1985. These alleged violations were thus clearly within the 6-month limitations period, and we therefore reject Respondent Suzan's 10(b) defense.

In part VI, par. 13, of his decision, the judge referred to employee Paredes rather than employee Carmen Lopez. We correct this inadvertent error.

[2] Respondent BMD excepts to the judge's conclusion that it violated Sec. 8(a)(1) by allowing an employee-made sign stating, "Please vote for BMD and save our job" to remain posted for several days prior to the 21 June 1985 election. In view of the ambiguity of the statement and the tenuous nature of Respondent BMD's connection with the alleged threat, we find merit in the Respondent's exception and shall modify the Order and notice accordingly.

[3] We shall modify the Order and notice to delete the judge's finding that the Respondents violated Sec. 8(a)(1) by telling employees they were silly and stupid in connection with the Union.

The General Counsel requests a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondents under the Federal Rules of Civil Procedure subject to supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. *Nathan's Furniture Store*, 278 NLRB 268 (1986).

[4] Although Otero often assisted Dordevic as an interpreter for the Spanish-speaking employees, he is not alleged to be an agent of the Respondents in connection with these statements.

cumstantial evidence from which a reasonable inference may be drawn. *NLRB v. Wal-Mart Stores*, 488 F.2d 114, 117 (8th Cir. 1973). See generally *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941). Such circumstances may include proof of knowledge of general union activity, the employer's demonstrated animus, the timing of the discharge, and the pretextual reasons for the discharge asserted by the employer. *General Iron Corp.*, 218 NLRB 770, 778 (1975), enfd. 538 F.2d 312 (2d Cir. 1976). See also *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808 (3d Cir. 1986), enfg. 277 NLRB 1179 (1985). In addition, the discharge of an employee who is not known to have engaged in union activity but who has a close relationship with a known union adherent may give rise to an inference of discrimination. See *Permanent Label Corp.*, 248 NLRB 118, 136 (1980), enfd. 657 F.2d 512 (3d Cir. 1981). Thus a discharge motivated by an employer's belief or suspicion that an employee engaged in union activity violates the Act. Id.

Here, the judge found, and we agree, that Respondent BMD harbored anti-union animus, as demonstrated by the numerous 8(a)(1) violations found, as well as by the discriminatory layoffs of five employees in addition to Meija and Paredes. In addition, based on these violations, we find that Respondent BMD had general knowledge of the employees' union activity. We further agree with the judge that the reason asserted by Respondent BMD for the layoffs of all seven discriminatees, lack of work, was wholly unsupported by the evidence and therefore pretexual. With respect to timing, as noted above, Meija was laid off the same day as union supporter Paz, and Paredes was laid off the following week.[5] Moreover, the layoffs of all seven alleged discriminatees closely followed the start of the union campaign. We find that these circumstances, in addition to Milkenvoic's observation of Meija and Paredes at lunch with one or both of the primary union activists, who were themselves unlawfully laid off, constitute a sufficient basis to infer that the Respondent knew, or at least suspected, that Meija and Paredes supported the Union. We therefore conclude, particularly in light of the absence of any legitimate basis for the layoffs,[6] that the General Counsel has established a prima facie case of discrimination with respect to Meija and Paredes. Inasmuch as the Respondents have not met their burden of demonstrating that the layoffs would have occurred even in the absence of the protected conduct of Meija and Paredes, we find that the layoffs violated Section 8(a)(3) and (1) of the Act.

[5] Contrary to the judge, we find that the fact that Paredes' layoff followed the other layoffs by several days does not significantly weaken the General Counsel's prima facie case, nor does it render Respondent BMD's defense any more plausible. In this regard we note that despite its claim of a general business slowdown necessitating the layoffs, Respondent BMD hired five new employees on the date of Paredes' layoff.

[6] See *Wright Line*, 251 NLRB 1083, 1088 fn. 12 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 395 (1983).

ORDER

The Respondents, BMD Sportswear Corp. and its alter ego Suzan Knitwear Corp., Queens, New York, their officers, agents, successors, and assigns, shall jointly and severally

1. Cease and desist from

(a) Laying off, discharging, or otherwise discriminating against any employee for supporting Knitgoods Workers Union, Local 155, International Ladies Garment Workers Union, AFL–CIO or any other union.

(b) Isolating the work stations of employees causing them to be subject to adverse conditions; assigning employees to inefficient machines causing a reduction in the amount of earnings they receive; issuing warning letters to employees because of their membership in and activities on behalf of the Union.

(c) Asking employees if they called the Union; whether they signed cards or any papers for the Union; why employees were supporting the Union's advocates; who signed for the Union; whether they liked the Union; why one of the Union's advocates did not get a job in a union shop if she was in the Union; if they knew of the Union; whether they spoke to the Union's agents; and if they were in the Union and who spoke to them about the Union.

(d) Accusing employees of forcing workers to sign cards; threatening that it would lay off employees who signed cards and close the shop, change its name, and replace the workers; threatening employees that if they signed cards for the Union or called it they would be fired; telling workers that if they did not sign a card they would continue to work; threatening employees that the Respondents would close the shop if the Union came in or won the election; telling employees that if the union problem continued Respondent BMD contemplated closing and expanding operations at Suzan.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Gloria Chunga, Carmen Lopez, Bertha Meija, Amalia Paredes, Edilma Nunez, Maria Garcia, and Mercedes Paz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from their files any reference to the unlawful actions taken against Chunga, Lopez, Meija, Paredes, Nunez, Garcia, and Paz and notify the employees in writing that this has been done and that the actions will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the New York facilities of BMD Sportswear Corp., and Suzan Knitwear Corp., copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not specifically found.

IT IS FURTHER ORDERED that the election held on 21 June 1985 among certain employees at Respondent BMD Sportswear Corp., is set aside and the Regional Director is directed to conduct a second election at such time as he deems that circumstances permit the free choice of a bargaining representative.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off, discharge, or otherwise discriminate against any employee for supporting Knitgoods Workers Union, Local 155, International Ladies Garment Workers Union, AFL–CIO or any other union.

WE WILL NOT isolate the work stations of employees causing them to be subject to adverse conditions; assign employees to inefficient machines causing a reduction in the amount of earnings they receive; issue warning letters to employees because of their membership in and activities on behalf of the Union.

WE WILL NOT ask employees if they called the Union; whether they signed cards or any papers for the Union; why employees were supporting the Union's advocates; who signed for the Union; whether they liked the Union; why one of the Union's advocates did not get a job in a union shop if she was in the Union; if they knew of the Union; whether they spoke to the Union's agents; if they were in the Union; who spoke to them about the Union.

WE WILL NOT accuse employees of forcing workers to sign cards; threaten that we would lay off employees who signed cards and close the shop, change our name, and replace the workers; threaten employees that if they signed cards for the Union or called it they would be fired; tell workers that if they did not sign a card they would continue to work; threaten employees that we would close the shop if the Union came in or won the election; tell employees that if the union problem continued BMD contemplated closing and expanding operations at Suzan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Gloria Chunga, Carmen Lopez, Bertha Meija, Amalia Paredes, Edilma Nunez, Maria Garcia, and Mercedes Paz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and

other benefits suffered as a result of the discrimination against them with interest.

WE WILL remove from our files any reference to the unlawful actions taken against Chunga, Lopez, Meija, Paredes, Nunez, Garcia, and Paz and notify them in writing that this has been done and that the actions will not be used against them in any way.

BMD SPORTSWEAR CORP. AND SUZAN KNITWEAR CORP., AS ALTER EGOS AND AS A SINGLE EMPLOYER

Alison Fairbanks and *Kevin Kitchen, Esqs.*, for the General Counsel.
Henry Woicik, Esq., of New York, New York, for Respondent BMD Sportswear Corp.
Stanley Yaker, Esq., of New York, New York, for Respondent Suzan Knitwear Corp.
Stanley Goodman, Esq. (Chaikin & Chaikin)., of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. On 1 May 1985[1] Knitgoods Workers Union, Local 155, International Ladies Garment Workers Union, AFL–CIO (Union) filed charges against BMD Sportswear Corp. (BMD) in Cases 29–CA–11824–1 and 29–CA–11824–2 and on 17 June filed a first amended charge in Case 29–CA–11824–1. The Regional Director issued an order consolidating cases, consolidated amended complaint, and notice of hearing on 28 June. On 24 June, the Union filed a charge against BMD in Case 29–CA–11929 and the Regional Director issued a complaint and notice of hearing on 24 September.

Based on those charges and on objections filed by the Union in Case 29–RC–6390, the Regional Director issued an order consolidating cases, consolidated amended complaint, and notice of hearing on 24 October.

On 21 October the Regional Director issued a Report on Objections, order consolidating cases, and notice of hearing, which consolidated for hearing Cases 29–CA–11824–1–2 and 29–CA–11929 and Case 29–RC–6390, which involves allegedly objectionable conduct[2] in that the Employer threatened its employees with plant closure if the Union won the election.[3]

On 15 November, Mercedes Paz filed a charge in Case 29–CA–12146–1 against BMD, and Maria Garcia filed a charge in Case 29–CA–12146–2 against BMD, on which the Acting Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing against BMD on 13 January 1986.

On 7 January 1986 a charge was filed by the Union against BMD and Suzan Knitwear Corp. (Suzan) in Case 29–CA–12213, on which the Acting Regional Director issued a complaint and notice of hearing against Respondents on 21 January 1986.

Finally, in order to clarify and consolidate the allegations of the various complaints and amendments made at the hearing, a written motion to amend complaints, made by the General Counsel and dated 19 March 1986, was granted by me at the hearing. The motion included all the allegations of the complaints and amendments made at the hearing, and alleges as follows:

(a) Respondent Suzan was established by Respondent BMD as a subordinate instrument to and a disguised continuation of a part of the business of Respondent BMD.

(b) Respondent BMD and Respondent Suzan have been affiliated businesses with common officers, ownership, directors, and operators; the directors and operators formulate and administer a common labor policy for the aforenamed companies, affecting the employees of the companies.

(c) Respondent BMD and Respondent Suzan are alter egos and a single employer within the meaning of the Act.

(d) Respondents interrogated employees concerning their union membership, activities, and sympathies.

(e) Respondents warned and directed their employees to refrain from becoming or remaining members of the Union.

(f) Respondents threatened their employees with discharge, and threatened that they would close a plant.

(g) Respondents laid off seven employees and failed to recall them because of their union activities.

(h) Respondent BMD assigned employees Maria Garcia and Mercedes Paz to more arduous and less agreeable job tasks; reduced their rate of pay by assigning them to lower paying job tasks; isolated their work stations from other employees; issued a warning letter to Paz; and caused their termination; all because of their union activities and because they gave testimony under the Act. After the close of the hearing, Respondents filed leave to amend their answers, which I granted.[4]

The case was heard before me in New York City on 12 days between 9 December 1985 and 16 April 1986.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent BMD,[5] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent BMD, a New York corporation, having its office and place of business at 1051 Wyckoff Avenue, Queens, New York, is engaged in the manufacture, sale,

[1] All dates herein are in 1985.

[2] Other objections were withdrawn by the Union before the hearing and are not before me.

[3] The petition was filed by the Union on 9 May. A Stipulation for Certification Upon Consent Election was executed by the parties and approved by the Regional Director on 29 May, and an election was held on 21 June in a unit consisting of all production, maintenance, shipping, and receiving employees employed by BMD at its 1051 Wycoff Avenue, Ridgewood, New York location, excluding all other employees, guards and supervisors as defined in the Act. The election resulted in 11 votes for the Union; 46 votes against the Union; and 8 challenged ballots.

[4] The answers, as amended, have been included in the exhibit file as R. Exh. 21.

[5] Respondent Suzan did not file a brief, but relies on BMD's brief.

and distribution of sweaters and related products. During the past year, BMD, in the course and conduct of its business operations, purchased and caused to be transported and delivered to its plant thread, yarn, and fabric valued in excess of $50,000, which were delivered to its Queens, New York plant directly from locations outside New York State.

Respondent Suzan, a New York corporation, having its office and place of business at 20–36 Harmon Street, Queens, New York, has been engaged in the manufacture, sale, and distribution of sweaters and related products.

Based on projection of its operations since about 24 April 1985, at which time Respondent Suzan commenced its operations, Respondent Suzan, in the course and conduct of its business operations will annually sell and ship from its plant products, goods, and materials valued in excess of $50,000 directly to points outside the State of New York.

Respondents admit and I find that BMD and Suzan are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. SUPERVISORY STATUS OF MELJUS MILKENVOIC

A. *Facts*

The General Counsel alleges that Meljus Milkenvoic is a supervisor of Respondent BMD. Respondents deny this. She did not testify.

BMD's president, Bora Dordevic, testified that Milkenvoic, the floorlady, is in charge of the factory in his absence, to ensure that the workers do their work properly. He relies on her and she gives work to and controls the work of the merrow machine operators. However he also noted that his wife, the secretary, and John (a porter), also give work to the merrow operators. Milkenvoic began work, as a Singer machine operator, when the factory opened in 1978 and she continues to work on the Singer although she also distributes work and "oversees" the work of the merrow operators. As the floorlady, she also examines the work done. Dordevic further stated that he tells her what work to distribute and she does so without using independent judgment. He stated that she does not hire, fire, or recommend such action. Milkenvoic is salaried, earning $400 per week and an additional $100 per week as a "percentage" because she opens and closes the factory in his absence[6] and is reliable. The additional sum pays part of her gasoline expense. No one else received such a percentage. The other persons who receive salaries are Dordevic and his wife who receive $500 per week each; cutter Antonio Otero—$510 and secretary Radmila Rajkov—$480.

Employees testified that Milkenvoic gave them work, instructed them on how to perform it,[7] and inspected the work to see that it was done correctly by walking around the shop and looking at the workers as they worked.[8] If the work was not done properly, she returned it to the worker for corrections, which one worker regarded as discipline. Work was also assigned to others for corrections. Paz conceded that Dordevic told Milkenvoic what work to give out, and she distributed work to whoever was finished with their job. The work was evenly distributed among those senior people.

Employees also asked Milkenvoic if they had a question about the work they were doing. Milkenvoic also signs the production tickets attached to the work of the piece-rate employees. That ticket lists the rate paid for the job. Employees conceded that Milkenvoic, in addition to her floorlady responsibilities, works on the Singer machine, although no percentage of her day on such tasks was established at the hearing.

Employees told Milkenvoic if they had to leave early or would arrive late, and she always permitted them to do so without checking with Dordevic. It was argued by Respondents, however, that the fewer hours a piece-worker works results in lesser pay so the Company essentially did not care when the workers left or arrived.[9]

Employee Lopez stated that Milkenvoic frequently yelled at her and told her to go home, but she did not leave because she knew that Dordevic would not fire her. In fact, Lopez told Milkenvoic that if she did not stop bothering her she would hit her. Dordevic then approached and told them to calm down. Lopez stated that she knew that Dordevic did not support Milkenvoic's actions.

Milkenvoic also asked employees if they could work overtime or on Saturdays.

B. *Analysis*

Milkenvoic, the floorlady at BMD, is in charge of the factory in the absence of its owner; opens and closes it; assigns work to the employees; instructs them on its performance; and checks the work and returns it for correction to the employee who performed the work, or to others for correction. She also answers questions about the performance of the work and signs the tickets that authorize payment to the piece-rate workers. She also asks employees if they can work overtime or on Saturdays and accepts explanations why the workers arrived late or must leave early. In addition, Milkenvoic received a percentage, amounting to $100 per week, for, among other things, these additional responsibilities. In addition, she was salaried unlike the operators, who received piece-rate wages or others, who were hourly paid.

The evidence also shows that her demand that an employee leave was ignored and not supported by Dordevic, and that part of her day consisted of work performed on a machine.

---

[6] Milkenvoic and the Dordevics are the only persons having keys to the factory.

[7] Occasionally Dordevic explains how to perform the work.

[8] Employee Caban stated that occasionally Mrs. Dordevic checks her work.

[9] This is in contrast to the reaction of Respondent BMD when piece-worker Paz took photos for 2 minutes. She was accused of not working and disrupting the operation.

Dordevic admitted that he relies on Milkenvoic, who assigns and controls the work of the operators, to ensure that the workers perform their jobs properly.

Notwithstanding her lack of authority to hire, discharge,[10] suspend, recall, or promote employees or to make effective recommendations for such action, I believe that the evidence is clear that Milkenvoic responsibly assigned work to and directed employees and was a supervisor as defined in the Act. *Dadco Fashions*, 243 NLRB 1193, 1194 (1979); *Ridgely Mfg. Co.*, 198 NLRB 860, 861 (1972).

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Organizing Drive*

Respondents are garment contractors. They receive raw materials from manufacturers and orders from manufacturers or jobbers. They cut and sew sweaters, first making a sample and then, on receiving approval, sew and ship the orders received. In the period from March to November 1985, BMD employed 61 to 76 employees, most of whom were merrow machine operators who sewed the garments together and were paid on a piecerate basis. BMD also employed cutters and other machine operators.

Suzan was a smaller company. Its records showed that 26 workers received payment in the first week of its operations in May.

According to employees Garcia and Paz, beginning at least in early 1985, the piecework rates were lowered at BMD by its president and owner, Bora Dordevic. The workers' complaint was that the rates per dozen were reduced for the same type of work that had previously been paid at a higher rate. The rates were reduced three to five times since January 1985, according to them, and whenever they complained, Dordevic refused to increase the rates to their former level.

About 16 April, the piece rate was again lowered and about seven employees spoke to Dordevic about that. He explained that the company for which they sewed the goods recently began business and it could not afford to pay more and as a result, he could not pay the employees more. The employees protested to no avail and Dordevic invited them to leave if they did not like the piece rate.

The following day, 17 April, a group of employees spoke about the need for a union, and Paz called Local 155. On 19 April, Paz and Garcia went to the Union after work. That morning, Dordevic asked Garcia if she and Paz called the Union. Garcia replied, "No, not yet." Dordevic told her to call the Union because he is not afraid of anyone. Also that day, Milkenvoic, the floorlady, asked Garcia if she signed any papers for the Union.[11] Garcia asked, "What papers?" and Milkenvoic replied that she knew she wanted the Union. Garcia answered that everyone wanted benefits, and "who does not want the Union." Milkenvoic also asked why she was supporting Paz, and added that Dordevic was very rich, and could open a factory in another location. Garcia replied that Dordevic would lose because if the workers struck he would not be able to receive work. Employee Bertha Mejia stated that she spoke about five times with employees in the factory during lunch about the Union and benefits. The employees, who spoke Spanish, were seated about 25 feet from Milkenvoic. There is no evidence that Milkenvoic understood any part of their conversation or overheard them.

On 21 April, Union Agent Ramonita Guzman visited Paz at her home. Paz signed a card for the Union and was given blank cards to distribute to her coworkers.

On 22 April, Guzman and fellow union agent Will Aldrich stood outside the factory, speaking with and distributing cards to employees. Garcia and Paz assisted. Guzman was present from 6:30 to 8 a.m. and from 2 to 4:30 or 5 p.m.

That day, Milkenvoic asked Garcia if she signed papers that Paz had for the Union. Garcia denied doing so, and asked her "what papers?" Milkenvoic replied that she knew that Garcia wanted the Union, and asked who else signed. Garcia did not reply. Garcia signed a union card that day and was given additional cards by Paz.

Garcia and Paz stated that beginning on 22 April they distributed union cards to employees before work, at lunch, in the bathroom, on the street, and at the homes of the workers.[12] They stated that they stood with Guzman and Aldrich while they solicited employees on the street in front of the factory. In the morning of 22 April, Paz spoke briefly with five or six employees before work. When Milkenvoic brought Paz work that day, she told Paz that she was silly and stupid, and accused her of forcing employees to sign cards. She added that Dordevic has a lot of money and does not care if he closed the factory for 6 months, reopened it under another name or owner, and replaced the workers. Milkenvoic further said that Dordevic did not like the Union and everyone who signed a card would be laid off. Paz replied that she did not care, that she was a good worker who would either get another job or take vacation. Milkenvoic then asked her if she called the Union. Paz answered that she did because the reduction of the piece rate was unfair. Thereafter, during each of the five or six occasions that Milkenvoic brought work to Paz that day, she told Paz that Dordevic would fire her; anyone who signed a card would be dismissed; and Dordevic would change the name of the Company. Each time Paz replied that she did not care.

That afternoon, after work, Paz distributed union cards with Garcia and Union Agent Guzman in front of the shop.

The solicitation continued on the street the next day, 23 April, with Guzman, Aldrich, Garcia, and Paz speaking to employees and helping them complete cards.

[10] However, employees Nunez and Paredes testified that Milkenvoic told them that they were laid off, and they should leave the premises, which they did.

[11] Dordevic's question to Garcia was corroborated by Paz, who earlier had asked a Yugoslavian worker to sign a card. She refused and told Milkenvoic that Paz asked her, and Milkenvoic told Dordevic, who asked Garcia the above question.

[12] This is corroborated by the testimony of Carmen Lopez, Bertha Mejia, Edilma Nunez, and Amalia Paredes who stated that they were given cards by Garcia or Paz.

Garcia stated that, while engaged in this activity, she saw Milkenvoic watching them. Paz stood with the others for 25 minutes in front of the factory that morning. During the day, during each of the five or six times Milkenvoic brought work to Paz, she told her that if she signed cards for the Union or called the Union she would be fired. She added that Dordevic had a lot of money and would close the factory, change its name, and replace the workers because he does not like the Union.

Also that day, Milkenvoic told Garcia that employee Dalia told her that Paz forced her to sign union papers. Garcia replied that Dalia was lying because she did not sign any papers. Later that day, Milkenvoic asked Gloria Chunga if she liked the Union and if she signed a card for it. Chunga replied, "Yes."[13] The following day Chunga was laid off.

As Paz was leaving work on 23 April, Dordevic told her that a customer had canceled an order and that she was no longer needed because there was no work. Paz asked that he lay off the new employees first. Dordevic answered that he would do as he wished. Paz said she would go to the Labor Department because she knew why she was being fired.

Delores Rivera, Paz' sister, stated that that week, Milkenvoic asked her why Paz did not get a job in a union shop if she is in the Union. Milkenvoic also told Rivera that Dordevic's friend had the same problem with a union and he closed his factory and moved. She added that Dordevic would close the shop if the Union comes in.

When Bertha Mejia left work at the end of the day, Dordevic told her that he had no more work, and she should leave.

The following day, 24 April, Paz returned to the shop with Union Agents Aldrich and Guzman, who introduced themselves to Secretary Redmila Rajkov. According to Paz, Aldrich, and Guzman, they asked Dordevic to reinstate Paz and he refused, saying that if the Union came in he would close.

Dordevic denied saying that. He testified that Paz demanded that he admit her, saying that "I am your god." Dordevic replied that there is only one God, and "you're not it." Paz said that she would close the factory. Dordevic told her that she did not open the shop and she could not close it.

I credit the testimony of Paz, Aldrich, and Guzman. Their versions were consistent, mutually corroborative, and believable because similar threats to close had been made by Dordevic directly and through him by Milkenvoic.

Later that day, Milkenvoic asked Garcia whether she signed papers for the Union. Garcia denied doing so. Milkenvoic then said that if the Union comes in she would be happy because she would get 3 months' vacation.

Also that day, Edilma Nunez, while working, waved through an open door at Paz and the union agents who were standing outside the shop.[14] Five minutes later Mira Dordevic, the wife of the owner and an admitted officer and agent of Respondent, came to her work station with Antonio Otero, the cutter, who translated. Mira asked if she knew of the Union, whether she spoke to the union agents, and whether she was in the Union or signed a union card. Mira said that she knew what the Union was doing, but she wanted to help Nunez so that she would not "get involved," and could continue to work and not lose her job. Nunez answered that the Union spoke to her at her house, and gave him a paper to sign, but she (Nunez) did not know if the paper was a union card. Nunez stated that Otero said that he did not tell Mira that she signed a card. In fact, Nunez had signed a card the night before at home, at the request of Guzman and Paz. Otero then told Nunez that anyone who was involved with the Union would be fired. Maria Dordevic did not testify.

At the end of the workday Bora Dordevic asked Nunez, through Otero, whether she knew about the Union and who spoke to her concerning it. He said that he was telling her this because he wanted to help her, adding that he wanted to know if she signed a card. He also stated that if she did not sign, she could continue to work. Nunez replied that Paz told her about the Union at lunch the day before, and that she signed a card at home at Paz' request, who told her that a majority of the workers signed cards. Dordevic answered that he knew that they wanted to bring a Union in, but that he would not permit that. He said that he would rather close the shop before the Union entered, and that if the Union comes in he would close. The following day Nunez was laid off by Milkenvoic who told her that work was slow.

Carmen Lopez signed a card that day outside the factory after work in the presence of Paz and the union agent while the gate was open. On 21 or 22 April Lopez had spoken to Paz about the Union at lunch.

The following day, 25 April, as Lopez was leaving, Milkenvoic asked for her phone number and told her that there was no more work, but that she would call when work picked up. Lopez gave her phone number but was never called. That day Garcia was laid off too.

Amalia Paredes was asked by Paz on 23 April at lunch to help her get a union in the factory. Paredes agreed. Paz told her to sign a card after work that day. Paredes signed a card outside the shop at the end of the day. On 3 May, Milkenvoic told Paredes work was slow and she should not come to work, but would be recalled.[15]

Sometime before the election, which took place on 21 June, Milkenvoic told employee Mirian Cedeno, while she was working, that she (Cedeno) would see what will happen after the election, adding that if the Union won, Dordevic would close the factory. Cedeno replied that if the shop closed she would look for another job.

[13] This conversation was corroborated by Garcia.

[14] This was corroborated by Union Agent Aldrich.

[15] On 23 April after the lunch conversation, Paredes was told by cutter Otero that she should not sign a union card because Dordevic would dismiss employees who signed as he did not want the Union; and would close the shop and replace the employees or send the work to another shop he controlled. Paredes told Otero that she intended to sign a card; and 2 days later told Otero that she did sign. I cannot attribute this conversation to Respondent inasmuch as Otero, a rank-and-file employee, was not Respondent's agent as to this conversation, as will be discussed infra.

About 1 month before the election, Dordevic called a meeting of all the employees. The meeting, which was very short, took place on the factory floor. Dordevic spoke Yugoslavian, and his words were translated into English by Secretary Rejkov. Then her words were translated into Spanish by cutter Otero for the Spanish workers, and into Polish for the Polish employees. All parties agree that Dordevic announced that there would be an election on 21 June, and that he did not want the Union. However, in addition, two employees, Delores Rivera and Dulce Sanchez, testified that Dordevic said that if the Union won, he would close the factory. But two other witnesses, also called by the General Counsel, Segunda Caban and Mirian Cedeno, who also heard the same Spanish translation, did not testify about that threat. Moreover, the Spanish interpreter, Otero, and Dordevic and Rajkov denied that Dordevic threatened to close the shop if the Union won the election, but rather they all testified that Dordevic invited the workers to vote as they wished.

Based on the conflict in the testimony, particularly that between the General Counsel's witnesses, I cannot find that Dordevic threatened to close the factory in that speech.

Sometime before the election a handwritten sign was posted in the work area of the factory. The sign was 4 feet by 4 feet and said, in English and Spanish, "Please vote for BMD and save our job. Thank you." A box on the sign had the word "no" written on it in various languages. The sign, which was prepared and hung by employees, including Otero, was posted at least for several days before the election and was in plain sight of everyone in the shop. Employee Delores Rivera stated that she saw Bora Dordevic look at the sign and tell his wife to look at it.

On 21 June, the election was held, which the Union lost by a vote of 46 to 11.

B. *The Layoffs*

The complaint alleges that the following employees were unlawfully laid off in April and May: Gloria Chunga, Maria Garcia, Carmen Lopez, Bertha Mejia, Edilma Nunez, Amalia Paredes, and Mercedes Paz.

1. Gloria Chunga

Chunga was hired on 5 October 1982 and was laid off on 24 April 1985, at which time she worked as a merrow machine operator.

Chunga spoke with Paz and other workers at lunch on 19 or 20 April and agreed with her that the workers should sign cards for the Union. On 22 April, Paz gave her the Union's address, and she went there after work and signed a card in the presence of other employees. The following day, 23 April, she answered yes when asked by Milkenvoic whether she liked the Union and signed a card for it. The next day, 24 April, as she was leaving for the day, Dordevic asked her if she wanted to receive unemployment benefits and she said she did.

Chunga testified that occasionally work is slow, but there was always work to do and she always worked 40 hours per week.

2. Carmen Lopez

Lopez was hired on 27 September 1982 and was laid off on 25 April 1985. She was a finisher who removed errant threads from the sweaters.

About 21 or 22 April Lopez spoke to Paz at lunch about the Union.

On 24 April she signed a card for the Union outside the factory after work in the presence of a union agent and Paz and another worker.

The following day, at the end of work, Milkenvoic told her that there was no more work, asked for her phone number, and said that if work picked up she would be called. Lopez was not called. She stated that when she left, there was more work to be done.

3. Bertha Mejia

Mejia worked for less than 1 month, from March to 23 April. She sewed labels into the sweaters. There were two others employed as label sewers.

A few days before 22 April, Mejia began conversing with her coworkers at lunch, while sitting at their machines. Five such lunchtime conversations concerned the Union, and included Paz and Garcia and their desire for a union because of the discharges of Spanish workers. They spoke Spanish. Milkenvoic was seated 25 feet away from them. On 22 April Mejia signed a union card at home.

On 23 April, Dordevic told her that there was no more work. Mejia testified, however, that there was sufficient work to be performed, and that there was never an occasion that she had no work to do.

4. Amalia Paredes

Paredes was employed for about 1 year, taking threads off sweaters.

Paz asked her in the factory at lunch on 23 April to sign a card after work that day and she did so 1 block from the factory.

On 3 May, Milkenvoic told her that because work was slow she should not come to work but should collect unemployment benefits, and she would be recalled when work picks up. Paredes stated that there was work left to be done when she was laid off.

5. Edilma Nunez

Nunez was employed for 1 or 2 months in 1984, then 3 or 4 weeks in April 1985, when she was laid off.

On 23 April she and others were told by Paz at lunch that they were bringing a union into the shop. That day after work she signed a card at home.

The following day, 24 April, she waved to the union agents from her workplace, and immediately Mira Dordevic approached her and asked her through interpreter Otero whether she knew of or spoke to union agents, and whether she was in the Union or signed a card for it. Although she told Otero that she signed papers for the Union, Otero told her that he did not tell Mira Dordevic that she signed a card. She was warned that anyone who was involved with the Union would be fired, and that if she had not signed a card she should not do so and could

thereby continue working. Later that day Bora Dordevic asked her the same questions, through Otero, and this time she answered that she signed a card. That admission was apparently repeated to Dordevic.[16] Bora then warned that he knew that "they" wanted to bring a union in, but that he would not permit it, and would rather close the shop than have the Union organize it. Bora then told her that if she did not sign a card, she could continue to work.

The following day, 25 April, Nunez was told by Milkenvoic not to come to work the next day as work was slow.

6. Maria Garcia

Garcia began work in August 1980 and worked until sometime in 1981 when she left. In 1983 she worked for 3 months and then left. She returned to work in August 1984 and was employed until 25 April 1985 when she was laid off. Her last period of employment was as a merrow machine operator.

Dordevic admitted that Garcia and Paz complained to him in April 1985 "one after another" regarding the piece rate, and requested an increase in that rate.

About 17 April she and Paz spoke about the Union and called the Union.

On 19 April, Dordevic asked Garcia if she called the Union. That day, Milkenvoic asked her if she signed papers for the Union, and Garcia told her that everyone wanted benefits. Later that day, Garcia and Paz went to the Union, and on 22 April Garcia signed a card. Thereafter from 22 April until she was laid off, Garcia solicited other employees to sign cards, helped others fill them out in the presence of the union agent, and was seen on 23 and 24 April by Milkenvoic doing so.

On 22 April, Milkenvoic asked Garcia if she signed for the Union. Garcia denied doing so, and Milkenvoic replied that she knew she wanted the Union, and asked who else signed. On 23 April, Milkenvoic told her that Paz forced another worker to sign for the Union. Garcia replied that that worker was lying. On 24 April, Milkenvoic again asked Garcia if she signed for the Union and Garcia denied doing so.

On 25 April, Dordevic told her that since many orders had been canceled she could receive unemployment benefits.

Garcia testified that when she was laid off, she had the usual amounts of work to do, and that from January 1985 until her layoff she always had work to do.

7. Mercedes Paz

Paz was hired in June 1978 or 1979 and was laid off on 23 April 1985.

Dordevic admitted that Paz complained to him very often about the piece rates.

On 19 April, Paz spoke with her fellow workers about the Union and went to its offices. She signed a card on 21 April and, thereafter, she spearheaded the Union's organizing drive. Beginning on 22 April until she was laid off the next day, she distributed cards at the factory, before and after work and at lunch, and she visited employees at their homes. She stood outside the shop with union agents and spoke to the workers about the Union. Milkenvoic spoke to her numerous times on 22 April about the Union, accusing her of "making" employees sign cards, criticizing her for supporting the Union, and threatening that those who signed cards would be laid off and the factory closed if the Union organized it. Milkenvoic asked Paz if she called the Union and Paz admitted doing so.

The following day, 23 April, Paz again distributed cards before work in front of the shop with Union Agent Guzman present. During the day, Milkenvoic again warned her several times that if she signed a card or called the Union she would be fired and the factory would close. As Paz left work that day, Dordevic told her that a customer canceled an order and that she was laid off.

The following day, 24 April, on the demand of the union agents to reinstate Paz, Dordevic refused and said that he would close the shop if the Union came in.

Paz stated that when she was laid off, she had much work still left to do and that in 1985, the merrow operators always had work. She conceded, however, that when work was slow, she left at 2:30 p.m.; the normal quitting time was 3:30 p.m.

Dordevic testified that in July 1984 Paz "made problems" by causing her family and one or two friends to leave work for 3 days. Their complaint concerned the low piece rates. Before leaving, Paz said she could earn more by collecting unemployment and working under someone else's social security number.

Dordevic testified that in February 1985 Paz complained that workers should not be sent home at 1 or 2 p.m. He told her that he was the boss, and that she could not give orders to him. Also in that month, she threw a sweater at a customer. When Dordevic protested, she said that she did not care—the factory was no good. Dordevic replied that if she did not like it she could leave.

In March, Dordevic installed new machinery for use on a new order. Paz asked him why he bought new equipment if he could not raise the piece rate. Dordevic replied that if he did not buy the new machinery, he would lose work.

In April, according to Dordevic, business declined and Respondent paid the same piece rate as the prior year. Paz asked for higher rate and Dordevic explained that for work previously done, the same rate had to be paid. Dordevic stated that from 18 to 20 April, Paz again complained about the piece rates and Dordevic answered that he had no time to argue. Finally, on 23 April, Paz again began to complain, and this time Dordevic told her to see him after work. Later, he told her to collect unemployment for 2 or 3 weeks. She threatened to close the factory and then left.

C. *The Return to work of Maria Garcia and Mercedes Paz*

Following their layoff by BMD in April, Garcia and Paz returned to work at BMD on 11 November as

[16] Otero told Nunez that he did not tell Mira that she signed a card. He was not asked if he told Bora that she expected a card.

merrow machine operators. Dordevic stated that he recalled them because work had increased.

Prior to their layoff in April they had worked on merrow machines, located in the central area of the factory, where 29 such machines were located in four rows. Paz had worked at the same machine for 7 years, and Garcia had worked at her machine during her last 8-month period of employment. During that time, their machines adjoined each other.

However, on their return in November, they were assigned to adjoining merrow machines but this time outside the merrow area in a place where such machines had never been before. They had the only merrow machines in that area. The new location was 8 feet away from the closest merrow machine in the merrow machine area. Separating the new location from the merrow machine was a 3-foot open hallway. Their new machines' location was about 30 feet from their former location. In addition, the new location was 3 to 4 feet from a steam machine where material is cut, pressed, ironed, and steamed, and 2 to 4 feet from a large, 14-foot floor-to-ceiling roll-up gate used to bring in material from the street. The new work station was also situated close to button and blind stitch machines.

Beginning on 12 November, Garcia and Paz were subjected to the combined effect of steam on their backs from the steam machine, and cold air from the roll-up gate when it was in an open position. They put piles of material between themselves and the steam machine as a barrier. Although the steam did not have a very adverse effect on them, the cold air from the gate affected them badly. They repeatedly complained to Milkenvoic about the open door. She told them that perhaps they would be moved to a different area but they never were. Their requests to her that the door, which was open "all the time," be closed, were ignored. In contrast, when other workers complained about the cold air, the door was shut. Garcia and Paz covered themselves with material in order to keep warm, and this was met with laughter by Mrs. Dordevic.

Garcia and Paz' repeated requests that their machines be moved were also ignored, notwithstanding that there were four vacant merrow machines in the merrow machine area where they formerly worked.

At times employees would be assigned to work at the blind stitch and button machines, which were closest to Garcia and Paz. But those employees would work at those machines sporadically, two or three times per week for 2 hours at most. When Garcia left, no one replaced her at her machine.

On 14 November, Paz took four photographs and Garcia took two photographs of their work area. The picture-taking took 2 minutes. Paz stated that Dordevic approached her and asked why she took the pictures. She replied that she wanted proof of the location in which she was working. Dordevic then told her that she had no permission to take the pictures, that the shop was a private place, and that he would call the police and have her arrested for doing so. Later that day Dordevic gave her a letter, provided by his attorney:

Re: Unauthorized Photographs on November 14, 1985

It has come to my attention that you took several photographs of BMD's equipment and your co-workers in the shop this morning. At the time these photographs were taken, you were supposed to be working at your machine. You did not have BMD's permission to take these photographs nor did you obtain the permission of your co-workers.

Your actions caused disruption in BMD's operations and greatly upset many of your co-workers.

Future incidents of disruptive conduct will not be tolerated and will result in further discipline up to and including your discharge.

Please indicate your receipt of this written warning by signing in the space provided.

Paz refused to sign the letter. Dordevic warned her that she could not interrupt work, and if she did so two more times she would be fired. Paz told him that he hated her because she called the Union. Dordevic said she should forget about the past. That letter was the first ever given to an employee.

There was evidence that photographs had been taken in the shop before, at such times as parties, or when a coworker left for a trip. In fact Paz took photos before and had not been required to obtain permission and had not been warned about such conduct.

Dordevic conceded telling Paz that she should have asked his permission to take the photos and admitted threatening that he would call the police because she did not have his permission. He also stated that Paz asked him why he did not dismiss her. Dordevic replied that he did "not need to."

Garcia and Paz stated that their machines were heavy, inefficient, and hard to operate. Garcia immediately told Milkenvoic of this and continued her complaints in succeeding days. Milkenvoic said that she would call a mechanic, but the mechanic did not come and the machine was not repaired. Paz' machine was repaired, but it still did not operate well. Garcia asked Milkenvoic why her worksite was moved, and Milkenvoic replied that boxes of material were placed in her old position, and there was no room for her machine. Garcia testified that before her April layoff boxes were also situated near her machine but she had no difficulty working.

Garcia stated that on 19 November, her last day of work, the roll-up door was open. The air was not cold, but the sun beat down on her back through the gate, making her feel as though she were at the beach. Her request that Milkenvoic close the door was ignored. However, later that day, as the sun changed its position, it became very hot for another worker who then complained and the door was immediately closed.

Paz stated that before her layoff in April, she produced 30 to 35 dozen sweaters per day and earned $450 to $600 per week, for a 9- or 10-hour day. In November, however, she produced only 17 to 25 dozen and earned $270 to $290 per week, for an 8-hour, or less, day. Paz attributed this to the harder work that she and Garcia were given. She stated that in November, she was as-

signed to work on material that was thick and loose, hard to sew, and had lines that had to be matched on each side. This work was paid at $2.50 per dozen, whereas because of the nature of the work, it had formerly been paid at $3.50.

Paz testified that before her April layoff all the workers shared the easy and hard work, but that in November only she and Garcia did that complex, low-paying work. Other operators were paid $2.50, but according to Paz, such work was easier and the material sewed was different, with no matching required. She accordingly stated that she was unable to make as much money because of the difficulty in working with the material and the inefficient machinery; the time-consuming line matching combined with the low piece rate held her earnings down.

Garcia stated that she did not return to work because she could not bear the working conditions—the cold, the sun, and the steam. She felt isolated from other workers.[17] She conceded that the nearest merrow operator, 8 feet away, also complained about the cold, but Garcia was much closer (about 4 feet) to the door, and also the other workers did not have the steam at their backs.

Paz last worked on 20 December. She stated that she did not return thereafter because of the intense cold from the door and the steam. because Dordevic looked at her in an angry way, because of the poor treatment she received, because she was given the worst work, and because the piece rate was too low. She stated that she may have continued working but for the machine she worked at and the type of work she was given.

Dordevic testified that the work that Garcia and Paz received was the same as given other employees. He added that if a particular order was small he gave the entire lot to two or three workers, and noted that Garcia and Paz did not work on any lots that were unique to them.

The photos taken on 14 November, the date the door was open all day according to Garcia, show the door closed and Garcia and Paz smiling in apparent good spirits. Garcia stated that she did not complain about the door being open that day and they testified that they did not want to look as miserable as they felt for the pictures.

IV. SUZAN KNITWEAR CORP.

A. *Facts*

The certificate of incorporation for Suzan was filed on 24 April 1985. Its officers, owners, directors, and stockholders are Jovo Milosevic and his wife Mira. Jovo is the brother of Bora Dordevic. Jovo had been a resident of the United States since 1968, and had owned and operated a small grocery store for the 4 years preceding the opening of Suzan. He had some experience in the textile industry in Europe more than 20 years ago, but his wife had worked in the sweater industry in the United States 5 years ago.

In March 1985, Milosevic and Dordevic purchased a building at 20–36 Harmon Street, a 5- to 10-minute drive or a 20-minute walk from BMD. Dordevic "lent" Milosevic $20,000 toward the purchase price of $65,000. The building is Suzan's location. In addition, Dordevic lent him another $20,000, half of which was used to open Suzan's initial bank account, and the other half was for a later $10,000 deposit into the same account. No loan documents were executed for this transaction and the loan is still outstanding.

Suzan began work about 3 May with five or six merrow machines and Singer, crochet, and tacking machines, all bought from Dordevic for $16,000, which sum Suzan paid Dordevic in October 1985.[18] In addition, certain small supplies were given to Suzan by BMD.

Dordevic ordered and paid, in part, for ironwork performed at Suzan's premises.[19] However, Milosevic showed the ironworker what he wanted done, and the work was performed based on Milosevic's instructions.

BMD and Suzan use the same corporate attorney, accountant, insurance agent and insurance company, bank, and suppliers for certain materials.

Dordevic denied having any position, title, or ownership interest in Suzan.

Dordevic testified that he helped his brother open Suzan because of familial obligation and because Milosevic helped him when he arrived in the United States in 1974 by paying his transportation from Europe, permitting him to live in his apartment, and giving him money for furniture. In fact, Dordevic borrowed $10,000 from his brother to go into business in 1978. He defended his loans to Jovo also on the ground that he lent money to other companies and to employee Paz.[20]

Dordevic stated that he helped Milosevic set up Suzan, gave him advice, and recommended companies with which he might do business. He also recommended that prospective employees who sought work at BMD apply for jobs at Suzan or other companies.

The testimony of Dordevic and Milosevic was quite contradictory concerning Suzan's securing work from AM Knitwear.

Milosevic testified that 1 week before Suzan opened he, alone, went to AM Knitwear and asked for work. He further stated that he did not know that BMD worked for AM. In contrast, Dordevic stated that he called AM in late March and asked that work be given to Suzan. Dordevic called again in mid-April and AM sent a box of samples to Suzan, where the sample garments were made by the wives of the two brothers. Thereafter, AM continued to give work to Suzan and, according to Respondents, AM was Suzan's sole customer.[21]

[17] On cross-examination Garcia conceded that whenever she returned from trips out of the country she would be assigned to a different merrow machine. However she noted that the machines were all located in the central merrow machine area, unlike the position outside that area to which she returned in November.

[18] In fact, BMD placed the order for two new merrow machines from Belmont Sewing Machine Co., which were delivered to Suzan. BMD paid Belmont, and Suzan repaid BMD.

[19] A $527.95 balance was paid by Suzan on the day it closed its operations, 24 February 1986.

[20] The loan to Paz was for $2000, which was repaid.

[21] I credit the testimony of Dordevic as to his solicitation of AM. It is hard to believe that AM would give work to Milosevic on his request—especially since he had no current experience in the textile industry. It appears that the introduction of Suzan by Dordevic, who works for AM at times, caused that company to employ Suzan.

Dordevic admitted that in the first month or so of Suzan's operations, he occasionally visited Suzan for about 30 minutes in the morning, two to three times per week or after work, to help, and show Milosevic how to do the work. Thereafter Dordevic visited Suzan once per week.

The Respondents' testimony that AM Knitwear was Suzan's sole customer was contradicted by Suzan employee Janet Khalil who testified that Suzan worked for two companies, including one that used the label "Kenneth Too." In fact she stated that 70 percent of her work consisted of Kenneth Too sweaters. BMD also performed work for Kenneth Too.

Union Representative Aldrich testified that on 10 January 1986, he observed boxes with what he believed were finished goods being transported from Suzan to BMD.

Cousins Janet Khalil and Maria Lopez, who had stopped working for BMD in early 1985, testified that in mid-May they together sought work at BMD. Dordevic told them that work at BMD was slow, and that he had many problems with the Union and the employees, but he suggested that they work at Suzan, where work was plentiful. Lopez told him that she did not know how to perform tacking work, and Dordevic said he would bring a device to make that work easier. Lopez began work at Suzan the next day, on 15 May. Dordevic brought the tacking piece and told the floorlady to give her work.

Lopez worked at Suzan less than 1 month when, before the BMD election on 21 June, Dordevic asked her whether she liked the work. She replied that she did. Dordevic asked her where Khalil was. Lopez said that Khalil left and she would leave soon too.[22] Dordevic asked why, and Lopez said because of "problems of Paz with the Union." Dordevic answered that he had problems also, and would tell Milosevic not to let Paz work for Suzan, but Lopez and Khalil could continue to work at Suzan. Dordevic also told them that if the union problem continued he was contemplating closing BMD and expanding operations at Suzan.

Khalil began work at Suzan about 2 weeks after Lopez, and was given work by the floorlady. No one at Suzan interviewed her for the position. She worked about 6 weeks and left because she was not paid enough. When she complained to Milosevic's wife, Mira, about the low pay, either Mira or Khalil called Dordevic at BMD and Khalil told him that the workers should be paid more than $2.75 for the complex work of matching lines. Dordevic told her that he paid $2.75 at BMD and only three lines had to be matched. Khalil left and collected unemployment benefits, but in about 1 month returned to Suzan—in late July or early August— and spoke to Dordevic's wife who told her that Dordevic was upset that while Khalil was collecting unemployment benefits, she was working at another company. She warned Khalil that if she did not stop collecting she would be reported. Khalil went to BMD where Dordevic told her the same thing. She asked to return to BMD but Dordevic told her that there was no work there, and he had many problems because the workers wanted to bring a union in, and he did not want a union, and would rather close. He then asked Khalil if she was involved with the Union; whether she signed a card for it; and whether she knew who signed union cards. Khalil admitted signing a card, and Dordevic told her to report for work at Suzan.

Shortly after Khalil returned to work for Suzan in late July or early August, friends visited her at work. Milosevic told her that he saw her talking to Paz around the corner and asked why those people visited her at work and also asked whether she signed a card for the Union. Khalil denied doing so. Milosevic then said that he knew that she signed. Khalil then admitted having signed and, when asked why, she replied that she wanted to support Paz and others and return to work. Milosevic said that he did not want to have the same problems as his brother, and he did not want her to receive visitors or phone calls.

Lopez stated that when she began work at Suzan, Dordevic was there every day, in the morning, for 2 or 3 hours, bringing samples and work, checking the work done by the operators, and fixing machines. In June, July, and August and thereafter, Khalil and Lopez saw Dordevic at Suzan much less often—twice a week and in some weeks not at all. They both saw Dordevic's wife at Suzan several times, giving work to the employees, and Lopez saw Radmila Rajkov, BMD's secretary at Suzan, writing on the piecework tickets. Dordevic also asked Suzan's workers if they could work on Saturday.

Dordevic, while at Suzan, yelled at Mrs. Milosevic that the work was not done correctly, and told her to make sure that it was done better. When the work was not done correctly, Dordevic would be called, and he came to Suzan and the problem was resolved. However, when workers complained to Dordevic about Milosevic, nothing was done.

At times, when the workers disagreed with Mrs. Milosevic as to how to do the work, she called Dordevic for instructions. Khalil asked Mrs. Dordevic for a job for her husband and was told to call Dordevic. Khalil called Dordevic who told her to have him report to Suzan the same day, which he did.

Employees of Suzan testified that they worked on sweaters that bore a Kenneth Too label. BMD worked for Kenneth Too, also. Dordevic stated that BMD employees do not work for Suzan during BMD's worktime. Otero, the BMD cutter, was seen working at Suzan on Saturdays.

Milosevic told the workers that they should do good work because Dordevic and the representative of a customer were coming to their work area.

B. *Analysis*

The General Counsel alleges that about 24 April Suzan was established by BMD as a subordinate instru-

[22] According to Khalil's testimony she began work at Suzan about 1 June, and left in mid-July. Thus, before the 21 June election, Lopez could not have told Dordevic that Khalil had already left. However, I credit Lopez as to this conversation because she testified in detail about a matter that affected her and Khalil directly. I believe that either she was mistaken about the date of this conversation, or Khalil incorrectly set forth her dates of employment at Suzan.

ment to and a disguised continuation of a part of the business of BMD and, since that time, BMD and Suzan have been affiliated businesses with common officers, ownership, directors, and operators; the directors and operators formulate and administer a common labor policy for the aforenamed companies, affecting the employees of the companies, and that BMD and Suzan are, and have been, alter egos and a single employer within the meaning of the Act.[23]

The factors for finding single employer and alter ego status are "much the same." *Mine Workers Local 1329 (Alpine Construction)*, 276 NLRB 415 fn. 3 (1985).

The Board stated in *Contee Sand & Gravel Co.*, 274 NLRB 574 (1985):

> The Board finds more than one enterprise to be a single employer where there is common ownership and financial control which is actual rather than potential, common management, interrelation of operations, and centralized control of labor relations. . . . But it is not essential that all of these elements be present. . . . As to whether an enterprise is the alter ego of another, the Board looks to a greater number of factors such as whether the enterprises have substantially identical ownership, management, business purpose, operation, equipment, customers, and supervision of employees. . . . There is also an additional factor which the Fifth Circuit describes in *Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 508 (5th Cir. 1982), in the following words:
>
> > However, the focus of the alter ego doctrine, unlike that of the single- employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective-bargaining agreement through a sham transaction or technical change in operations.

However, "absent a disguised continuance, the Board generally finds alter ego status only where the two enterprises have substantially identical ownership, business purpose, management, supervision, customers, operation and equipment." *T. E. Elevator Corp.*, 268 NLRB 1461 (1984). It should be noted that "no one factor is controlling and all need not be present. Complete identity in ownership is not a requisite, particularly where ownership resides in members of the same family. Centralized control of labor relations is the most important single factor." *Super Save*, 273 NLRB 20, 28 (1984).

The General Counsel alleges in the complaint that Suzan was established by BMD as the disguised continuation of a part of the business of BMD, and in her brief states that the timing of the creation of Suzan, inter alia, shows that BMD attempted to shift its operations to Suzan in order to avoid unionization. A threshold question therefore is whether Suzan's creation was related to the Union's campaign at BMD.

The evidence establishes that the first contact with the Union by BMD employees was made on 17 April, and the first mention of the Union by a respondent official was on 19 April. However, there was unrebutted testimony that the building that was to house Suzan was purchased 1 month earlier, in March,[24] and the certificate of incorporation for Suzan was filed with the New York Secretary of State on 24 April. Even if action was taken on Friday, 19 April, to incorporate Suzan, the first day of Respondent's knowledge of the union drive, it is unlikely that incorporation could have been achieved 3 working days later, on 24 April.[25]

As set forth above, however, even if Suzan was not created for the purpose of shifting operations to it from BMD, its existence for that purpose would be unlawful. *Samuel Kosoff & Sons*, 269 NLRB 424, 429 (1984) (disguised extension). Nevertheless, an alter ego relationship may be found even in the absence of a disguised continuance. *T. E. Elevator Corp.*, supra.

BMD and Suzan have virtually identical operations, in that they are both garment industry contractors that sew sweaters. They utilize the same types of machinery and the same classifications of employees to perform the same functions—at locations not too distant. Certain machines were given to Suzan by BMD.

There is some dispute as to the identity of customers, and no definite finding can be made that Suzan performs work for Kenneth Too.[26] However, AM Knitwear is a joint customer of both Companies, with Suzan perform-

---

[23] Respondents object to the inclusion of Suzan as a respondent after 4 days of hearing had taken place. Their argument is essentially that Suzan was denied due process inasmuch as Suzan, by virtue of the claim that it was a single employer or alter ego of BMD, was not present at the earlier part of the hearing before it was alleged as a respondent, and thus could not defend as to the underlying unfair labor practices testified to in that period. I affirm my ruling made at the hearing to permit Suzan to be named as a respondent. Suzan was served with a copy of the charge and complaint that alleged its alter ego and single employer status. Thereafter, at the hearing, these issues were fully litigated with Suzan being given full opportunity to develop evidence as to that. The new charge was filed on 7 January 1986 and the complaint issued on 21 January. The hearing resumed on 18 February, and continued thereafter for 7 days. Suzan's attorney attended the hearing on only 1 day, 17 March, when its president testified. Compare *George C. Shearer Exhibitors*, 246 NLRB 416 fn. 3 (1979).

In addition, Suzan and BMD were given the opportunity to call and recall witnesses, as to the alter ego and single employer issues, who testified about such matters in the initial 4 days of hearing.

Although Suzan was not "present" at the initial 4 days of the hearing because it had not yet been served with the complaint or named as a party, nevertheless, once found as BMD's alter ego, Suzan cannot complain that it was not present at the early part of the hearing because the interests of alter egos are identical, and Suzan was present and did defend itself through the representation of BMD. *Southeastern Envelope Co.*, 246 NLRB 423, 424 (1979). See also *Hopkins Hardware*, 271 NLRB 175 (1984). *Seaward International*, 270 NLRB 1034 (1984), cited by Respondent is inapposite. In that case, the General Counsel adduced testimony only as background material and not in support of a separate violation. However, following the close of the General Counsel's case and testimony by most of the respondent's witnesses, the General Counsel moved to amend the complaint to include an independent violation based on that testimony. Here, the amendment, including Suzan as a respondent and naming it as an alter ego and single employer, was made during the General Counsel's case early in the hearing and no misrepresentation was made as to the purpose of the amendment.

[24] No conclusive evidence, such as contract of sale or deed was offered, however.

[25] No conclusive evidence, such as copies of filed documents or postal return receipts were offered.

[26] Kenneth Too's records were not offered in evidence.

ing most of its work for that Company, and BMD doing such work when it needs jobs to fill in.

As to ownership, "the Board does not view legal ownership in a vacuum, but instead looks to the totality of the circumstances to determine where the real control exists." *East Tennessee Packing Co.*, 270 NLRB 520, 524 (1984). Suzan is owned entirely by Jovo Milosevic and his wife. BMD is owned by Bora Dordevic, the brother of Jovo. Thus, although the two Companies have different owners, the "totality of the circumstances" must be viewed. When that is done, the evidence is that (1) Bora and Jovo jointly purchased the building that houses Suzan, (2) Dordevic "lent" Milosevic $20,000 toward the purchase of the building; (3) Dordevic "lent" Milosevic $20,000, which was deposited in and became Suzan's initial bank deposits, for which no loan documents were executed and which is still outstanding; (4) BMD ordered and paid $16,000 for two new machines, which Suzan repaid; and (5) BMD ordered and paid in part for ironwork performed at Suzan. Such is evidence of alter ego status. *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982); *Farmingdale Iron Works*, 249 NLRB 98, 107 (1980).

Regarding management, supervision, and control of labor relations, Dordevic admittedly played an active role in the startup of Suzan, giving Milosevic advice and soliciting customers and prospective employees, and he was concededly present, at first, to help his brother and show him how to do the work. The testimony was that although Dordevic was present at Suzan frequently in the beginning of its operation, his presence tapered off, and he was there less often, but when he was present he checked the work done by the operators, brought samples, and fixed machines. Although he may have remained in the background at Suzan, his presence was felt, even when he was not there, and in his relationship with the Suzan employees he did exercise supervisory control. *Super Save*, supra.

Thus, employees Khalil and Lopez, former workers of BMD, were actually hired by Dordevic to work at Suzan.[27] When disagreement with the pay or the work at Suzan occurred, calls were made to Dordevic at BMD, who resolved the problems. Dordevic and his wife, an official of BMD, warned Khalil, who was then a Suzan former employee, that if she continued to collect unemployment benefits she would be reported. The only explanation for Dordevic's being upset at Khalil's abuse of Suzan's unemployment insurance account is that Dordevic was closely involved with the management and labor relations activities at Suzan.

In addition, Dordevic's wife, an official of BMD and an admitted supervisor, distributed work at Suzan, and BMD's secretary was observed writing on the piecework tickets at Suzan. It should be noted that Suzan has its own, separate floorlady.

It is clear that inasmuch as Jovo Milosevic lacked the management experience and expertise in the industry, he would have to and did rely on Dordevic to supply the expertise in setting up and running Suzan. *Rogers Cleaning Contractors*, 277 NLRB 482, 488 (1985).

It is clear that Dordevic, a close relative of Milosevic, dominated the management of both companies, *J. M. Tanaka Construction*, 249 NLRB 238, 241 (1980), and "continued to have influence and played a substantial role in the operation (of the company)" *Denzil S. Alkire*, supra.

When the above evidence is considered in the context of the credited statements about Dordevic's reaction to the Union, a finding of alter ego status is compelled. Thus, Supervisor Milkenvoic repeatedly threatened the workers that if they selected the Union, Dordevic would close the factory, and reopen it under another name or owner and replace the employees. Dordevic also told employees that he would close the shop before recognizing the Union, and told Suzan employee Lopez that if the union "problem" continued he was contemplating closing BMD and expanding operations at Suzan. Although the opposite, in fact, occurred—Suzan was closed in February 1986—in the beginning of Suzan's operation, when Khalil and Lopez were hired, Dordevic suggested that they work at Suzan where the work was plentiful, and not at BMD, where the work was slow. Thus, the statements set forth above show an intention by BMD to use Suzan as an alter ego to divert its operations to Suzan and avoid unionization of that company. *Nabco Corp.*, 266 NLRB 687, 694 (1983); *Fugazy Continental*, 265 NLRB 1301, 1303 (1982). This is made all the clearer by Dordevic's telling Suzan employee Lopez that he would tell Milosevic not to hire Paz who was an outspoken union advocate.

Respondent, citing *L & J Equipment*, 274 NLRB 20 (1985), argues that alter ego status should not be found where a brother helps another get started in business, especially given the assistance extended to Dordevic by Milosevic when he arrived in the United States. While I agree that a close family member should not be prejudiced or placed at risk for helping another, the facts as set forth above establish that Dordevic went far beyond simple assistance to Milosevic. *L & J* is inapposite because the two companies there were totally independent corporations as to their operations and control of labor relations. The employees in *L & J*, unlike here, were separately hired and assigned, and there was no common supervision. Here, Khalil and Lopez were hired by BMD to work at Suzan, and Dordevic and his wife exercised supervisory authority over Suzan's employees.

I, accordingly, find and conclude that the preponderance of the evidence supports a finding, which I make, that Suzan is the alter ego of BMD, and that they constitute a single employer.

V. THE ALLEGED INTERROGATIONS, WARNINGS, AND THREATS

The complaint alleges that Respondent interrogated employees; warned and directed them to refrain from becoming members of the Union; and threatened them with discharge and with plant closure if they became or remained members of the Union and if they gave any assistance and support to it.

[27] Even the recommendation of employees, admitted by Dordevic, has been found to be a factor leading to a finding of alter ego status. *Denzil S. Alkire*, supra at 1325.

The General Counsel alleges that, in certain of the conversations, in which Antonio Otero acted as the interpreter, Respondents are responsible for the statements uttered through Atero at the times he interpreted for Respondents' officials. I agree. I, accordingly, find that Otero was an agent of Respondents when he interpreted their statements. *Tweel Importing Co.*, 219 NLRB 666, 671 (1975).[28]

BMD and Suzan's witnesses denied interrogating, warning, or threatening employees. I credit the testimony of the employee witnesses who testified concerning these matters. They all testified, as to these conversations, in a straightforward, honest, consistent manner about matters that had a great impact on them and that must have impressed them strongly. Their testimony is believable also because of the numerous instances of similar remarks being made in a short span of time when the union campaign was at its height.

I, accordingly, find the following, all set forth in detail above, to violate Section 8(a)(1) of the Act.

(a) Dordevic's question to Garcia on 19 April if she and Paz called the Union.

(b) Milkenvoic's question to Garcia on 19 and 24 April whether she signed any papers for the Union, and her further inquiry on 19 April as to why she was supporting Paz.

(c) Milkenvoic's questions on 22 April to Garcia whether she signed papers that Paz had for the Union and inquiry as to who else signed, and her statements to Paz that she was silly and stupid; her accusation that Paz forced workers to sign cards; and her threat that Dordevic would lay off everyone who signed cards, close the shop, change its name, and replace the workers; and her question whether Garcia called the Union.

(d) Milkenvoic's threat to Paz on 23 April that if she signed cards for the Union or called it she would be fired, and her repeated threat that Dordevic, because of his dislike for the Union, would close the factory, change its name, and replace its workers.

(e) Milkenvoic's question on 23 April to Chunga whether she liked the Union and if she signed a card for it.

(f) Milkenvoic's question to Rivera during the week of Paz' layoff as to why Paz did not get a job in a union shop if she was in the Union, and her statement that Dordevic's friend's reaction to the same problem with a union was to close and move, and Dordevic would do the same.

(g) Dordevic's threat on 24 April to Paz that he would close the shop if the Union came in.

(h) Mira Dordevic's questions on 24 April to Nunez if she knew of the Union, whether she spoke to the union agents, and whether she was in the Union or signed a union card.

(i) Bora Dordevic's questions on 24 April to Nunez if she knew about the Union, who spoke to her concerning it, and whether she signed a card; his warning that if she did not sign she could continue to work; and his statement that he would close his shop before the Union entered and that if the Union came in he would close.

(j) Milkenvoic's statement to Cedeno, before the election, that if the Union won the election, Dordevic would close the factory.

(k) Dordevic's statement to Lopez before the election that if the union problem continued he contemplated closing BMD and expanding operations at Suzan.

(l) Dordevic's statement to Khalil in the summer of 1985 that he would rather close if the Union were to organize BMD; and his questions whether she was involved with the Union, whether she signed a card for it, and whether she knew who signed union cards.

(m) Jovo Milosevic's question in late July or early August to Khalil whether she signed a card for the Union; and his statement that he knew she signed such a card.

(n) The sign posted in the shop that said "please vote for BMD and Save our job. Thank you."

The Board held in *Rossmore House*, 269 NLRB 1176, 1177 (1984), that the basic test for evaluation of whether interrogations violate the Act is: ". . . whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." The Board also pointed out:

> Some factors which may be considered in analyzing alleged interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. See *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). These and other relevant factors are not to be mechanically applied in each case. Rather, they represent some areas of inquiry that may be considered in applying the *Blue Flash* test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. [269 NLRB at 1178 fn. 20.]

The evidence is clear that the questions and inquiries of the employees, which I have credited as set forth above, constitute unlawful interrogation. The atmosphere in which the questioning occurred was charged with and accompanied by hostility and unlawful threats of discharge and plant closure. *Master Security Services*, 270 NLRB 543, 550 (1984). There was no need to know the information sought and the questioning was conducted, in part, by the owners of BMD, and Suzan, which must have tended to restrain and coerce the workers. Thus, the questions of employees whether they called the Union; whether they signed cards for the Union;[29] who

[28] In her brief, the General Counsel also claims that Otero was Respondents' agent in connection with a conversation, described above, with employee Amalia Paredes. I disagree. Otero, a rank-and-file employee, spoke to Paredes alone, and was not interpreting at that time. Moreover, no complaint allegation identified Otero as having specifically, independently, violated the Act. In addition, at the hearing, the General Counsel expressly stated that she named Otero as an agent solely with respect to those occasions when he acted as an interpreter. It would thus be unfair to now allege that Otero independently violated the Act.

[29] At the hearing on 18 February 1986, the General Counsel moved to amend the complaint to allege that Milosevic interrogated employees (see *Continued*

else signed cards for the Union; whether workers liked the Union; why Paz did not get a job in a union shop if she was a union member; whether employees knew of or spoke to the union agents all are unlawful interrogations and violate Section 8(a)(1) of the Act. *Moe Warehouse & Accessory*, 275 NLRB 1132, 1140–1141 (1985); *Carpenter Trucking*, 274 NLRB 300, 302 (1985).

The evidence is also clear that the numerous threats to employees, set forth above, as to discharges and plant closure, because of the Union, constitute unlawful threats in violation of Section 8(a)(1) of the Act.[30] *Moe Warehouse*, supra; *J. & G. Wall Baking*, 272 NLRB 1008, 1011 (1984); *Central Motors*, 269 NLRB 209 (1984); *Bronx Metal Polishing*, 268 NLRB 887, 889 (1984); *Atlas Microfilming*, 267 NLRB 682 fn. 2 (1983).

The sign that said, "Please vote for BMD and save our job. Thank You." was posted in the shop for several days before the election. It was prepared and posted by employees, and there is no credible evidence that Respondents promoted its preparation of posting. However, the evidence is clear that Respondent was aware of its presence (Dordevic told his wife to look at it), and permitted its continued presence. In addition, the message was consistent with other threats made by Respondents. Thus, the message in effect stated that employees' jobs would be saved if they voted against the Union,[31] with the implication being that if they voted for the Union they would lose their jobs. I accordingly find that Respondent ratified the act of the employees in preparing and posting the sign, and in permitting it to remain posted, and that therefore the sign also threatened employees with job loss if the Union was selected by them.

VI. THE LAYOFFS

All the seven laid-off employees discussed the Union among themselves and signed cards for the Union shortly before their layoff. Lopez, Paz, and Paredes signed their cards in front of the shop. Chunga, Garcia, Nunez, and Paz were subjected to unlawful interrogation 1 to 3 days before their layoffs, and Nunez and Paz were the subjects of unlawful threats 1 day before their layoffs.

Dordevic knew of the Union at least on 19 April and certainly not later than 22 April.

Given the timing of the layoffs, which began on 23 April, coming on the heels of the Union's organizing campaign, and the animus of Respondent BMD as demonstrated in its interrogations of employees about their union activities and threats to lay off workers who signed cards or called the Union, and its threats that it would close the shop, and replace its employees and reopen under a different name, I find that the General Counsel has made a prima facie showing that the union activities of five of the seven employees was a motivating factor in Respondent's decision to lay them off. *Wright Line*, 251 NLRB 1083 (1980).

Specifically, Chunga was employed for 2-1/2 years at the time of her layoff. She discussed the Union with her fellow employees, and on 22 April signed a union card. On 23 April, she told Milkenvoic that she liked the Union and signed a card for it. The next day she was laid off.

Lopez was employed for 2-1/2 years at the time of her layoff. She spoke about the Union with Paz, and on 24 April signed a card outside the shop in the presence of Paz, who had already been laid off, and a union agent, who was by then known to Respondent. The next day she was laid off.

The union agents were conspicuously present on 22 and 23 April speaking to employees in front of the shop, and on 23 April Milkenvoic observed them.

Mejia spoke with her fellow employees including Garcia and Paz at work about the Union. Although Milkenvoic was nearby, there was no evidence that she could understand the Spanish conversations. On 22 April, Mejia signed a card at home and the next day was laid off with Paz.

Mejia was not subjected to any interrogations or threats. On these facts, I cannot draw an inference that Respondent was aware of her union activities. There was no evidence that Respondent knew that she spoke with anyone about the Union, or of her card signing at home. The small-plant theory was not asserted by the General Counsel, nor could it be applied here where 75 employees were working at that time. I accordingly find that the General Counsel has not made a prima facie showing that Mejia's layoff was motivated by her union activities.

Paredes worked for about 1 year, was asked at work by Paz on 23 April to sign a card, and did so after work one block from the factory.

She was laid off on 3 May. There was no evidence that Respondent saw or understood her conversations with Paz, or that it was aware of her card signing one block from the shop. Unlike other employees who were laid off almost immediately after they signed cards in front of the shop, she was not laid off for 1-1/2 weeks after she signed a card away from the shop. She was not the subject of interrogation or threats. On these facts I cannot find that the General Counsel has made a prima facie showing that Paredes layoff was motivated by her union activities.

Nunez was employed for 1 or 2 months in 1984 and for 3 or 4 weeks in 1985 at the time of her layoff. On 23 April she spoke to Paz at lunch about the Union, and signed a card at home. The next day, after waving to the union agents, she was interrogated by Mira Dordevic and later by Bora, and admitted signing a card. She was also threatened with layoff and that the shop would be closed. She was laid off the next day. Respondent's witnesses testified that Nunez was hired as a temporary em-

---

"m" above). Respondent BMD objected on the ground that the amendment was untimely. I reserved decision. The charge against Respondent Suzan was filed on 7 January 1986, and alleged that that Company was a single-integrated enterprise or alter ego of Respondent BMD. The interrogation, as testified by Khalil, which I have credited, occurred in late July or early August 1985. The charge's language that "by these and other acts, the employer has interfered with, restrained and coerced employees in the exercise of Section 7 rights," covers the interrogations alleged at the hearing. In addition, the interrogations occurred within 6 months of the filing of the charge. I, accordingly, overrule the Respondents' objection, and permit the amendment to the complaint. *J. M. Tanaka*, 249 NLRB 238, 243 fn. 1 (1980).

[30] Milkenvoic's report to the employees of Dordevic's intentions violate the Act as unlawful threats on their own, and as reports that Dordevic had made these threats. *A & E Stores*, 272 NLRB 737 (1984).

[31] The sign had a box labeled "no."

ployee to work only until a certain job that she was working on was finished. I reject this testimony. There was no evidence as to what job she was working on, or how long it was to last. Her prior employment, also as a presser, for 1–2 months in 1984 ended because she could not locate a babysitter, and not because she was hired then as a temporary employee. Moreover, the abruptness of her layoff coming 1 day after she waved to union agents from inside the shop and was then immediately interrogated and threatened with layoff by Bora and Mira Dordevic, and admitted signing a union card, lend strong support to a finding that her layoff was motivated by her union activities.

Garcia and Paz were the most active and vocal union supporters. They called the Union, signed cards, actively solicited others to join the Union, stood with the union agents outside the shop and spoke to their fellow workers, and were the subjects of interrogations and threats shortly before their layoffs. Garcia was told by Milkenvoic that she knew that Garcia wanted the Union. Similarly, Milkenvoic criticized Paz for supporting the Union and Paz admitted having called the Union. She was warned that if she called the Union or signed a card for it she would be fired.

I accordingly find and conclude that a prima facie showing has been made that the decision to lay off Chunga, Paredes, Nunez, Garcia, and Paz was motivated by their union activities. *Wright Line*, supra.

Dordevic denied laying off the five employees because of their union activities or sympathies. Rather, Respondent asserts that the workers were laid off for lack of work. BMD's records received in evidence, however, do not support this defense. Thus, Dordevic testified that some orders were canceled in February, more were canceled in March, and most were canceled in April. He began laying off personnel in February. Dordevic also stated that his slow season ran from early March to late May 1985.

The important period of time to examine is the period preceding BMD's knowledge of the Union's campaign.

BMD's records show the following number of employees employed as of the week ending:

1 March—73	19 April—75
8 March—73	26 April—76[32]
15 March—73	3 May—71
22 March—76	10 May—65
29 March—75	17 May—64
5 April—75	24 May—63
12 April—75	31 May—62

Respondent was first aware of the employees' interest in the Union on 19 April.

The week ending 26 April was the week in which the bulk of BMD's unlawful interrogations and threats occurred, and in which six of the seven alleged discriminatees were laid off.

The following week, 3 May, the payroll numbered 71, and thereafter, until 15 November, it ranged from 59 to 65.[33]

Thus, the records reveal that prior to the advent of the Union, weekly employment levels in March and April were quite high—from 73 to 76 workers. What is curious and suspect is that these high levels existed at a time when, according to Dordevic, substantial amounts of orders were being canceled by its customers and layoffs were taking place.

In addition, although Dordevic identified the slow season as running from early March to late May, the number of employees employed weekly in that period averaged 71 workers. In contrast, from the week ending 7 June until 15 November, presumably Respondent's busy season, the employee complement averaged 62.

These payroll records simply do not support a finding that some orders were canceled in February, more in March, and most in April, with accompanying layoffs because of the reduction in orders, as testified by Dordevic. In contrast, the records show that in March and April, employment was at its highest, with more workers employed in April than in March.

It thus appears that notwithstanding BMD's claimed reasons for the layoffs in the week ending April 26—lack of work due to cancellation of orders—employment remained at high levels during the period 1 March to 26 April, when the records should have revealed lower employment. It was not until the Union's appearance as an active force on 22 April that the layoffs of workers began, and the payroll dropped markedly.[34]

In sum, Respondent has not met its burden that it would have laid off the employees in the absence of their union activities. *Wright Line*, supra.

Additionally, even assuming BMD had insufficient work and was therefore justified in laying off the five employees, inasmuch as I have found that Suzan was the alter ego of BMD, Suzan, which began operations on May, had sufficient work and hired other employees,[35] and could have employed the five laid off here.

In making this finding, I have considered the fact that in late July, former Suzan employee Khalil told Dordevic that she signed a card for the Union and no action was taken against her. Rather, Dordevic told her to return to work at Suzan. This would tend to indicate that Dordevic took no action against a card signer, and thus had no animus toward the Union in the layoffs of the five BMD employees. However, I believe that it supports a finding of the discriminatory layoff of the five. In the same conversation, Dordevic told Khalil that he did not want a union at BMD and would rather close, and he did not accept her for work at BMD because, in addition to having no work, he had many problems due to the employees' desire for union representation. Thus, he

[32] That number is apparently the total number of employees employed in that week, according to Secretary Rajkov's testimony. The layoffs that week would therefore reduce the number.

[33] The period 1 March to 15 November was the only period offered in evidence.

[34] I am aware that two employees were laid off on 29 March and one on 19 April.

[35] Milosevic testified that Suzan began operations with 6 to 15 employees.

suggested that she return to Suzan, which was not the object of the Union's organizing campaign.

VII. THE RETURN TO WORK OF GARCIA AND PAZ

A. *Action Taken Against Them*

Garcia and Paz were recalled to work on 11 November, following their layoffs in late April. A charge had been filed concerning their layoffs, and on 24 October a complaint had issued alleging that the layoffs violated the Act.

The General Counsel asserts that, on their return to work, they were subject to certain unlawful actions, designed to force them to quit, and their subsequent quitting constituted their unlawful constructive discharge.

The actions alleged in the complaint are the:

(a) Assignment to more arduous and less agreeable job tasks.
(b) Reduction of their rate of pay by their assignment to lower paying job tasks.
(c) Isolation of their work stations.
(d) Issuance of a warning letter to Paz.

It is further alleged that those actions against Garcia and Paz were taken because of their union activities and because they gave testimony under the Act.

As set forth above, Garcia and Paz were returned to work and placed in an area separate from that occupied by other merrow machine operators. Although the distance between their work stations and that of the other operators was not that great—only 8 feet across an open hallway—their segregation into a separate area served to mark them as pariahs, and as persons not welcome in the BMD family.

The area that they were assigned to had never before been used as a merrow machine workplace, and merrow machines had ever been situated there. The only reason given for their assignment to that location was that boxes of material blocked Garcia's regular workplace. Garcia had worked without difficulty in her usual place in the past with boxes around her machine, and even if this were true, there was no showing as to why the boxes could not be moved, and also the reason given does not explain why Paz could not have returned to her regular workplace. Indeed, Paz' regular workplace and machine were available and unoccupied. Garcia and Paz' repeated requests to be moved were ignored; nothwithstanding that there were four vacant machines in the merrow area. *Pilliod of Mississippi*, 275 NLRB 799 (1985).

In addition, Garcia and Paz, by virtue of their new work area, were subject to the combined effect of heat from the steam machine and cold air from the open door. While it is true that the nearest merrow operator to them, only 8 feet away, would surely have also been exposed to the cold air, almost to the same extent as them, it appears that they were placed in that location so that they would suffer the most intense effect of these conditions. Thus, they were the closest to the steam machine, and also nearest to the roll-up gate. The discriminatory nature of their assignment so close to these adverse elements is clearly seen in Respondent's ignoring their pleas that the door be closed; telling them that perhaps they would be moved but never doing so, and laughing at their attempts to keep warm; while at the same time honoring the request of others that the door be closed.

I also find that they were assigned to machines that were inefficient and difficult to operate, and that Paz' requests for repairs to the equipment were ignored. Although Garcia's machine was repaired, it still did not operate well. The discriminatory nature of the assignment to these machines is readily seen in the failure of Respondent to move the two to other machines, despite their repeated requests. Their assignment to these machines did result in a reduction in their earnings because they could not be operated as efficiently as their former machines.

I find, as alleged, that the issuance of the warning letter to Paz violated the Act. She took the photos, in a space of 2 minutes, to document her claim that she worked in an isolated location. Photographs had freely been taken before this, without permission, by Paz and others, on social occasions. Dordevic issued the warning letter because she did not obtain permission and disrupted the operation. This is in contrast to Respondent's argument that pieceworkers' attendance was irrelevant to it because if they do not work they are not paid. Dordevic's exaggerated response to the picture taking—threatening to call the police and have her arrested—emphasize that the warning letter was discriminatory.

That the letter was issued because of her activity in the past as a union advocate and outspoken leader of the Union's campaign is clear in view of the illegal interrogations, threats, and layoff that she was subject to before. Moreover, Dordevic told an employee prior to her recall that he would tell Milosevic not to hire Paz. The fact that Dordevic, when accused by Paz of hating her because she called the Union, told her to forget about the past, does not minimize the discriminatory nature of the warning letter, the first of its kind ever given to a BMD worker. In addition, the reaction to the picture taking demonstrated Dordevic's animosity toward Paz for her union activities because, by taking the pictures, she sought to document her later charge that her work station was discriminatorily located. In fact she told Dordevic, when he asked why she took the photos, that she wanted to show her work location.

However, I cannot find, as alleged in the complaint, that Garcia and Paz were discriminated against by their assignment to lower paying job tasks. Paz testified that on her return to work in November, the piece rate for all the merrow operators, including she and Garcia, was $2.50. There can be no discrimination against her if the new piece rate was applied equally to all the workers. There has been no allegation nor has it been proven, that the piece rate was unlawfully unlawfully reduced. Rather it was applied equally to all.

Paz' complaint, however, is that her ability to earn the same pay as before her April layoff was reduced because she and Garcia were assigned to the tedious jobs of matching lines on loose, heavy material. Such time-consuming work caused them to complete fewer pieces and they therefore received less pay in the piece-rate system.

Dordevic testified that he assigned work equally to all the workers, and he gave small lots to two or three workers without favoritism. Other workers testified that the complex work of matching lines was given to the more experienced workers. Paz gave contradictory testimony about the prices paid for the work. First she testified that on her return in November, jobs were priced at $2.50 and $3.50 per dozen. Then she stated that all jobs were $2.50, but she did very little work priced more than $2.50, and was not given the same amount of higher priced work as the other merrow operators. This indicates that she was given some higher priced work. Garcia too gave testimony that did not support this allegation. She stated that in November the thick material work at issue was shared among all the workers.

On such testimony, and in the absence of proof of rates of pay and gross pay earned by Garcia, Paz, and the other workers, and the amounts of various types of work performed by the merrow operators, I cannot find that Respondent assigned them to lower-paying job tasks.

In sum, I find that the General Counsel has made a prima facie showing that the (a) isolation of the work stations of Garcia and Paz, at which they suffered adverse conditions in terms of their location near the steam machine and gate, (b) assignment to inefficient machines, and the resulting reduction in the amount of earnings they received, and (c) issuance of a warning letter to Paz were motivated by their union activities.

It is clear that the isolation of Garcia and Paz and their location near the steam and gate causing them to build a barrier of material and cover themselves to keep warm, which was met by Mrs. Dordevic's laughter, was designed to and did hold them up to ridicule before the other employees and its purpose was to discredit their militant advocacy of the Union. *Silver State Disposal Co.*, 271 NLRB 486, 491 (1984). Similarly, I find that their assignment to inefficient machines and the reduction of the amounts of earnings they received due to the machines' inefficiency were in reprisal for their union activities. *City Service Insulation Co.*, 266 NLRB 654, 659 (1983). In addition, the issuance of the warning letter was also in retaliation for Paz' leadership in the union campaign.

I accordingly find that these actions were motivated by their union activities. However, I am not persuaded that the General Counsel has established a prima facie case showing that Respondent violated Section 8(a)(4) and (1) of the Act. Dordevic in his remarks to Garcia and Paz made no reference to their participation in the Board proceeding in Case 29–CA–11824–1, –2 or Case 29–CA–11929.

To establish a violation of Section 8(a)(4) of the Act the record must show that Respondent's discrimination against employees was "because they had filed charges or given testimony under the Act." I find no such showing has been made. Accordingly, I shall recommend dismissal of the allegation that by its treatment of Garcia and Paz, Respondent also violated Section 8(a)(4) of the Act.

Respondent has not met its burden of showing that it would have taken the same actions against Garcia and Paz in the absence of their union activities. *Wright Line*, supra.

B. *The Constructive Discharges*

The General Counsel alleges that the actions taken against Garcia and Paz on their return to work in November caused their constructive discharge.

> The Board [citing *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976)] has held that a constructive discharge occurs when an employee quits because an employer has deliberately made working conditions unbearable. Two elements must be proven to establish a constructive discharge:
>
> > First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities. [*Algreco Sportswear Co.*, 271 NLRB 499, 500 (1984).]

The record must demonstrate that the conditions imposed on Garcia and Paz "were so intolerable as to force them to resign, or that the Respondent would reasonably have expected [them] to quit." *Algreco*, supra.

Garcia and Paz, the most vocal and active of the union advocates, initiated the Union's organizing campaign, actively solicited other employees in and out of the shop to sign cards, and stood with union agents outside the premises and spoke to and solicited their fellow employees. It is clear that Respondent harbored great animosity toward them, and I have found that Garcia, the subject of illegal interrogations, and Paz, the object of interrogations and illegal threats, were in fact laid off in April because of their union activities.

Garcia and Paz were recalled, and at the same time subject to discriminatory treatment because of their advocacy of the Union.

I believe that the evidence supports a finding that the isolation of Garcia and Paz to a location near the steam machine and gate which subjected them to adverse conditions causing them to build barriers and cover themselves to keep warm held them up to ridicule; assignment to inefficient machines which caused them to earn less than they might have and the issuance of the warning letter to Paz accompanied by an overblown reaction to innocent picture taking to indicate her right to a nondiscriminatory work location, all show that Respondent sought to make work so intolerable that they would have to quit, thus ridding Respondent of prominent union supporters. *Ace Machine Co.*, 249 NLRB 623, 632 (1980). I believe that the isolation (*Hall of Mississippi*, 249 NLRB 775, 778 (1980)), the adverse work conditions, and the inefficient machines that affected their earnings, so that they were forced to resign (*City Service Insulation Co.*, supra; *Ellis Toyota*, 266 NLRB 442, 455 (1983)), and the issuance of the warning letter to Paz for a brief, minor photo session were all designed to and did cause the resignations of Garcia and Paz.

Further evidence of the motive in making conditions unbearable to force the resignations of Garcia and Paz may be seen in Dordevic's conversation with Paz when she took the pictures. According to Dordevic's testimony, Paz asked him why he did not fire her. Dordevic replied that he did not need to. I infer from this that he correctly believed that he did not have to fire her, and face another charge, because he would make life at BMD so intolerable that she would have to, and did quit.

The facts that their attempts to protect themselves from the steam and keep warm when the door was open were met with laughter by Mrs. Dordevic, while at the same time their request to be moved were ignored, all demonstrate that these burdens, when combined with the inefficient machines, the reductions in earnings, and the warning letter caused and were intended to cause conditions that forced them to resign, and Mrs. Dordevic's laughter and Mr. Dordevic's statement that he did not need to fire Paz also show that Respondent reasonably expected them to quit because of these intolerable conditions.

The conditions made Garcia and Paz' continued employment with Respondent untenable and compelled their resignation. Furthermore, the foreseeability of their resignations coupled with Dordevic's union animus, combine to support a finding that this was the intended result of the conduct. *Bronx Metal Polishing Co.*, 276 NLRB 299, 305 (1985).

VIII. THE OBJECTIONS TO THE ELECTION

The Union's objection is as follows:

> The Employer threatened its employees with plant closure if the Petitioner won the election.

Inasmuch as I have found violations by Respondent of Section 8(a)(1) of the Act by threatening employees with plant closure in the critical preelection period, this objection is sustained, and I will recommend that the election be set aside and the Regional Director be directed to conduct a second election.

CONCLUSIONS OF LAW

1. Respondent BMD Sportswear Corp. is and at all times material herein has been an employer engaged in commerce within the meaning of the Act.

2. Respondent Suzan Knitwear Corp. at all times material herein has been an employer engaged in commerce within the meaning of the Act.

3. Respondent Suzan Knitwear is the alter ego of Respondent BMD Sportswear, and they constitute a single employer.

4. Knitgoods Workers Union, Local 155, International Ladies Garment Workers Union, AFL–CIO is a labor organization within the meaning of the Act.

5. By laying off Gloria Chunga, Carmen Lopez, Edilma Nunez, Maria Garcia, and Mercedes Paz because of their membership in and activities on behalf of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By constructively discharging Maria Garcia and Mercedes Paz because of their membership in and activities on behalf of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

7. By isolating the work stations of Maria Garcia and Mercedes Paz, causing them to be subject to adverse conditions in terms of their location to the steam machine and gate; by their assignment to inefficient machines and the resultant reduction in the amount of earnings they received; and by the issuance of a warning letter to Mercedes Paz, all because of their membership in and activities in behalf of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

8. By asking employees if they called the Union; whether they signed cards or any papers for the Union; why employees were supporting Mercedes Paz; who signed for the Union; why Paz did not get a job in a union shop if she was in the Union; if they knew of the Union; and whether they spoke to union agents; if they were in the Union; and who spoke to them about the Union, Respondent violated Section 8(a)(1) of the Act.

9. By telling employees that they were silly and stupid in connection with the Union; by accusing employees of forcing workers to sign cards; by threatening that it would lay off employees who signed cards and close the shop, and change its name and replace the workers; by threatening employees that if they signed cards for the Union or called it they would be fired; by telling workers that if they did not sign a card they would continue to work; by threatening employees that Respondent would close the shop if the Union came in or won the election; by telling employees that if the union problem continued Respondent BMD comtemplated closing and expanding operations at Suzan; by permitting a sign to be posted that stated: "Please vote for BMD and save our job Thank You.", Respondent violated Section 8(a)(1) of the Act.

10. The acts and conduct set forth in Conclusion of Law 9, above, relating to threats to close the shop, constitute objectionable conduct warranting the setting aside of the representation election conducted on 21 June 1985.

11. Respondent has not violated the Act with respect to the layoffs of Bertha Mejia and Amalia Paredes; by the assignment of Maria Garcia and Mercedes Paz to lower-paying job tasks or that they were discriminated against in violation of Section 8(a)(4) of the Act.

12. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully laid off Gloria Chunga, Carmen Lopez, Edilma Nunez, Maria Garcia, and Mercedes Paz and constructively discharged Maria Garcia and Mercedes Paz, I recommend that Respondent be ordered to recall Chunga, Lopez, and Nunez and reinstate Garcia and Paz and make them whole for any loss of earnings they may have suffered as

a result of the discrimination against them. The amount of backpay shall be computed in the manner set forth by *Isis Plumbing Co.*, 138 NLRB 716 (1967), as modified by *Florida Steel Corp.*, 231 NLRB 651 (1971).

[Recommended Order omitted from publication.]

Culmtech, Ltd. *and* George Boston, David Gostinski, Donald Pachucki, Jr., Donald Pachucki, Sr., and John Ward

Paul Vida *and* International Union, United Mine Workers of America. Cases 4–CA–15595 and 4–CA–15743

4 March 1987

DECISION AND ORDER

BY MEMBERS BABSON, STEPHENS, AND CRACRAFT

On 24 November 1986 Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The General Counsel also filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Culmtech, Ltd., Inkerman, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the General Counsel established a prima facie case of discrimination with respect to the discharges on 7 January 1986 of employees Donald Pachucki, Sr. and Donald Pachucki, Jr. We agree particularly with the judge's analysis of the evidence as to timing in relation to the telephone call from union official Fred Casaia and the pretextual reasons for the discharges. See *Wright Line*, 251 NLRB 1083, 1088 fn. 12 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). As to evidence of the Respondent's knowledge of prounion sentiment among employees we note that the Respondent's foreman, Dick Troup, admitted to be a supervisor within the meaning of Sec. 2(11) of the Act, had a conversation in December 1985 with employee David Gostinski, himself later a victim of a discriminatory discharge, wherein Gostinski voiced his support for a union and his belief that a union would "straighten this plant out." We further note the otherwise unexplained remark by Plant Superintendent John Barney to Pachucki, Sr., made at the summary discharge meeting held about 1 hour after the delivery of the telephone message, that Pachucki, Sr., was "unhappy" with his job. In this light we conclude that the circumstances surrounding the 7 January discharges are sufficient to infer that the Respondent suspected that one of the Pachuckis was engaged in union activity and fired them both for that reason. We do not find it necessary to find, as to the Respondent's direct knowledge of the Pachuckis' union activity based on the telephone message itself, that Casaia necessarily mentioned his union position in identifying himself and rescheduling his meeting with Donald Pachucki.

With respect to the discriminatory discharges of Gostinski, George Boston, and John Ward, the judge found that the Respondent learned of their union activities when Foreman William Tocheny overheard their conversation at the timeclock on 24 January 1986. Testimony by the Respondent's plant manager, John Bianco, reveals that Tocheny was a supervisor within the meaning of Sec. 2(11) of the Act in that he was the only foreman on the night shift, used independent judgment in assigning work and changing work assignments, had independent authority to permit employees to leave work early, and was considered by Bianco to be "in charge" of the night shift.

[2] As part of the remedy the General Counsel seeks an order which will include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the order. We have concluded that under the circumstances of this case such a clause is not warranted.

Carmen P. Cialino, Esq., for the General Counsel.
Richard M. Goldberg, Esq., for the Employer.

DECISION

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges were filed in the above cases on February 6 and April 14, 1986. A consolidated complaint issued on June 30, 1986. The General Counsel alleges that Respondent Employer violated Section 8(a)(1) and (3) of the National Labor Relations Act by threatening an employee to close its facility; by soliciting employee complaints and grievances and promising increased benefits; by soliciting an employee to dissuade other employees from supporting the Union; and by terminating and refusing to reinstate employees Donald Pachucki Jr., Donald Pachucki Sr., John Ward, David Gostinski, and George Boston. Respondent Employer denies violating the Act as alleged.

Hearings were held on the issues raised in Wilkes-Barre, Pennsylvania, on August 11 and 12, 1986. Upon the entire record, including my observation of the demeanor of the witnesses and, after due consideration of the briefs filed by counsel, I make the following

FINDINGS OF FACT

Respondent Culmtech is an employer engaged in commerce as alleged. The United Steelworkers of America and the International Union, United Mine Workers of America are labor organizations as alleged. As the parties stipulated, the Employer was engaged in the construction of its coal mining and processing facility at Inkerman, Pennsylvania, from about July 1 to December 31, 1985. On January 1, 1986, the Employer began production at Inkerman. George Boston was hired on August 14, 1985; Donald Pachucki Jr. was hired on September 26; Donald Pachucki Sr. was hired on October 28, 1985; David Gostinski was hired on November 2, 1985; and John Ward was hired on November 2, 1985. The Employer had in effect a policy whereby it fully paid insurance premiums to Blue Cross/Blue Shield on behalf of production and maintenance employees who had successfully served a probationary period. Pursuant to this policy, the Employer notified Blue Cross/Blue

Shield on November 12, 1985, that employee Boston would receive coverage on the effective date of November 13, 1985. Blue Cross/Blue Shield was similarly notified on December 5, 1985, for employee Pachucki Jr. and his effective date was December 25, 1985; on January 6, 1986, for employees Gostinski and Ward, and their effective dates were January 31, 1986; and on January 6, 1986, for employee Pachucki Sr., and his effective date was January 26, 1986. See G.C. Exh. 2.[1]

Fred Casaia is subdirector of the United Steelworkers Union. His office is in the IBE Building in Wilkes-Barre. Casaia testified that on January 7, 1986, he telephoned Respondent Employer. Casaia explained:

> I felt it was very necessary for me to get hold of Don Pachucki. I have an organizing staff under me and they had set up a meeting with this gentleman to discuss organizing at [his] place of employment . . . . [Prior] commitments wouldn't allow me to be there the day that the meeting was scheduled, so I wanted to postpone that meeting for, I believe it was [to] the 10th of January. . . . I had no way of getting in touch with Mr. Pachucki other than calling [his] place of employment.

Casaia recalled his telephone conversation to Culmtech, as follows:

> The young girl that answered the phone . . . asked who I was. I told her who I was and what I wanted. . . . I was told that he [Pachucki] was out in the field . . . that she would make sure that he would get the message.[2]

Donald Pachucki Sr. testified that he was the "head equipment mechanic" for the Employer; that his son Pachucki Jr. worked as his "helper for mobile equipment"; and that during the latter part of December 1985, he had spoken to Paul Vida, David Gostinski, John Ward, Lenny Schall, and Mike Andrew at work "regarding getting a Union into" Culmtech. Vida, at the time, was a foreman. These "conversations" took place "frequently" at the "plant garage," in the "breaker" and "more or less all over." It was decided among the employees that Gostinski and Ward "were going to contact the Union" and Pachucki Sr. "would be the spokesman."

Pachucki Sr. next testified that about 6 a.m. on January 7, 1986, he started work at the plant. He was to install new brakes on a "Hough 400." This assignment had been given to him by David Small, the owner of Culmtech. He had to "take the parts down to State Equipment . . . to try to match them up with new parts" and was, consequently, "out of the facility" during the day. After he returned to the plant about 2:30 p.m., Pachucki Jr., his son, handed him "a phone memo" and said "Jeanie [the plant secretary] handed me this . . . I don't know who this person is . . . it's got to be for you." (See G.C. Exh. 3.) The "phone-memo," dated January 7, is addressed to "Don Pachucki," from "Fred Casaia," and states: "reschedule for Friday morning 9 or 10 a.m.," and requests a "call back" at the Union's telephone number.

Later that same day, about 3:10 p.m., Pachucki Sr. "quit work" for the day. He went to his truck which was parked in front of the garage and "started it up." However, Plant Superintendent John Barney and Foreman Kevin Lewis "stood behind his truck." Barney approached Pachucki Sr. and said that "he wanted to see [Pachucki Sr.]." Barney, according to Pachucki Sr., then questioned the employee "about the parts" for the "Hough 400" and "who gave [him] authorization to start working on the machine." Barney instructed Pachucki Sr. "to see" Barney "in his office" and "bring [his] boy with [him]." Pachucki Sr. and Pachucki Jr. immediately went into Barney's office, where they had the following conversation:

> . . . Mr. Barney told me [Pachucki Sr.] I was unhappy there with my job, and I told him I wasn't unhappy. . . . He said, I made up my mind I can [get] rid of the department and . . . you're through. . . . I asked him, what do you mean, I'm through? . . . He said, you're done . . . get going . . . take [your son] with you. . . .

Pachucki Sr. had never received any complaints or warnings about his work; he had never been told that he was violating company procedures; and he had in fact received "compliments" from Small, the owner. Further, Pachucki Sr. had been told that his son, Pachucki Jr., was "doing a good job."[3]

Donald Pachucki Jr. testified that he started working for Respondent as a laborer, he then became a plant mechanic, and he "started helping his father as a mechanic's helper." He identified General Councel's Exhibit 3 as the telephone message from the secretary, Jeanie. He gave this message to his father and they were both fired by Barney later that same day. Pachucki Jr. recalled:

> He [Barney] told my dad that he was unhappy there, and my dad kept asking, what do you mean unhappy, and he wouldn't say . . .; at the end . . . he just said, you're through . . . take your boy with you . . . . Barney had stated: "we're phasing out the department." Pachucki Jr. added: "but we had work there for another two weeks."[4]

[1] It was also stipulated that Boston received a $2 hourly pay raise effective December 30, 1985, and the "reason for raise listed on personnel records" was "transfer—merit increase"; Gostinski received a $1.50 hourly pay raise effective the same date for the same "reason"; Pachucki Jr. received a $1.50 hourly pay raise effective October 7, 1985, and the "reason" was "merit increase"; and Ward received a $1.50 hourly pay raise effective December 30, 1985, and the "reason" was "transfer." Pachucki Sr., who was then receiving a $10 hourly rate, was not given a raise.

[2] On cross-examination, Casaia noted that Pachucki "and others" were scheduled to be at the "meeting"; the "purpose" of the "meeting" was "for putting together a campaign"; "they were my committee people." On redirect, Casaia further noted that he did not specify in his telephone conversation to Culmtech "whether it was [for] junior or senior" Pachucki—he "was not aware of the fact there was a junior and a senior at the time."

[3] Pachucki Sr. identified G.C. Exh. 4 as a "want ad" appearing in the local newspaper for Culmtech "the Saturday after I got fired." Barney did not testify in this proceeding.

[4] Pachucki Jr. acknowledged that once he had received a verbal warning from Plant Manager John Bianco. Pachucki Jr. had been assigned to

Continued

David Gostinski worked as a welder for the Employer. He testified that he started working at the facility while it was being constructed and, when the plant started production, he was kept on as a welder. Plant Manager John Bianco informed Gostinski that "we have heard nothing but good about your work . . . we did like your work . . . and we are going to keep you as a permanent employee." Employees Pachucki Sr., Pachucki Jr., Boston, and Ward were also in this "group of men they wanted."

Gostinski next recalled that he spoke with coworkers Ward, Boston, Clark, Vida, Pachucki Jr., Pachucki Sr., Tomaselli, and Magione "regarding unionization of the plant." These "daily" conversations took place "in the breaker, in the shop, in front of the time slots." In December 1985, Gostinski also had a conversation pertaining to unionization with Plant Foreman Dick Troup. Gostinski explained:

> Mr. Troup and I were alone. We were talking about the problems the plant had . . . he mentioned that he was in the Mine Workers at one time . . . I said, well, they have a lot of expertise in this field so they could probably help us find a lot out . . . I voiced my support of a union and said that would be what would straighten this plant out . . . he said, we could fix the plant ourselves, we don't need the union . . . .

Gostinski similarly told Foreman Bernie Gorcenski about "the problems we were having" and they both "agreed" that "a union could help the plant."

Thereafter, on January 22, 1986, Gostinski reported for work at 11 p.m. He was to work until 7 a.m. the next day. Foreman William Tocheny told Gostinski that they were going to work in the "sizing plant." Apparently, to do the particular job there, they would have to let the plant "run down"—"you can't work on it while it's moving . . . they had to run the system out." Therefore, there was at least a 45-minute delay in getting started. During this delay, Gostinski assisted Tocheny in getting the necessary tools and explaining to Tocheny "how to pack the heavy media pump." Then, from about 12 midnight until 2 a.m., Gostinski assisted in "packing the pump" with Foreman Tocheny. At 2 a.m., "we went to a different site to assist two men who were helping" the onsite contractor foreman for Hamilton Industries, Norman Ward. Hamilton Industries. Hamilton Industries was engaged in "rebuilding the cam shaft system" in the "breaker." In performing this particular job, Norman Ward "became very angry because we didn't have the tools we needed." Nevertheless, they "continued to perform that task until the end of [the] shift." There was, however, as Gostinski further noted, a "power outage" between 4 and 5 a.m. and "we were ordered out of the breaker by our foremen, both foremen, "Tocheny and Norman Ward—because it was unsafe." At 7 a.m., Gostinski "punched out."

Gostinski next testified that after he "punched out," Foreman Troup "called" him to the office, and the two had the following conversation:

> He [Troup] called me into the office, and he says I understand that—and we were alone—I understand you were in my desk the other day. And I said, yes, I was. And he said, what were you looking for? And I says I was looking for a three-quarter inch drive extension tool I needed for the job. And he says, what were you on, and I says I was fixing a belt, refuse return or refuse line, and he said that if you needed a tool, he says, where do you usually go? I said, well, I usually go here, because we always come here for the tools. That's where they are kept. Or we go in the breaker.
>
> And then he said, well, I understand you were looking at a union book. And I said, well, I was looking where I was supposed to look for the tool. I lifted it up and I saw, right on top where the tool usually is, there is a small union book, about this big around, it was the 1978 bylaws book for the United Mine Workers, and he says, what were you doing looking at it?
>
> I says, well, I picked it up for 30 seconds. You know, when you pick up something, you are going to look at it. If you identify a tool you pick up, you have to look at it, look at what you pick up, and I took about 30 seconds. I looked at it, put it down and found the tool I needed.
>
> . . . .
>
> He said that we didn't need a union and that he could take care of the problems in the breaker . . . we could solve the problems in the breaker.
>
> And I did voice my opinion freely to him. Because he was a mineworker at one time, I said that it's evident that you can't straighten the breaker's problem out. We need somebody else to help us with them.
>
> . . . .
>
> He said that, you know, we were considering you to take over Paul's position. That was a foreman on the third shift. They had just removed him. And I says, well, I wouldn't take it anyway. He says I know you wouldn't, he says, but that's the reason you didn't get the job, because you were reading that book about unionization.

Gostinski, as he further testified, reported for work at 11 p.m. on January 23. He worked his full shift that night. About 7 a.m. on January 24, as Gostinski was getting "ready to punch out," Gostinski, John Ward, Boston, and Clark "were talking about starting a union." Foreman Tocheny was "two or three feet away." Gostinski recalled:

> We did talk about a union . . . we said the plant has problems [and] we want to solve the problems
>
> . . . .

put oil into pumps and gear boxes. Pachucki Jr. was then instructed to do another job. Consequently, he did not "put" the oil "into the gear boxes." Bianco later faulted Pachucki Jr. for this and Pachucki Jr. explained that he "was taken off the job by" Foreman Dick Troup. As noted supra, Pachucki Jr. had received a merit pay increase during October 1985. He also had successfully completed his probationary period during December 1985.

Later that same day, January 24, coworker John Ward telephoned Gostinski at home "and said John Bianco just gave me a call and said not to bother coming in, that we're fired." Gostinski nevertheless reported for work on the evening of January 24. He was then informed by Foreman Gorcenski that he was "fired."

On the following day, January 25, Gostinski went to the plant and spoke with Plant Manager Bianco. They discussed, inter alia, a "letter" or "memo" pertaining to his firing. (Cf. G.C. Exh. 8.) Gostinski then pressed Bianco, "Why was I fired?" Bianco replied: "It's none of your business." Later, by letter dated February 3, 1986 (G.C. Exh. 5), the Employer notified the Pennsylvania Office of Employment Security that Gostinski was fired "due to leaving the jobsite without foreman's permission and was caught rummaging through foreman's desk . . . ."[5]

John Ward testified that he started his employment at Culmtech on November 2, 1985, and he received a pay increase in early 1986. Initially, he was "put on steel erection" as an ironworker in the "sizing plant." Later, during January 1986, he was "hired on permanent as a welder/mechanic" on the third shift. Ward, on or about January 6, 1986, "called the United Steelworkers in Wilkes-Barre" and "set up a meeting for Wednesday the 8th . . . to get pledge cards and get everything started to organize." Ward then apprised the Steelworkers' representative that coworker "Pachucki is interested in it . . . he would be the one . . . to talk to . . . ." Ward also spoke to his coworkers frequently at the plant "about a Union [and] about better working conditions . . . ."

Ward recalled that Pachucki Sr. and Pachucki Jr. were both "discharged" on January 7; "we figured it was because of the Union activities"; "and we just sort of eased off a little bit for a couple of days . . . ." Then, Ward and his coworkers (including Gostinski and Boston) contacted the United Mine Workers. Ward explained "why" they then turned to the United Mine Workers:

> Well, at that point, because of the confidence breach with calling the Steelworkers for one reason, and for another reason that Boston and Vida knew a person with the Mine Workers.

Ward reported for work at 11 p.m. on January 22, 1986. William Tocheny was his foreman. The employees were "going to work with Norman Ward [of Hamilton Industries] in the sizing plant to redo the shaker . . . ." Ward, like Gostinski, related the ensuing sequence of events on his shift until 7 a.m., when they checked out. He too noted the absence of "proper tools," the "power outage," and resulting delays. Thereafter, Ward reported for work at 11 p.m. on January 23. "Nothing was said at all" to Ward or his coworkers "concerning the performance of the night before." At the end of this shift, on the morning of January 24,

> when we were punching out, we were gathered around the timeclock and we were talking among ourselves about the Union because . . . George [Boston] was supposed to have pledge cards . . . we were just wondering when he would be getting the pledge cards and when he could start handing them out and try to get everything going.

This group included Ward, Gostinski, Vida, Clark, Tommaselli, and Boston. Foreman Tocheny was "right behind us . . . about two or three feet."[6]

Later that same day, January 24, Ward received a telephone call at home from Plant Manager Bianco, "stating that I was not to report to work that night . . . we're being fired." Bianco stated: "[Ward] did not perform [his] duties on the night of the 22nd." Bianco also apprised Ward that Gostinski and Boston were "fired"—Gostinski "is getting fired for the same reason" and Boston "was fired for another reason which was none of [Ward's] business." Ward then testified:

> I asked him what the real reason was, why I was being fired . . . and he just told me it was none of my business.

Ward had "never" received any complaints or warnings about his work. In fact, Norman Ward of Hamilton Industries had complimented his work.

George Boston's testimony corroborates in significant part the testimony recited above (Tr. 130–148). He worked for the Employer in the construction of the plant and was later made a "permanent employee" with Gostinski, Ward, Pachucki Sr., and Pachucki Jr. He was twice asked to be a foreman, but declined the offer. He never received any complaints or warnings about his work. He was repeatedly complimented by his superiors.

Boston participated in the "conversations at Culmtech regarding unionization of the plant." He spoke with Gostinski, Ward, and other coworkers "quite often" about a union. He contacted an "official" with the United Mine Workers in an effort to get the organizational effort at the plant underway. The following week he was fired.

Boston worked on January 22. Foreman Tocheny assigned him his duties. He recalled the absence of proper tools and a power outage that evening. He worked the next night, January 23. He was not criticized or faulted for his work on January 22. He discussed the Union with his coworkers as he checked out on the morning of January 24. Foreman Tocheny was standing nearby. Later that day, Foreman Troup telephoned him at home and said, "You are discharged." Troup then faulted Boston for "shitting around" at work on January 22. Boston pressed Troup for the "real reason" and was told: "It's none of your business."[7]

---

[5] Gostinski had filed a complaint with the Pennsylvania Human Relations commission. He claimed that "one of the reasons [he] was fired was because of [his] religious affiliation." See Tr. pp. 77–101, G.C. Exhs. 6 and 7. The commission did not find any basis for this complaint and an appeal is presently pending.

[6] Tocheny had been appointed foreman that week. As foreman, he assigned Ward "his duties."

[7] Boston later went to the plant and was told by Bianco that he was fired for "proscrastination of assigned duty." He pressed Bianco for the "real reason," and was again told: "It's none of your business."

Paul Vida was employed by Culmtech from August 1985 until March 1986. He served as a foreman from mid-December until mid-January. In that capacity, he "assigned" work to the employees and was "responsible for their work." While serving as foreman, he frequently discussed "unionizing the plant" with Boston, Gostinski, Ward, Pachucki Sr., and Pachucki Jr. He even gave Boston the telephone number of an official of the United Mine Workers.

On February 17, 1986, Vida was called into Bianco's office, and there they had the following discussion:

> Well, he [Bianco] said he was getting some complaints about me. I said, what, my work? He said, no, your work is fine. He said, you are trying to organize a Union. I said, yes. We then talked about it a little bit, discussed, you know, what the plant was like being built, and he said that the Company [is] just starting out, a Union wouldn't be good at this time, and if the Union did get in it would be a sinking ship, and he will not get off a sinking ship . . .; he said the plant would probably close down if the Union came in . . . .

Later, on February 26, Vida attended a meeting in the plant. All the employees were present. David Small, the owner, spoke. Vida testified:

> He [Small] said there is no reason why the Union should come here; you will have to pay Union dues. We will offer you an incentive pay on the amount of coal that is produced. He said, if a strike did occur, he would shut the plant down and get new employees.
>
> A man asked him, why the five men were discharged, he said for not doing their work. A man asked what about a pension plan, he said he would check with the board . . . if there was a strike he would close the plant . . . he wanted an open door policy. In other words if you have a complaint, he wants the men to come to the management and work it out without the Union.

Two days later, on February 28, Bianco again called Vida into his office. Bianco "said, I [Vida] had a lot of influence with the men and I could control them, because there was something in the plant concerning the Union . . . he said, I could control the men . . . in other words I could have it stopped if I wanted to . . . ."[8]

John Bianco, plant manager for Respondent, testified that he had "two meetings" with employee Vida in his office. Bianco asserted:

> What they pertained to was an employee at the plant had approached me . . . feeling pressured by Vida and other employees concerning Union issues.
>
> I did call in Vida and told him that I had had a complaint and I would appreciate it if he did his Union soliciting, his handing out of literature, that it must be done on his own time and not the Company's time. It must be done on his time and the fellow-worker's time.

Bianco placed this meeting in mid-February 1986. Two or three days later, according to Bianco, Vida was again observed handing out literature "in front of the shop during Company hours." It was "right after a shift change." Bianco again faulted Vida in his office. Bianco claimed that was "the extent of [his] discussions with" Vida. He denied, inter alia, making any threatening or coercive statements attributed to him by Vida.

Bianco later attended a meeting of employees on February 26. Small, the Company president and owner, spoke to the employees about the Union. According to Bianco:

> What we did was tell all the employees to become fully aware of the issues so they can make an honest decision . . . .

Bianco claimed that an employee then "asked" about a "pension plan." Small responded: "We were going to try and put one in effect." Bianco insisted that this subject "was brought up [earlier] at the Christmas party" in mid-December.[9] Small, assertedly, did not "make any promises to the employees on February 26. Small, assertedly, told the employees on February 26:

> Nothing had been done with the pension plan; he could not himself put a pension plan into effect . . . he would have to check with the board . . . he was very interested in seeing it go through . . . .

Bianco next testified that Pachucki Sr. and Pachucki Jr. were both terminated previously on January 7, 1986. Bianco asserted that "we ran into quite a few problems" with Pachucki Jr. "and he had been warned on numerous occasions" by myself and the shift foreman about "the quality of work and about his applying himself . . . ." Bianco claimed that Pachucki Jr. had been transferred from "plant mechanic" to "mechanic helper" under his father because of his "problem." Bianco also claimed that: "We felt that if we let Don Jr. go that his father would walk off the job, and we needed [the father for a particular job.]" Elsewhere, Bianco claimed that Pachucki Sr. also "started dragging his feet" and that he was "warned" about "purchasing parts" "on his own." Bianco insisted that on January 7, when the two Pachuckis were fired, he had no "idea anything was going on" about a union.

As for the later firing of employees Ward, Gostinski, and Boston on January 24, according to Bianco, manage-

[8] On cross-examination, Vida acknowledged, inter alia, that management had discussed "giving an incentive on coal produced" "from the beginning of the plant." Vida explained:

> There was talk before the plant went into production, but there was never anything that ever came of it . . . .

Vida also acknowledged that Bianco did not ask him "to talk to anybody else to try to get them not support the Union" "in so many words." And, Vida recalled that Bianco, on February 17, "said the plant would probably close if the Union comes in . . . . It is too early. . . . The plant is just starting out . . . ."

[9] According to Bianco, the "pension plan," an "incentive plan," "wages," "vacation and holiday benefits" were all "brought up at the Christmas party."

ment had decided that, because of the "numerous incidents in the plant prior to this discharge date . . . the verbal recommendation of Norman Ward [of Hamilton Industries] and the letter that [Norman Ward] submitted and the problems that the plant was going through, warranted the discharge of these three . . . ." Bianco, assertedly, had "warned" Boston on "numerous occasions" about his work. Then, on January 22, Boston, and apparently his coworkers, failed to complete the "repair work to be done in the clean coal sizing station." Bianco insisted that there was a "complete set of tools" and the delay in finishing the job was because Boston was a procrastinator. The assigned repair job was "very critical." Bianco further insisted that on January 24, when Ward, Boston, and Gostinski were fired, he was not aware of any union activity at the plant "not to [his] knowledge." He claimed that he first learned of union activity at the plant in mid-February.

On cross-examination, Bianco acknowledged that Pachucki Sr. was discharged on January 7 "in the middle of a job" involving the repair of brakes on a machine necessary "to move coal." Bianco identified Jean McIntyre as the office employee "involved with employee relations" who would, inter alia, relay telephone messages to personnel and file their workmen's compensation papers. In addition, Bianco acknowledged that during late December or early January, he became "aware" that Gostinski was "very dissatisfied" with his pay and was "complaining." Bianco then warned Gostinski "to quit causing trouble."

Bianco testified that Norman Ward of Hamilton Industries was, in effect, his "co-supervisor" on the night shift on January 22—Norman Ward of Hamilton Industries had "authority over the employees." Bianco identified General Counsel's Exhibit 8, a memorandum dated January 24, as the only written communication received from Norman Ward concerning the performance of the night shift on January 22. According to Bianco:

> The following morning [January 23] [Norman Ward] was very upset verbally and we asked him to put it in a letter . . . .

General Counsel's Exhibit 8 states:

> This memo is to make aware that on Wednesday evening, the writer reported to the site, at 11 PM, to work on modifying the Clean Coal Sizing Screen with men from the night shift. It must be noted that their [sic] was no urgency in getting down to work. First I was told that they did not have enough tools to do the job, after hunting around, some tools were found.
>
> They did not have burning equipment—this was found in the Prep. Plant. Most of the remarks were made by the millwrights (J. Ward, D. Gostanski, G. Boston). By 1:30 AM we got down to a steady turn of work. At 6 AM these men were assisted by the Winniedorffers. We made good time, but were slowed down due to the conrod ends which had to be ground down to make a fit in the bearings at the screen ends.
>
> This grinding added two hours extra to the job.

Bianco acknowledged that there were "more people involved" on January 22 other than Ward, Gostinski, and Boston, and they were not "discharged or disciplined." Bianco was not present at the plant during the night of January 22, and Norman Ward did not testify in this proceeding. Tocheny, the Employer's foreman and supervisor on the night shift, no longer employed by the Company, also did not testify. Tocheny was then "supervisor over maintenance."

Richard Troup, a foreman for the Employer, testified that he was "over the construction part of the plant" when the two Pachuckis were terminated. He denied knowledge of any union activity at the time. He denied knowledge of any union activity when Gostinski, Ward, and Boston were later fired. He claimed that "if there was any talk about the Union," he "would have heard." He also denied telling Gostinski, inter alia, that "he did not get a foreman's job . . . because of reading a Union book or any Union activity."

Bernard Gorcenski, now a welder mechanic for Respondent, testified that he was a "lead man" on January 24; that on January 24, Ward and Boston were "contacted by phone that their employment was terminated"; and that "they couldn't get hold of Gostinski so they told [him] when he came in that night . . . ." He asserted that he was not aware of any Union activity at the time, "I had no knowledge of that."

David Small, the president and chief executive officer of Respondent, testified that he held employee meetings on February 26, 1986, "to make the Company's position known" on the union organizational effort. He, assertedly, was "asked questions" about a "pension plan." He had "discussed" this subject earlier at the Christmas party. He again indicated that he "was in favor of it." He, assertedly, was "asked" about an "incentive plan." He had "discussed" this subject earlier at the Christmas party. He again indicated that he "was in favor of it." He again repeated that "employees of a company should share in the profitability and we would tie that sharing to the productivity of coal"—"once [the Company] did become profitable . . . that kind of plan would be instituted."

Small denied any knowledge of union activity when Pachucki Sr., Pachucki Jr., Boston, Gostinski, and Ward were fired. He particularly faulted Boston, Gostinski, and Ward because they "basically doped off and dragged their feet and procrastinated and the job wasn't done" on the night of January 22. He claimed that "was the straw that broke the camel's back"—"we felt that the problem was that the maintenance crew on the graveyard shift was simply not getting the jobs done . . . ." He asserted that Norman Ward of Hamilton Industries "made it quite clear that the reason that the work wasn't done was because of these three individuals" Ward, Gostinski, and Boston. As noted, Norman Ward did not testify. (Cf. G.C. Exh. 8, quoted supra.)

On cross-examination, Small faulted the performance of Pachucki Sr. as "one of the prime causes of problems in the plant" the "mobile equipment didn't run"; "he was too slow"; "he dragged his feet." Small similarly faulted

the performance of Pachucki Jr. And, as for the "graveyard maintenance shift," Small acknowledged that Ward, Gostinski, and Boston were "not the only individuals working the shift" on January 22. The others, as noted, were not fired.

I credit the testimony of Casaia, Pachucki Sr., Pachucki Jr., Gostinski, Ward, and Boston as detailed above. Their testimony is in significant part mutually corroborative. They impressed me as trustworthy and reliable witnesses. And their full and complete account of the pertinent sequence of events withstood the test of cross-examination. On the other hand, I do not credit the testimony of Bianco, Small, Troup, and Gorcenski insofar as their testimony conflicts with the above testimony of Casaia, Pachucki Sr., Pachucki Jr., Gostinski, Ward, and Boston. The testimony of Bianco, Small, Troup, and Gorcenski was at times vague, incomplete, inconsistent, and shifting. They did not impress me as reliable or trustworthy witnesses. In particular, I find incredible here management's asserted nondiscriminatory reasons for the sudden firing of Pachucki Sr., Pachucki Jr., Gostinski, Ward, and Boston. As discussed below, I find these belated, unsubstantiated, shifting, and contradictory reasons advanced by the Employer for the sudden firing of the five employees to be pretextual, and the real reason to be the suspected union activities of these employees.[10]

In addition, on this record, I am persuaded that the testimony of Vida, as recited above, is more complete and reliable than the testimony of Bianco. Bianco admittedly called Vida into his office on February 17 and 28. I find incredible Bianco's assertion that he twice summoned Vida to his office only to tell Vida that he, Bianco, received a "complaint" from a fellow employee and he "would appreciate it if" Vida solicited and distributed for the Union "on his own time" and "the fellow-worker's time." The purpose of this meeting, according to Bianco, was to protect a complaining employee who assertedly had been "pressured by Vida and other employees concerning Union issues." Further, I find Vida's recollection of Small's statements to the assembled employees on February 26 to be credible. Small's recollection and Bianco's recollection of Small's statements to the employees were at times vague and incomplete. And, as stated, I do not regard Small and Bianco, on this full record, to be reliable witnesses.

Discussion

The credible evidence of record, as recited supra, makes it clear that management summarily discharged employees Pachucki Sr. and Pachucki Jr. on January 7 because of their suspected union activities, in violation of Section 8(a)(3) and (1) of the Act. Pachucki Sr. and Pachucki Jr. were both hired by the Employer during the construction of its Inkerman facility. Management was pleased with their work and they were later kept on as permanent employees. Management complimented the work of both employees. Pachucki Sr. was made "head equipment mechanic" receiving a $10 hourly rate. Pachucki Jr. was given a "merit increase" and later assigned to assist Pachucki Sr. "as a mechanic's helper." The two employees had received no reprimands from the Employer.

Then, during late December, Pachucki Sr. spoke to his coworkers, including employees Gostinski and Ward, about "getting a Union into" Culmtech. The employees decided that Gostinski and Ward "were going to contact the Union," the United Steelworkers, and Pachucki Sr. "would be the spokesman." Arrangements were made for the employees to meet with the Union's representatives. However, Casaia, the Union's subdirector, could not attend a scheduled meeting and, consequently, he telephoned the plant on January 7 to so advise Pachucki. Casaia was then unaware that there was a Pachucki Sr. and Pachucki Jr. working at the plant. Accordingly, he simply left a message with the plant secretary, Jean McIntyre, for Pachucki, explaining to her that the scheduled meeting was postponed. Later that same day, Superintendent Barney summoned Pachucki Sr. and Pachucki Jr. into his office. There, Barney faulted Pachucki Sr. for being "unhappy" at Culmtech. Barney then apprised Pachucki Sr., "You're through . . . take your boy with you . . . ." Barney, at the same time, claimed that the Employer was "phasing out the department." There was, however, work which remained to be done, including the repair of a machine critical to the processing of coal. In fact, management promptly placed a "want ad" in the local newspaper for a replacement "mechanic." Elsewhere, Plant Manager Bianco claimed that Pachucki Sr. had been "warned" about "purchasing parts" "on his own" and he had "started dragging his feet" at work. Bianco also claimed that "we ran into quite a few problems" with Pachucki Jr., but "we felt that if we let Don Jr. go that his father would walk off and we needed [him]." The credible evidence of record does not support these inconsistent assertions by the Employer.

I find and conclude that the Employer became aware of the union activities of Pachucki Sr. by January 7, when Union Representative Casaia telephoned the plant to advise Pachucki that the scheduled union organizational meeting was postponed. That same day, management summarily fired both Pachucki Sr. and Pachucki Jr. Significantly, Casaia's telephone message pertaining to the postponed union meeting did not specify Pachucki Sr. or Pachucki Jr. The credible evidence shows that, up to this point, both employees were highly regarded by management. And, it was only hours after this union activity surfaced when they were suddenly fired. Further, I reject as pretextual management's unsubstantiated, inconsistent, contradictory, shifting, belated, and incredible reasons assigned for this firing. The weaknesses of these asserted reasons only serve to bolster the inference that management suddenly fired both Pachuckis on January 7 because of suspected union activities, in violation of Section 8(a)(3) and (1) of the Act.

Subsequently, when employees Gostinski, Ward, and Boston attempted to renew this organizational effort at the plant, management summarily fired them too, in further violation of Section 8(a)(3) and (1) of the Act. Gos-

[10] I note that Foreman Norman Ward of Hamilton Industries, office secretary Jean McIntyre, Foreman and Supervisor William Tocheny, and Superintendent John Barney, all involved in the pertinent sequence, did not testify in this case.

tinski, Ward, and Boston, like Pachucki Sr. and Pachucki Jr., started working for the Employer during the construction of the plant. Later, they were kept on as permanent employees. They were given pay increases.[11] Gostinski credibly testified that he was complimented by management for his good work. Gostinski was even told that he was being "considered" for a foreman's position. And, Boston was twice asked to become a foreman—he too was repeatedly complimented by his superiors.

Employee Ward credibly recalled that when Pachucki Sr. and Pachucki Jr. were both fired on January 7, "we figured it was because of the Union activities" and "we just sort of eased off a little bit for a couple of days." Then, Ward and his coworkers—including Gostinski and Boston—turned to the United Mine Workers for organizational assistance. As Ward explained, on January 24:

> When we were punching out, we were gathered around the time clock and we were talking among ourselves about the Union because . . . George [Boston] was supposed to have pledge cards . . . we were just wondering when he would get the pledge cards and when he could start handing them out and try to get everything going.

This group included Ward, Gostinski, and Boston. Tocheny, the Employer's foreman and supervisor on the night shift, was standing "right behind" them "about two or three feet."

Earlier, Gostinski had made known to Foreman Troup his strong "support of a Union." Troup, however, informed Gostinski, "we don't need the union." Then, on the morning of January 23, Troup faulted Gostinski for "looking" in his desk at a "Union book." Gostinski explained to Troup that he was looking for a tool and saw the union book there. Troup instructed Gostinski, "We didn't need a union." Troup, at the same time, revealed to Gostinski: "We were considering you to take over . . . foreman on the third shift . . . the reason you didn't get it the job [was] because you were reading that book about unionization."

During the afternoon of January 24, Gostinski, Ward, and Boston were notified at home that they were fired. Management claimed that they had failed to "perform" their "duties on the night of [January] 22nd." The employees had not been warned or criticized about their work. And, when they pressed management for the "real reason" for their firing, they were told: "It was none of [their] business."

Management claims that the three employees were fired because of proscrastination on the night of January 22. As noted, Tocheny, the Company's supervisor on the night shift, did not testify. In addition, Norman Ward, foreman of Hamilton Industries, who was also directing the night shift, did not testify. The credible evidence of record, detailed above, fails to support this and related assertions. Indeed, management later notified the Pennsylvania Office Of Employment Security that Gostinski was fired "due to leaving the jobsite without foreman's permission and was caught rummaging through foreman's desk . . . ." Here, too, management's unsubstantiated, inconsistent, contradictory, shifting, belated, and incredible reasons assigned for this sudden firing only serve to bolster the inference that it was really their union activities which caused this action.

In sum, I find and conclude that the Employer violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employees Pachucki Sr., Pachucki Jr., Ward, Boston, and Gostinski.

The General Counsel alleges that Respondent Employer also violated Section 8(a)(1) of the Act by threatening an employee that it would close its facility if the employees selected union representation and, in addition, by soliciting this same employee to dissuade his coworkers from supporting the Union. The credible evidence of record supports this allegation. Thus, as employee Vida credibly recalled, Plant Manager Bianco summoned Vida to his office; stated "you are trying to organize a Union"; warned that a "Union wouldn't be good at this time . . . if the Union did get in it would be a sinking ship . . ."; and then "said the plant would probably close down if the Union came in." Later, Bianco again summoned Vida to his office. This time, Bianco said that Vida "had a lot of influence with the men" and "could control" them with respect to the union effort. Vida understood that Bianco was, in effect, saying that Vida "could have it stopped if he wanted to . . . ."

I find and conclude that Bianco's conduct, assessed in the context of the Employer's discriminatory firing of the five union protagonists, tended to interfere with employee Section 7 rights, in violation of Section 8(a)(1) of the Act. Cf. *Purolator Armored*, 268 NLRB 1268, 1275–1280 (1984). Bianco threatened Vida with the closing of its facility if the employees chose union representation. Bianco then enlisted the support of Vida in opposing the Union. This conduct, in context, tended to impinge on employee Section 7 rights.

The General Counsel also alleges that the Employer solicited employee complaints and grievances and promised its employees increased benefits and improved terms and conditions of employment if they voted against union representation. In my view, the credible evidence of record does not sufficiently support this allegation. Thus, employee Vida credibly recalled how Company Owner Small addressed the assembled employees. Small, during his meeting, was asked, inter alia, "about a pension plan" and said "he would check with the board" of directors. An "incentive plan" was discussed. Small also "wanted an open door policy." Management had discussed these and similar improved benefits with the employees a few months earlier. The testimony of record falls far short of sufficiently establishing an unlawful solicitation and promise of benefits. I would therefore dismiss this allegation of the complaint. Cf. *American Laster Corp.*, 280 NLRB 483 (1986).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce as alleged.

[11] The Employer's "reason for the raise" for Boston and Gostinski stated "merit increase." The "reason for the raise" for Ward was "transfer."

2. The United Steelworkers of America and the United Mine Workers of America are labor organizations as alleged.

3. Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employees Pachucki Sr., Pachucki Jr., Boston, Gostinski, and Ward.

4. Respondent violated Section 8(a)(1) by threatening an employee to close its facility if they chose union representation and by soliciting an employee to dissuade his coworkers from supporting the Union. Respondent has not committed other 8(a)(1) violations alleged.

5. The unfair labor practices found above affect commerce as alleged.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such unlawful conduct or like and related conduct and to post the attached notice. Respondent Employer will also be directed to offer employees Pachucki Sr., Pachucki Jr., Gostinski, Ward, and Boston immediate and full reinstatement to their former jobs or, in the event such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of their unlawful discharges, by making payment to them of a sum of money equal to that which they normally would have earned from the date of Respondent Employer's discrimination to the date of its offers of reinstatement, less net earnings during such period, with backpay and interest to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 651 (1977), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). In addition, Respondent Employer will be directed to preserve and make available to the Board, on request, all payroll records and reports and all other records necessary to determine backpay and reinstatement under the terms of this decision. Further, Respondent Employer will be directed to remove from its files any reference to the disciplinary actions and discharges found unlawful herein in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Culmtech, Ltd., Inkerman, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in the United Steelworkers Of America, the United Mine Workers Of America, or any other labor organization, by discriminatorily discharging and failing or refusing to reinstate its employees.

(b) Threatening employees that it would close its facility if the employees chose union representation.

(c) Soliciting employees to dissuade other employees from supporting the Union.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employees George Boston, David Gostinski, Donald Pachucki Sr., Donald Pachucki Jr., and John Ward immediate and full reinstatement to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have sustained by reason of Respondent's unlawful action, with interest, as provided in this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, as well as other records necessary or useful in analyzing and computing the amount of backpay due under the terms of this Order.

(c) Remove from its files any reference to the discharges of Boston, Gostinski, Pachucki Sr., Pachucki Jr., and Ward, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

(d) Post at its Inkerman, Pennsylvania facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 28 days from the date of this Orderwhat steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the remaining allegations of the complaint be dismissed.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in the United Steelworkers of America, the United Mine Workers of America, or any other labor organization, by discriminatorily discharging and failing or refusing to reinstate our employees.

WE WILL NOT threaten our employees that we will close down our facility if they choose union representation.

WE WILL NOT solicit our employees to dissuade their coemployees from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL offer employees George Boston, David Gostinski, Donald Pachucki Sr., Donald Pachucki Jr., and John Ward immediate and full reinstatement to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have sustained by reason of our unlawful conduct, with interest.

WE WILL remove from our files any references to the discriminatory discharges of Boston, Gostinski, Pachucki Sr., Pachucki Jr., and Ward, and WE WILL notify them that this has been done and evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

CULMTECH, LTD.

Martin Marietta Energy Systems *and* Oil, Chemical and Atomic Workers International Union, Local 3-288. Case 10-CA-21503

4 March 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 29 September 1986 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Martin Marietta Energy Systems, Oak Ridge, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Howard Trimble, Esq., for the General Counsel.
W. Bruce Swain, Esq., of Bethesda, Maryland, for the Respondent.
John Williams, District Director, of Knoxville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

Howard I. Grossman, Administrative Law Judge. The charge was filed on 21 January 1986[1] by Oil, Chemical and Atomic Workers International Union, Local 3-288 (Local 3-288), and complaint issued on 13 May. It alleges in essence that Martin Marietta Energy Systems (the Company, or the Respondent) unilaterally and without bargaining with Local 3-288 implemented a health benefit plan for its employees in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

A hearing was held before me on this matter on 24 June 1986 in Oak Ridge, Tennessee. Thereafter, the General Counsel and the Respondent filed briefs. On the entire record, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company is a Maryland corporation with an office and place of business in Oak Ridge, Tennessee, where it is engaged in the operation of laboratories and nuclear facilities for the Department of Energy. During the past calender year, a representative period, the Company sold and shipped from its Oak Ridge, Tennessee, facility finished products valued in excess of $50,000 directly to customers located outside the State of Tennessee. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings establish and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Local 3-288 has been certified since 1946 as the representative of hourly employees in the Department of Energy's gaseous diffusion plant at Oak Ridge, Tennessee. The contractor operating those facilities at that time was Union Carbide Corporation, and Local 3-288 entered into a series of collective-bargaining agreements with that contractor, the last one terminating in October 1984. In that year, the Respondent was awarded a contract to perform these functions, and, in October 1984, entered into a current collective-bargaining agreement with the "International Union . . . and its Local 3-288."[2]

Two memoranda of agreement made a part of the contract specify that the Company agrees to provide for its employees as Special Medical Expense Plan and a Hospitalization and Surgical Plan, both administered by Connecticut General Life Insurance Company. The cost of the first plan is divided equally between the Company and participating employees, and the cost of the second plan is borne wholly by the Company. Employee participation in both plans is voluntary.[3]

Article XV Section 1 of the collective-bargaining agreement reads as follows:

> *Section1.* It is hereby agreed that this contract contains the complete agreement between the parties or their successors, and no additions, waivers, deletions, changes or amendments shall be made during the life of this contract except by mutual consent, in writing, of the parties.[4]

Although the complaint, as noted, alleges the unfair labor practices to be the Company's unilateral implementation of a health benefit plan, at the hearing the General Counsel asserted that a "broader issue" was involved, to wit, a midterm change in the collective-bargaining agreement in violation of the proviso to Section 8(d) of the

[1] All dates are in 1986 unless otherwise indicated.

[2] G.C. Exh. 3.
[3] G.C. Exhs. 2 and 3 (pp. 87-88).
[4] G.C. Exh. 3, p. 63.

Act. Company counsel agreed that this was an issue, that it had been advanced in the past by the General Counsel, and the Company's position was that no "midterm change (was) involved."

B. *December 1985 Meeting of the Parties Concerning a New Health Benefit Plan*

1. Company notice of the meeting

Local 3–288 protests lack of notice to its International of meeting held on 19 December 1985 concerning a new health benefit plan offered by the Company. Company Superintendent of Personnel Relations Donald H. Blanton testified without contradiction that he called Local 3–288 President John Herron on 18 December 1985, and told him that the Company and the Local needed to get together so that the Company could communicate information on health care. Herron made no response.

Company Personnel Director Harry G. Conner affirmed that company practice in the past had been to inform the local president of such meetings. International representatives appeared in such meetings from time to time; however, the Company did not notify them separately. Although International Representative John Williams stated that International representatives were present at meetings, he agreed that the procedure on occasion had been for the Company to notify the local president, who then informed the International. Williams asserted that he first learned of the health benefit meeting on the day after it was held, i.e., 20 December 1985.

2. The December meeting

Representative of the Company, Local 3–288, and another labor organization were present during the meeting on company premises. Company Director of Personnel Administration Robert E. Burnett told the union representatives that the Company intended to make a health maintenance organization plan (HMO) available to employees beginning in January 1986. Although Burnett did not discuss any specific HMO plan, he compared HMO's generally with the existing indemnity health benefit plan being administered by Connecticut General, and utilized slides in his presentation. Only those employees living in counties serviced by the HMO would be eligible. However, there would be no change in the existing indemnity benefit plan, and an employee could elect to continue with that plan. Like the old plan, the HMO program was optional. However, an employee could not elect to be covered by both plans—if the employee opted to remain under the indemnity benefit plan, he could not enroll in an HMO program even if he paid for it himself.

Various union representatives asked questions of Burnett and received answers. The principal factual issue is whether the Company stated that its intention to introduce HMO's was not negotiable, or whether it told the unions that the provisions of an HMO plan were not negotiable. Minutes of the meeting kept by Company Labor Relations Specialist D. E. Anderton, affirmed by him to be accurate, show that Burnett was asked whether HMO plans were negotiable. Burnett's reply: "They are not negotiable. HMO's themselves decide what they offer."[5] Anderton's testimony elaborated on Burnett's reply—"[t]he HMO's themselves decide what they put into the package that they offered employees. We were not a part of that. We were not in the decision making in that aspect of the benefit plans package itself." An officer of Local 3–288, Mike Church, testified that he also kept minutes of the meeting, and that Burnett's reply to the question was that "benefits are strictly determined by the HMO and are not negotiable."

On the basis of this consistent evidence, I find that the Company did not tell the union representatives that its decision to offer HMO's was not negotiable. Rather, it informed them that details of an HMO plan were formulated by the HMO's, and were not negotiable.

The evidence also shows that Local 3–288 did not agree or disagree with Burnett's statements, and that Burnett did not ask whether Local 3–288 had any objections. In response to a question on whether there would be further meetings on this issue, Burnett replied that there would be further information in the mail, and that the HMO's themselves would schedule meetings to explain the HMO programs.[6]

C. *Dissemination of Further HMO Information*

A company newspaper dated 26 December 1985 stated that the Company had been evaluating HMO's and planned to offer one to "employees in the near future as an alternative to the present group medical plan."[7] On 6 January 1986, the Company sent letters to employees advising them that two HMO plans (Blue Cross and Whittaker Health Services) would be made available with the enrollment period from 15 January to 15 February 1986, and that coverage would be effective 1 March 1986. The letter stated that employees could remain with the current plan if they chose to do so.[8] A notice further explaining the plans was placed on company bulletin boards on 15 January 1986,[9] and a local newspaper carried a story giving similar information.[10]

D. *Other Company Programs*

Company counsel stated at the hearing that the HMO plan was a "classic case of a new program offered to the collective-bargaining agent for his acceptence or comment." The Company elicited evidence of other such programs. Thus, Personnel Relations Superintendent Blanton testified to the implementation of a special accident insurance plan, a service award program, and a scholarship program.[11] Blanton averred that Local 3–288 was made aware of these programs about the time of their implementation, but never requested bargaining about them.

---

[5] Jt. Exh. 1.

[6] On the question of whether Burnett was asked about further meetings, I credit Anderton's minutes—which state that Mike Walls, a member of the other labor organization, asked this question—rather than Anderton's denial during his testimony. Jt. Exh. 1, p. 3.

[7] R. Exh. 1, p. 2.

[8] R. Exh. 2.

[9] R. Exh. 3.

[10] R. Exh. 4.

[11] R. Exhs. 5, 6, 7, and 8.

The Company document describing the special accident insurance plan states that it constitutes "supplemental coverage" in cases of death, dismemberment, or total disability. The eligibility requirements do not exclude employees who are already covered by the existing hospital and surgical plan.[12] Although the collective-bargaining agreement also provides for dental, group insurance, and pension plans, there is no special accident insurance plan other than treatment for injury caused by accidents in the basic hospital and surgical plan.[13] Blanton testified that the service award program did not replace any benefit in the existing contract, and examination of that document shows that it does not contain a service award program or a scholarship plan.[14]

E. *Legal Analysis and Conclusions*

As set forth above, although the complaint alleges only the Company's unilateral implementation of a new health benefit program, counsel for the General Counsel stated at the hearing and the Respondent's counsel agreed that the issue is whether the Respondent engaged in a midterm modification of the collective-bargaining agreement violative of the proviso to Sec. 8(d).[15]

The Board has recently explained the different principles involved in allegations of this nature:

> Sections 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." Generally, an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good-faith impasse in bargaining. Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to "modif[y] . . . the terms and conditions contained in" the contract: the employer must obtain the union's consent before implementing the change. If the employment conditions the employer seeks to change are not "contained in" the contract, however, the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change. [*Illinois Coil Spring Co.*, 268 NLRB 601, 602 (1984), enfd. sub nom. *Auto Workers Local 547 v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).]

The Respondent argues there was no midterm modification of the contract. "No change occurred in the negotiated medical insurance plan contained in the collective-bargaining agreement." Accordingly, no provision "contained in" the contract was modified.[16] After receiving notice of the Company's intention to offer a new health benefit plan, "[t]he Union consciously chose to sit back not protest and file charges with the NLRB after enrollment in the HMO's had commenced."[17] Local 3–288 thus waived its rights to bargain on the issue of the HMO's. The Company cites authorities in support of its position, and the General Counsel cites similar authorities, but seeks to distinguish them on the ground that Local 3–288 was given inadequate notice of the time and subject matter of the December meeting.[18]

The basic premises on which the Company's waiver argument depends is its position that there was no midterm change in the contract. The record shows that there was no change in "the negotiated medical insurance plan"—the employees were free to continue with the plan if they chose to do so. However, it does not follow from this fact that there was no change in the collective-bargaining agreement. The Respondent's substitution of an HMO plan for the existing indemnity benefit plan constituted a unilateral change in the contract.

Further, as set forth above, the contract provides that there shall be no "additions, waivers, deletions, changes or amendments (to the contract) . . . except by mutual consent in writing." The Company's unilateral implementation of the HMO program, without Local 3–288's written or other consent, modified this provision of the contract.

The other programs made available to employees without Local 3–288's consent did not necessarily constitute midterm modifications, because their subject matters were not covered by the contract, and the employees could receive the new benefits without sacrificing any contractual right. Nor did Local 3–288's silence when they were implemented constitute acquiescence in any future modifications of the contract. In this case, an employee could sign up for an HMO plan only as an alternative to the contractual indemnity benefit program, which would then be denied to him. It is clear that the HMO plan was thus an "addition" to, a "change" in, or an "amendment" to the existing contract.[19] Its imple-

---

[12] R. Exhs. 5 and 7.

[13] G.C. Exh. 3.

[14] Ibid.

[15] The proviso to the first paragraph of Sec. 8(d) reads as follows:

Provided, That where there is in effect a collective-bargaining contract covering employees in any industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice on the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

[16] R. brief, p. 9.

[17] Id. at 12.

[18] G.C. brief, p. 11.

[19] The Respondent's action would have been unlawful even if the employees had not been compelled to sacrifice the existing benefit plan. By making a new plan available, the Respondent was adding an additional and possibly advantageous feature to a benefit already covered by the contract. It is unlawful for an employer unilaterally to pay employees

Continued

mentation without Local 3-288's written consent constituted an abrogation of the contractual provision requiring such consent, and thus further modified the collective-bargaining agreement.

None of the many waiver cases cited by the Respondent[20] or distinguished by the General Counsel[21] involved the midterm modification of a collective-bargaining agreement. The issue is not whether Local 3-288 waived a bargaining right, but, rather, whether it abandoned a contractual right for which it had already bargained and had obtained in a written agreement. In such cases, the requirements of the proviso to Section 8(d) are explicit, as set forth above. The Respondent did not serve the required written notices, offer to meet with the other party, notify the Federal Mediation and Conciliation Service, or continue in full force the existing agreement.[22] The following language of an administrative law judge has been accepted by the Board with judicial approval:

> It is undisputed that Respondent implemented changes in an existing collective-bargaining agreement without the Union's consent. Such conduct is violative of Section 8(a)(5) and (1) of the Act because Section 8(d), which defines the duty to bargain, prohibits such changes . . . In this case, the Union did not agree to Respondent's proposed modifications. In these circumstances, the Board and the Courts have clearly and consistently found an employer's mid-term modification of a fixed term contract to be unlawful. See *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975); *C & S Industries, Inc.*, 158 NLRB 454, 457-458 (1966); *We-Care Trading Co., Ltd.*, 265 NLRB No. 56, slip op. at 7 (1982). *La Porte Transport Co.*, JD-152-84, quoted in *Herman Brothers, Inc.*, 273 NLRB 124, 125 (1984), enfd. mem. 780 F.2d 1015 (3d Cir. 1985).[23]

In accordance with my findings above, I make the following

Conclusions of Law

1. Martin Marietta Energy System is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union, Local 3-288 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all relevant times the foregoing labor organization has been and continues to be the exclusive representative of Respondent's employees in the following unit found appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All hourly employees, excluding guards and salaried employees (monthly or weekly) employed by the Respondent at its Oak Ridge Gaseous Diffusion Plant, Oak Ridge, Tennessee.

4. At all relevant times the Respondent and the foregoing labor organization have been parties to a collective-bargaining agreement concerning employees in the unit described above which, inter alia, provides for a Special Medical Expense Plan and a Hospitalization and Surgical Plan, and, further, provides that no additions, waivers, deletions, changes or amendments in said agreement will be made except by mutual consent, in writing, of the parties to the contract.

5. By offering to the employees in the unit described above and by implementing without the written consent of said labor organization, a new Health Maintenance Organization plan as an alternative to the foregoing contractual rights, which would be sacrificed upon employees acceptance of the new plan, the Respondent thereby unilaterally added to, deleted from, changed, or amended said collective-bargaining agreement, and modified by abrogation that section of the contract requiring that any such modification be by mutual consent and in writing.

6. The Respondent's action described above constitutes a refusal to bargain within the meaning of Section 8(d) of the Act, and thus constitutes a violation of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act, including the posting of the attached notice. I shall recommend that the Respondent be ordered to rescind its unlawful modification of the collective-bargaining agreement by withdrawing its offer of Health Maintenance Organization benefits as an alternative to the existing medical benefits under the contract.

It is the Board's established policy not to require rescission of an unlawful wage increase previously granted, because of the injury thereby sustained by employees.

---

more wages than the amount specified in the collective-bargaining agreement. *European Parts Exchange*, 270 NLRB 1244 (1984). Making additional benefits of the same nature available to employees without the Union's consent stands on the same footing.

[20] *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939); *NLRB v. Island Typographers*, 705 F.2d 44 (2d Cir. 1983); *NLRB v. Spun-Jee Corp.*, 385 F.2d 379 (2d Cir. 1967); *NLRB v. Alva Allen Industries*, 369 F.2d 310 (2d Cir. 1967) *Charlie's Oil Co.*, 267 NLRB 764 (1963); *Talbert Mfg.*, 264 NLRB 1051 (1982); *Towne Plaza Hotel*, 258 NLRB 69 (1981); *K & S Circuits*, 255 NLRB 1270 (1981); *W. G. Best Homes Corp.*, 253 NLRB 912 (1980); *Citizens Natl. Bank of Willmar*, 245 NLRB 389 (1979) *Citizens Hospital of East Liverpool*, 234 NLRB 58 (1978); *Clarkwood Corp.*, 233 NLRB 1172 (1977); *Globe-Union, Inc.*, 222 NLRB 1081 (1976); *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975); *U.S. Lingerie Corp.*, 170 NLRB 750 (1968); *American Buslines*, 164 NLRB 1055 (1967).

[21] *Cherokee Culvert Co.*, 266 NLRB 290 (1983); *Hartmann Luggage Co.*, 173 NLRB 1254 (1968).

[22] Although this inaction was not specifically alleged in the complaint, the latter "clearly encompassed Respondent's failure to comply with Section 8(d) by its unilateral change and Respondent was not misled into failing to litigate this issue." *Herman Brothers*, 273 NLRB 124, 126 (1984), enfd. mem. 780 F.2d 1015 (3d Cir. 1985).

[23] See also *Burger Pits*, 273 NLRB 1001 (1984), enfd. 121 LRRM 3305 (9th Cir. 1986); *Croft Metals*, 272 NLRB 208 (1985) (note reference to change in a health insurance plan at 213). enfd. 771 F.2d 849 (5th Cir. 1985); *Campo Slacks*, 266 NLRB 492 (1983).

European Parts Exchange, supra, 270 NLRB at 1245. Inasmuch as some of the Respondent's employees may have accepted the new medical plan being administered by third-party health maintenance organizations, and abrupt termination of said plans might similarly be injurious to said employees, I shall recommend that nothing in the Order be construed to require the Respondent to terminate any such existing individual plan. However, the evidence shows that such plans have coverage for a specific period of time, with employee option thereafter to change to another plan. The rescission order recommended shall apply to any subsequent renewal of the new plan, absent the Respondent's compliance with its contractual obligation to obtain the written consent of the aforesaid labor organization.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondents, Martin Marietta Energy Systems, Oak Ridge, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Offering or implementing new health benefit programs which offer benefits otherwise covered by its existing collective-bargaining agreement with Oil, Chemical and Atomic Workers International Union, Local 3–288, without the written consent of said labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its offer of a Health Maintenance Organization plan made available to employees in the unit described above, absent the written consent thereto by the above-name labor organization, provided that nothing shall be construed so as to require the Respondent to rescind an already existing individual plan prior the end of the period when it expires according to its terms.

(b) Post at its Oak Ridge, Tennessee, Gaseous Diffusion plant, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT offer or implement any new health benefit plan which offers benefits otherwise covered by our existing collective-bargaining agreement with Oil, Chemical and Atomic Workers International Union, Local 3-288, without the written consent of said labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our prior offer and implementation of a new health benefit plan and will not renew it without the written consent of the aforesaid Union, except that we will not interfere with any existing individual plans for the period of their existing coverage as specified in the said plans.

MARTIN MARIETTA ENERGY SYSTEMS

Lenape Products, Inc. ***and*** **Charles Bernhardt Sr.**
Case 22-CA-13631

4 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN, BABSON, STEPHENS, AND CRACRAFT

On 11 June 1985 Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, but not to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Lenape Products, Inc., Trenton, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees for engaging in a lawful work stoppage.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer its Division 3 day-shift employees who were discharged for having engaged in a work stoppage on 27 December 1984, including Charles Bernhardt Sr., Charles Bernhardt Jr., Lottie Dillon, Isabel Elisio, Maria Bruno, Mayra Torres, Sarran Doogah, and Beverly Martinez, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful discharge of them, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Trenton, New Jersey, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] In sec. II,A, par. 3 of his decision, the judge incorrectly spelled Hermann Glinecke's first name as "Herman." In that same paragraph, as well as in his recommended Order, the judge erroneously stated that the Respondent's Division 3 plant is located in Pennington, New Jersey. While the Respondent's main office and two other plants are located in Pennington, its Division 3 plant is located in Trenton, New Jersey.

In sec. II,A, par. 11, the judge incorrectly spelled Isabel Elisio's first name as "Isabella" and as "Isabelle" in his recommended Order and notice.

In sec. II,B, par. 2, the judge incorrectly cited Dirt Digger, which is now published at 274 NLRB 1024 (1985).

We correct these inadvertent errors.

Chairman Dotson would overrule *Abilities & Goodwill*, 241 NLRB 27 (1979). In his view an unlawfully discharged striker must unconditionally request reinstatement in order to trigger an employer's backpay obligation. He would therefore follow the Board rule as it existed prior to *Abilities & Goodwill* and as set forth in *Bartlett-Collins Co.*, 230 NLRB 144 (1977).

[2] We shall issue a new Order and notice reflecting the proper spelling of Isabel Elisio's first name and properly identifying the location of the Respondent's Division 3 plant.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge you for engaging in a lawful work stoppage.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Charles Bernhardt Sr., Charles Bernhardt Jr., Lottie Dillon, Isabel Elisio, Maria Bruno, Mayra Torres, Sarran Doogah, and Beverly Martinez, and any other Division 3 employee who was discharged for having engaged in a work stoppage on 27 December 1984, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his or her discharge and that the discharge will not be used against him or her in any way.

LENAPE PRODUCTS, INC.

Gary A. Carlson, Esq., for the General Counsel.
Arnold M. Mellk, Esq. (Katzenbach, Gildea & Rudner), of Lawrenceville, New Jersey, for Lenape Products, Inc.
Ezra D. Rosenberg, Esq., on the brief.
Carl S. Yaller, Esq., of Media, Pennsylvania, for Charles Bernhardt, Sr.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Lenape Products, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act, by having discharged certain employees for having engaged in a strike. Respondent, in its answer, avers that the employees involved in this case had quit and Respondent denies it violated the Act.

The hearing was held before me in Newark, New Jersey, on April 17 and 18, 1985.

Based on the entire record in this case, including my observation of the demeanor of the witnesses, and after full consideration of the briefs filed with me by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that Respondent is engaged in the business of manufacturing and in the nonretail sale of ceramic products and that its operations annually meet the Board's nonretail standard for the assertion of jurisdiction.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

There is very little dispute about the events in this case.

The employees involved in this case have not been represented by a labor organization for purposes of collective bargaining.

In late August 1984 (all dates hereafter are for 1984 unless specified otherwise), Respondent hired Herman Glinecke as its production control manager to put its Division 3 plant in Pennington, New Jersey, on a profitable basis and also to ensure that a $240,000 order for the production of 40,000 ashtrays would be processed through its Division 3 phase by January 1, 1985, and to completion by January 31, 1985, to avoid paying a contractual penalty.

Shortly after he took over, Glinecke made a number of changes to which many of the Division 3 employees objected. Thus, he stationed himself behind employees for long periods as they worked and timed their operations with a stopwatch. He disallowed an employee a "grace period" whereby employees could punch in up to 4 minutes late without penalty, by instead docking her for being a minute late. He asked another employee to work overtime on Sunday to assist in clearing out an area, but assigned him instead to production work. When that employee protested, he was sent home and informed that he would no longer be assigned to overtime work. Some of the employees at Division 3 perceived that Glinecke was responsible also for excessive fumes resulting from the method he used to ignite gas in the kilns. They also thought he was not doing as much as his predecessor to keep a rat infestation problem under control. They expressed their concern about techniques, introduced by Glinecke in handling ceramic objects, which they perceived as having caused skin rashes and related illnesses. One of the perceived concerns of the Division 3 employees pertained to Glinecke's moving them from their normal assignments to other duties, e.g., assigning a presser to the work of making clay. In mid-December, Glinecke brought in to the Division 3 plant an operation that was normally done at another of Respondent's facilities, located 9 miles distant. That operation involved the redoing of defective work at the other facility. The increased workload at Division 3 resulting from the transfer stimulated further changes in work assignments.

Charles Bernhardt Sr., the charging party in this case, was one of the Division 3 employees. He testified that he and the other Division 3 employees complained among themselves about the foregoing matters. He testified further that he spoke to Glinecke about them and that Glinecke responded that he did not care what the employees thought. Bernhardt testified that the Division 3 employees decided that they would get nowhere with Glinecke and that he asked Glinecke to tell "Pete" Hexter (Respondent's principal stockholder and its de facto chief executive officer[1]) that the employees wanted "to meet with him to discuss (their) working conditions and the problems at Division 3." According to Bernhardt, Glinecke replied that he would tell Hexter of this request. Glinecke and Hexter testified for Respondent. Glinecke did not controvert Bernhardt's testimony respecting the

[1] Hexter testified he serves in that capacity, but is not one of Respondent's officers.

desire of the Division 3 employees to meet with Hexter. Instead, Glinecke's account suggests that he handled all the problems at Division 3 in a manner satisfactory to Bernhardt and the other employees there. I credit Bernhardt's testimony that the employees had, through Glinecke, sought a meeting with Hexter.

Hexter testified that he has always been on a first name basis with Respondent's employees and has always been available to discuss their problems. He testified also that he regularly visited the Division 3 facility. To the extent that Hexter's account suggests that the Division 3 employees had no concerns, I reject it as Glinecke himself acknowledged that he had received complaints from employees about the changes he made in their work assignments.

Bernhardt testified also that he and the other Division 3 employees on the day shift then talked about starting a union. Bernhardt called Nathan Rutkin, Respondent's traffic manager at the Division 1 plant, 9 miles away. Rutkin is also president of Local 185A, Glass, Pottery, Plastics & Allied Workers International Union, AFL–CIO, CLC. Rutkin gave Bernhardt the union's telephone number. Bernhardt later obtained authorization cards for that union and, on December 19, he and other Division 3 employees filled out those cards. That testimony and the signed authorization cards were offered solely to establish that the Division 3 employees were serious in their concerns about their complaints regarding their working conditions under Glinecke. Thus, they met with a union representative and told him they may walk out because of their complaints. The union cards were not offered for the purpose of proving that their termination of employment, a week or so later, was due to their union activities, inasmuch as there is no complaint allegation that Respondent has violated Section 8(a)(3) of the Act.

Defective work from another plant, Division 4, was brought to Division 3 to be reworked. By December 27, the Division 3 employees "couldn't take no more [and] decided to walk out . . . but . . . would try to get a hold of Mr. Hexter" first. Bernhardt telephoned Hexter on December 27. There is a variation between their respective accounts of that telephone discussion. Bernhardt's testimony is that he asked Hexter if it was possible for the employees to meet with him. He testified further that Hexter put him off by saying he had meetings elsewhere to attend and by suggesting that the employees wait until after the holidays. Bernhardt testified also that he then accused Hexter of giving him "the runaround" and that he also told Hexter that the employees would walk out by noon if Hexter did not come to the Division 3 plant by then. Bernhardt concluded his account of the conversation by his testimony that Hexter told him, "God dammit, Charlie, if you want to walkout, walkout. I'll just get other people to replace you." Hexter's version of the call is that Bernhardt told him that the employees wanted him to come right down and that when he told Bernhardt that he would be there at 1 p.m. because he had another meeting scheduled, Bernhardt told him that the employees would walk out if he was not at the Division 3 plant by 11 a.m. Hexter testified that he told Bernhardt to either wait until 1:00 p.m. or the meeting with the employees would have to wait until after the holidays. I see no material difference in the respective accounts. If a credibility resolution were necessary, I would credit Bernhardt's account particularly as Hexter's subsequent actions, as he related them and as set out below, disclose that he was not going to wait until after the holidays to talk with the employees if they walked out.

Bernhardt had the telephone conversation with Hexter about 10:15 a.m. He informed his coworkers of it and placed a call to Glinecke, who was at another facility. Bernhardt told Glinecke that the employees were walking out. Glinecke drove to the Division 3 plant and arrived in time to see the employees there punching out. It was then about 11 a.m.

On the afternoon of the same day of the walkout, December 27, Hexter met with Respondent's president and they instructed Respondent's payroll administrator to write each of the employees who walked out. Her letter to each was dated December 27 and stated, "[o]n December 27, 1984, you abandoned your position . . . [and] therefore your position is no longer available." On December 28, the employees came in to pick up their paychecks. Glinecke testified that Bernhardt told him then that what the employees did "was a dumb thing to do" and asked if Hexter was ready to talk. Glinecke told them that Hexter instructed him not to hire back any of the employees who walked out.

The parties stipulated that the names of the employees who walked out on December 27 and who received a December 27 letter from the payroll administrator are:

Charles Bernhardt, Sr.
Sarran Doogah
Lottie Dillon
Mayra Torres
Maria Bruno
Isabella Elisio

Beverly Martinez testified for the General Counsel that she was also one of the Division 3 employees who walked out on December 27 and who heard Glinecke state, on December 28, that Hexter would not hire back those who had walked out. It is not clear whether she was sent a letter from the payroll administrator as the others were sent.

There may have been other day-shift employees who joined in the December 27 walkout.[2]

On January 9, 1985, nine employees signed a letter sent to Hexter seeking to talk to him about plant conditions and also stating that they wanted their "jobs back." That letter was offered by the General Counsel to demonstrate that the employees who walked out on Decem-

[2] At one point in the hearing, the General Counsel asserted that a day-shift employee, Michele Tirado, had also been unlawfully discharged on December 27 because she joined in the walkout that day. The testimony offered by Respondent, however, established that Tirado had been laid off for lack of work on December 21 and thus was not even at work on December 27. On the record before me, I find that she did not participate in the December 27 walkout. I cannot say, based on the record herein, however, that only the ones named above did.

ber 27 did not thereby quit.[3] There is no allegation that on January 9, 1985, they were unlawfully refused reinstatement.

B. *Analysis*

Respondent contends first that the General Counsel failed to offer credible evidence that the employees were engaged in a concerted act as, in Respondent's view, the evidence established that the Charging Party effectively manipulated the employees because he had been passed over for promotion. That contention is without merit and is based solely on Respondent's speculation.

Respondent next asserts that the December 27 walkout was unprotected as, in its view, Respondent was not given timely notice of the employees' intention to engage in a work stoppage. The facts do not support that contention either. The credited evidence establishes that Respondent wanted to delay a walkout until after the holidays, at least. It should not be the Board's function to weigh tactical advantages either side may seek. Respondent, in its brief, extracts a quotation from the dissenting opinion in *Tri-State Truck Service v. NLRB*, 616 F.2d 65 (3d Cir. 1980), to suggest that the General Counsel here is engaged in an overly enthusiastic prosecution of a marginal case. *Tri-State* factually has little resemblance to the instant case in which employees had numerous complaints for which they sought relief. In recent and analogous cases, the discharge of employees who walked out in similar circumstances as in the instant case was held unlawful. See *Dirt Digger Inc.*, 274 NLRB 1024 (1985). See also *Seminole Mfg. Co.*, 272 NLRB 365 (1984). Thus, I find that the employees involved herein did not quit their employ but, instead, had been discharged on December 27 because they engaged in concerted activities protected by Section 7 of the Act.

[3] One of the nine who signed was Charles J. Bernhardt Jr., the son of the Charging Party. Other testimony before me establishes that he was among the employees present on December 28 when Glinecke informed them that Hexter would not take them back. It appears, however, that he may not have been sent a December 27 letter from the payroll administrator referred to above. I find that the General Counsel has made out a prima facie case that Bernhardt Jr. was among the employees who walked out on December 27 and who were informed the following day that they thereby would not be taken back. The Januray 9, 1985 letter also was signed by Michele Tirado, whose status is discussed, supra.

Conclusions of Law

1. Respondent is an employer engaged in commerce as defined in Section 2(2), (6), and (7) of the Act.

2. Respondent has committed an unfair labor practice violative of Section 8(a)(1) of the Act, by having discharged Division 3 day-shift employees who engaged in a work stoppage on December 27, 1984, including Charles Bernhardt Sr., Charles Bernhardt Jr., Sarran Doogah, Lottie Dillon, Mayra Torres, Maria Bruno, Isabelle Elisio, and Beverly Martinez.

3. The unfair labor practice found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act. It having been found that Respondent unlawfully discharged employees, including Charles Bernhardt Sr., Charles Bernhardt Jr., Lottie Dillon, Isabelle Elisio, Maria Bruno, Mayra Torres, Sarran Doogah, and Beverly Martinez and that it has since failed and refused to reinstate them to their former positions or equivalent positions in violation of Section 8(a)(1) of the Act, it is recommended that the Respondent be ordered to remedy such unlawful conduct.

In accordance with Board policy, it is recommended that the Respondent be ordered to offer these employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges enjoyed, dismissing, if necessary, any employees hired on or since the date of their discharges to fill the positions and to make them whole for any loss of earnings they may have suffered by reason of the Respondent's unlawful conduct, by payment to them of sums of money equal to the amounts they would have earned from the date of their unlawful discharges to the date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]

best copy available

Local 449, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) *and* National Metalcrafters, Inc.

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) *and* National Metalcrafters, Inc. Cases 33–CB–2043 and 33–CB–2044

5 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 31 January 1985 Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondents filed exceptions and a joint supporting brief and the Charging Party filed cross-exceptions. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified,[1] and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Local 449, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), their officers, agents, and representatives, shall take the action set forth in the Order.

Barbara S. Van Auken, Esq., for the General Counsel.
Robert C. Long, Esq., for the Charging Party.
Michael B. Nicholson, Esq. and *Ann C. Hodges, Esq.*, for the Respondent Unions.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Adminstrative Law Judge. This[1] consolidated proceeding was litigated before me at Rockford, Illinois, on October 18, 19, 22, and 23, 1984, pursuant to charges filed and served on November 14, 1983, and a consolidated complaint issued on January 30, 1984, and amended both before and at the hearing, which alleges that both Respondent Unions (Local 449 and the International) have maintained an unlawful restriction on members' rights to resign their union membership; have unlawfully refused to honor or accept such resignations tendered to them; and have unlawfully threatened resigned employees with internal union charges for crossing a picket line. Local 449 and the International deny the commission of unfair labor practices, and advance the affirmative defenses that the complaint is barred by Section 10(b) of the Act, the doctrine of laches, and the doctrine of res Judicata and/or collateral estoppel.

On the entire record,[2] and after considering the testimonial demeanor of the witnesses and the posttrial briefs, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION AND LABOR ORGANIZATIONS

The pleadings established that the employer involved meets the Board's jurisdictional standards and is an employer engaged in commerce with the meeting of Section 2(6) and (7) of the Act. Local 449 and the International are each a labor organization within the meaning of Section 2(5) of the Act.

[1] As noted by the judge, the Respondent Local's executive board, by letter sent 2 November 1983, notified the employees that it had "approved" the internal union charges filed concerning their resignations and that such charges would be "administered" under the International constitution. The judge concluded that the letter did not violate Sec. 8(b)(1)(A) of the Act. Although we do not find a separate violation of Sec. 8(b)(1)(A) based on the letter, we note, as the judge found that the letter was the first notification to the employees that their resignations had not been accepted and we conclude that the letter was part and parcel of the Respondent's unlawful refusal to accept the employees' resignations from union membership.

We also disagree with the judge's finding that the evidence does not establish that the Respondent Local's executive board is an agent of the Respondent International Union. The executive board represents the Respondent Local between membership meetings when urgent business so requires and, as found by the judge, for the purpose of receiving resignations the executive board is clearly an agent of the Local. Because, as the judge also found, the Local is an agent of the International it follows that the executive board is also an agent of the Respondent International Union.

In affirming the judge, we find it insignificant that the constitutional provision restricting resignations cannot be enforced by the imposition of fines. In *Sheet Metal Workers Local 73 (Safe Air)*, 274 NLRB 374 (1985), we reaffirmed our holding in *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), approved by the Supreme Court in *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), that *any* restriction on resignation from union membership is invalid, irrespective of the period of restriction, and that the mere maintenance of a constitutional provision restricting resignation restrains and coerces employees from exercising their Sec. 7 rights. Because the Respondents in this case have maintained a provision restricting the submission of resignations to a 10-day period, we agree that they have violated Sec. 8(b)(1)(A) and that the entire provision as it pertains to the restrictions is invalid.

[2] The judge also ordered the Respondents to expunge from the constitution of the International Union and any other of the governing documents of Local 449 and/or the International in which it may appear art. 6, sec. 17, of the constitution of the International Union. We agree. See *Auto Workers Local 73 (McDonnell Douglas)*, 282 NLRB No. 64 (Dec. 18, 1986), in which we ordered expunction of the same provision and in doing so elaborated on the reasoning of *Neufeld*, supra.

[1] The transcript of record, which reflects the case numbers as "30–CB–2043 and 30–CB–2044" should be corrected wherever the error appears to read "33–CB–2043 and 33–CB–2044."

[2] Certain errors in the transcript are noted and corrected.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Relevant Facts and Law*

Local 449 and the International were each a signatory party to a collective-bargaining agreement covering the production and maintenance employees of Keystone Consolidated Industries, Inc., of which the Charging Party is a division, who are employed at Rockford, Illinois plants, including that of the Charging Party. The agreement expired on April 13, 1983, by its terms, but was extended through April 16, 1983, by agreement of all parties to the contract. No new agreement was reached and a strike was voted for by members of Local 449 and authorized by the International. A picket line was established and the strike and picketing of the Rockford plants previously referred to commenced about April 19, 1983, and was continuing at the time of the hearing.

During the strike employees submitted resignations from union membership. The constitution of the International Union adopted in May 1983 and the previous one adopted in June 1980 contain an identically worded section, denominated article 6, section 17, in both, reading as follows:

> A member may resign or terminate membership only if s/he is in good standing, is not in arrears or delinquent in the payment of any dues or other financial obligations to the International Union or to her/his Local Union and there are no charges filed and pending against her/him. Such resignation or termination shall be effective only if by written communication, signed by the member and sent by registered or certified mail, return receipt requested, to the Financial Secretary of the Local Union within the ten (10) day period prior to the end of the fiscal year of the Local Union as fixed by this Constitution, whereupon it shall become effective sixty (60) days after the end of such fiscal year; provided, that if the employer of such member has been authorized either by such member individually or by the Collective Bargaining Agreement between the employer and the Union to check off the membership dues of such member, then such resignation shall become effective upon the effective termination of such authorization, or on the expiration of such (60) day period, whichever is later.

The bylaws of Local 449 expressly provide: "The Constitution of this organization shall be the Constitution of the International Union, UAW, and these By-Laws shall be in all respects subordinate to said Constitution and all applications and interpretations thereof." The testimony before me established that Local 449, as this quotation provides, does indeed conduct its affairs in accord with the provisions of the International constitution, and looks to that document for guidance in so doing.

The maintenance of article 6, section 17, by the International and Local 449 is a violation of Section 8(b)(1)(A) because it places unlawful restrictions on union members' right to resign. The Board has recently held that union members have a right to resign from membership, and a union cannot lawfully restrict that right. The restrictions on resignation set forth in article 6, section 17, of the Unions' constitution are therefore invalid under *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), and the mere maintenance of such restrictions violates Section 8(b)(1)(A) of the Act. *Engineers & Scientists Guild (Lockheed-California)*, 268 NLRB 311 (1983); *Typographical Union (Register Publishing)*, 270 NLRB 1386 (1984).

The complaint alleges that Local 449 and the International have refused to honor or accept resignations from the members named below because those resignations did not comply with article 6, section 17, of the International constitution.[3] Set forth after each employee's name in the first column of dates is, in most cases, the postmark date on his or her letter to Local 449 notifying Local 449 of the sender's desire to resign or, as some writers put it, withdraw from union membership. The date following Robert Bartell's name is the date of mailing to which he credibly testified. There was no proffer of any letter of resignation from Gary Hare or Jody Wills. Although Local 449 has letters of resignation in its possession from Gerald Cole and Don Smith, they are not dated. The postmark on Rudi Sobirai's envelope containing his letter of resignation is unreadable, thus the date on the letter appears after his name. With respect to Joe Avendano, Leonard Forsell, Patrick Horkheimer, Andrew Larson, Pat Smith, and Charles Woodard, no envelopes were produced for their letters of resignation, and I have therefore set down after their names the dates they wrote on the letters. The letter of Larry Hare was mailed to National Metalcrafters, but was in Local 449's possession at the time of the hearing. Perry Wilhite resigned by telegram. The second column contains the dates of rehire[4] for these employees.

	Dates of Resignation letters or mailing dates	*Rehire date*
Joe Avendano	5/20/83	5/23/83
Robert Bartell	6/27/83	9/27/83
Roger Bougord	5/20/83	5/23/83

[3] The fact that the resigning members submitted their resignations in writing, and many by certified mail, return receipt requested, persuades me they were aware of the constitution's requirements, but whether members had sufficient notice would make no difference in this case because the restrictions on resignation in art. 6, sec. 7, of the International constitution are invalid and unenforceable. *Newspaper Guild Local 47 (Pulitzer Publishing)*, 272 NLRB (1984); *Newspaper Guild Local 3 (New York News)*, 271 NLRB 1251, 1252 fn. 8 (1984).

[4] The Company's records report them as "rehire" rather than "return" or "recall."

	Dates of Resignation letters or mailing dates	*Rehire date*
Teri Casas	5/4/83	5/2/83
Julie Chorak	4/30/83	5/2/83
Gerald Cole	undated	7/5/83
Dan Cooper	10/7/83	10/10/83
Harold Cooper	9/30/83	10/3/83
Darrell Danekas	5/2/83	5/2/83
Roy Davis	4/30/83	5/2/83
Mary Ferdon	5/2/83	5/2/83
Leonard Forsell	9/6/83	9/6/83
Larry Gulley	5/31/83	5/31/83
Billy Haggard	4/30/83	5/2/83
Koren Haggard	4/30/83	5/2/83
Gary Hare	none	5/2/83
Larry Hare	4/30/83	5/2/83
Dave Hawkins	10/24/83	10/24/83
Sheila Hoffman	4/30/83	5/2/83
Patrick Horkheimer	9/29/83	9/29/83
Virginia Hunt	5/2/83	5/2/83
Andrew Larson	9/7/83	9/8/83
Juanita Lawrence	4/30/83	5/2/83
Lawrence Lewis	5/3/83	5/2/83
Wesley Kleasner	10/7/83	10/10/83
John Marks	11/1/83	11/1/83
Wanda McClard	8/8/83	8/8/83
LaVerne Melvin	5/2/83	5/2/83
Ron Olthoff	4/30/83	5/2/83
Brenda Parham	6/8/83	6/1/83
Shirley Phillips	5/2/83	5/2/83
Larry Simmins	5/16/83	5/16/83
Don Siemens	8/3/83	8/4/83
Curtis Smith	5/3/83	5/2/83
Don Smith	undated	10/24/83
Pat Smith	9/27/83	9/28/83
Rudi Sobirai	8/24/83	8/29/83
Perry Wilhite	6/6/83	7/11/83
Jody Wills	none	7/5/83
Charles Woodard	8/27/83	8/29/83
Juanita Woods	5/5/83	5/2/83

Certain other members of Local 449, including its president, Stanley Mayer, and its vice president, Jerry Fields, filed charges against all those above named except John Marks on October 3, 1983, for engaging in conduct unbecoming a member, such conduct being resigning from Local 449 improperly under article 6 of the International constitution and crossing the picket line to perform work while a strike against the Employer was in progress. On November 2, 1983, the executive board of Local 449 "approved" the charges and directed that they be administered as set forth in article 31 of the International constitution. One must not place too much emphasis on the use by the executive board of the word "approved" because other record evidence makes it clear that it does not take a position on the merit of the charges, but only certifies that the charges may be brought under existing provisions of the International constitution. Pursuant to its "approval" of the charges, the executive board, on November 2, 1983, sent the following letter, on Local 449 letterhead in a Local 449 envelope, to all of the members listed above in column A except possibly Gerald Cole and Koren Haggard:

> The Executive Board of Local 449 on November 2, 1983, approved charges filed by the Members of Local 449 against you for engaging in conduct unbecoming a member of said Local Union.
>
> The charges are resigning from Local 449 UAW improperly under Article 6 of the UAW International Constitution and crossing the picket line to perform work while a strike against the employer, National Metalcrafters is in progress.
>
> These charges shall be administered as per Article 31 of the UAW International Constitution.
>
> The Executive Board
> Local 449

Nine addressees[5] did not claim or open their letters and they were returned to the sender. The fact the letter was directed to all the employees named above obviously established that their resignations had then been received by Local 449.

[5] Robert Bartell, Harold Cooper, Mary Ferdon, John Marks, Curtis Smith, Donald Smith, Pat Smith, Juanita Woods, and LaVerne Melvin.

The complaint alleges that both unions, by Local 449's executive board, on November 2, 1983, threatened the employees named above in column A with internal union charges for crossing the picket line. The threat is allegedly contained in the November 2 letter quoted above. Apart from the failure of the evidence to support the General Counsel's contention that the executive board is an agent of the International,[6] all the letter does is advise the charged member that a charge had already been filed. The executive board is required by article 31 of the International constitution to give such notification. I cannot believe the General Counsel is contending that a charged member should not be notified of the charge, and the notice of a charge already filed is hardly a threat of a charge. The letter contains nothing of a threatening nature and does not violate Section 8(b)(1)(A) of the Act.

None of the charged members have appealed the executive board's action set forth in its November 2 letter. Neither Union has taken any further action on the charges. No fines have been imposed and none can be imposed on the charged members because a constitutional convention was held from May 15 to 20, 1983, during which the International constitution was amended to eliminate all provisions for fining members, and to expressly set forth the only action that can be taken against a member found guilty as charged, which is suspension or removal from union office or suspension or expulsion from membership.

The Respondents' contention that their inability to levy fines against the resigning members is a defense is without merit. The controlling rule set forth in *Neufeld Porsche-Audi*, supra, is that a union may not place restrictions on a member's right to resign. Whether charges are filed or fines levied is only significant in that they may be coercive restrictions on the exercise of that right. The refusal to honor a resignation tendered, without more, violates the Act, and an issue in this case is whether there has been a refusal to honor the resignations. The resignations, as the executive board letter of November 12 acknowledges, reached Local 449. I am also persuaded that the filing of charges against resigning members on October 3 is evidence that resignations tendered prior to that time had been received. Many of the resignations were sent by certified mail, return receipt requested, in compliance with the directive in article 6, section 17, of the International constitution. The others were in writing,[7] but were either sent by regular mail or delivered by other unspecified means, including, in one case, by telegram. Local 449 received these resignations, and whether they were sent by registered or certified mail, requested a return receipt, or were hand delivered would seem to be of no discernible importance to the recipient inasmuch as the registry and/or certification and return receipt provisions redound to the benefit of the sender, not the receiver, by establishing receipt of the message sent. Moreover, the requirements of registry and/or certification and return receipt for written resignations are themselves restrictions on resignation that accomplish nothing but to make the process of resignation more difficult. Finally, the Board has long held "the failure of employees to follow union rules and regulations in terminating their union membership will not deprive them of the protection of the Act where they have clearly indicated they no longer wish to remain members of the Union." *Auto Workers (Paulding, Inc.)*, 130 NLRB 1035, 1043 (1961); and see *Distillery Workers Local 80 (Capitol-Husting)*, 235 NLRB 1264, 1265 (1978). For all of these reasons I conclude and find the written resignations of the employees were effective on receipt[8] and should have been honored[9] more than 6 months prior to the filing and service of the charges in this case, but this raises a question of statutory limitations because Section 10(b) of the National Labor Relations Act provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The question is whether the resignations submitted before May 14, 1983, were rejected before or after that date. The first and only communication to the resigning members with respect to their resignations was the executive board's letter of November 2, 1983, well within the 6-month period. This letter was a clear notice to the resigning members that their resignations were not being honored by Local 449. The 6-month limitation period under Section 10(b) does not begin to run until the alleged unlawful activity with which a respondent is charged becomes actually or constructively known to the person adversely affected. *Carpenters Wisconsin River Valley Council (Skippy Enterprises)*, 211 NLRB 222, 227 (1974). Accordingly, I find the 6-month limitation period on the refusal to honor the resignations began to run on November 4, 1983, the date the November 2 letters were received, because it was on that date and by that letter the employees were first put on notice that their resignations had not been accepted. The Board recently reaffirmed that a union violates Section 8(b)(1) by refusing to acknowledge the effectiveness of its members' resignations when its bylaws contain an invalid restriction on resignation. *Typographical Union (Register Publishing)*, 270 NLRB 1386 (1984). Here, the restriction is in the International constitution, which contains the rules on resignation to which Local 449 adheres and on the basis of which its executive board concluded the charges against resigning members were properly brought. Neither the International nor Local 449 has ever acknowledged the effectiveness of the resignations. I find that the failure to acknowledge the resignations or

[6] The executive board is plainly a creature constructed by Local 449, and is its agent. Local 449 bylaws specifically provide for the executive board to consist of Local 449's executive officers, and specifically set forth in detail its duties. It does not act in a vacuum, as the Respondents seem to suggest, but is an arm of Local 449 erected by that Local for specific purposes of the Local, and operates under authority delegated to it by Local 449.

[7] Whether Gary Hare or Jody Wills resigned in writing is not shown in the record.

[8] *Newspaper Guild of Local 3 (New York News.)*, 271 NLRB at 1252.

[9] The letters addressed to Local 449 or its officers and mailed are presumed to have been received in the ordinary course of mail. *Communications Workers Local 11500 (American Telephone)*, 272 NLRB 850 (1984). The presumption has not been rebutted.

notify the affected employees that the effectiveness of their resignations was still in question until November 4 was not a mere oversight but a deliberate refusal to honor the resignations. Local 449, by so refusing, violated Section 8(b)(1)(A) of the Act. Inasmuch as the International constitution and the testimony of Sam Casazza, the subregional director of the International, establishes that a resignation from membership submitted to Local 449 also constitutes a resignation from the International, Local 449 is found to be an agent of the International for the purpose of receiving such resignations. I therefore conclude and find that the International, by its agent Local 449, failed and refused to honor the resignations submitted by the employees named hereinabove and by so doing violated Section 8(b)(1)(A) of the Act.

The evidence that Casazza is an agent of Local 449 for all purposes and Meyer an agent of the International for all purposes is not particularly persuasive, but, for the purposes of this case, it is unnecessary to resolve that issue.

B. *Affirmative Defenses Raised by the Respondents*

The Respondents urge that the maintenance of the constitutional provision involved in this case for 38 years without challenge by the Board may not now be challenged due to the time limitation in Section 10(b) of the Act[10] and the doctrine of laches. It is true that the enactment of the provision long preceded the statutory limitation period and may not now be found to be an unfair labor practice. This does not, however, bar a finding that the maintenance within the period is unlawful. With respect to the laches argument it is clear, as the Charging Party points out, that a laches defense is inapplicable to the Board. *Merrell M. Williams*, 265 NLRB 506, 508 (1982). The defense of res judicata is not applicable because the issues in this case have not been litigated, and nothing substantial has been offered to support a bare claim of collateral estoppel.

The Respondents' contention that the failure of resigning members to contest the intraunion charges against them through the Union's internal appeal procedures requires dismissal of the unfair labor practice charges requires no discussion other than to say it is totally without merit. *Carpenters Ventura County Council (Commercial Constructors)*, 259 NLRB 541, 546 (1981).

CONCLUSIONS OF LAW

1. The Charging Party is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 449 and the International are labor organizations within the meaning of Section 2(5) of the Act.

3. Local 449 and the International violated Section 8(b)(1)(A) of the Act by maintaining invalid restrictions on resignations from membership.

4. Local 449 and the International violated Section 8(b)(1)(A) of the Act by refusing to accept employees' effective resignations from membership.

5. The aforesaid violations of Section 8(b)(1)(A) of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondents have not violated the Act in any other manner alleged in the complaint, as amended.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondents, Local 449, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), their officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining in their governing documents article 6, section 17, of the constitution of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW).

(b) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act by refusing to acknowledge or accept their effective resignations from membership in Local 449 and the International.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Remove from the constitution of the International Union and any other of the governing documents of Local 449 and/or the International in which it may appear article 6, section 17, of the constitution of the International Union.[12]

(b) Acknowledge and approve the resignations from membership received from the employees found in this decision to have tendered such resignations, give each of the employees written notification of the acknowledgment and approval, and dismiss any intraunion charges pending against any of them for crossing a picket line to work after submitting a resignation from union membership,[13] with written notification to them of the dismissal.

---

[10] Sec. 10(b) provides, in pertinent part, that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of the charge on the charged party.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] The removal remedy in this case does not preclude UAW local unions located in Canada and serving Canadian nationals and industries, and over which the Board has no jurisdiction, from maintaining art. 6, sec. 17 in their local governing documents.

[13] The dismissal of the pending intraunion charges for working *after* resigning from membership is essential to assure affected members such charges will not be acted on. With respect to those members who returned to work *before* the Union received their resignations, the charges filed against them for so doing may not be found by me to have been either improperly filed or improperly considered by the executive board

Continued

(c) Post at their offices and meeting halls Rockford, Illinois, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Deliver to the Regional Director signed copies of the notice in sufficient number to be posted by the employer involved, if willing.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

(*Newspaper Guild Local 3 (New York Times)*, 272 NLRB 338 (1984)), but this does not alter my finding that their resignations were effective on receipt and must be approved by the Respondents.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act by maintaining in our governing documents article 6, section 17, of the constitution of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), which reads as follows:

> Section 17. A member may resign or terminate membership only if s/he is in good standing, is not in arrears or delinquent in the payment of any dues or other financial obligations to the International Union or to her/his Local Union and there are no charges filed and pending against her/him. Such resignation or termination shall be effective only if by written communication, signed by the member and sent by registered or certified mail, return receipt requested, to the Financial Secretary of the Local Union within the ten (10) day period prior to the end of the fiscal year of the Local Union as fixed by this Constitution, whereup it shall become effective sixty (60) days after the end of such fiscal year; provided, that if the employer of such member has been authorized either by such member individually or by the Collective Bargaining Agreement between the employer and the Union to check off the membership dues of such member, then such resignation shall become effective upon the effective termination of such authorization, or on the expiration of such sixty (60) day period, whichever is later.

WE WILL NOT refuse to acknowledge or grant resignations from union membership tendered to us in writing.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our governing documents article 6, section 12, of the constitution of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

WE WILL acknowledge and grant membership resignation requests tendered to us in writing. The resignation requests previously tendered to us in 1983 by the employees named below are acknowledged and granted:

Joe Avendano	Andrew Larson
Robert Bartell	Juanita Lawrence
Roger Bougord	Larry Lewis
Teri Casas	Wesley Kleasner
Julie Chorak	John Marks
Gerald Cole	Wanda McClard
Dan Cooper	Ron Olthoff
Harold Cooper	Brenda Parham
Darrell Danekas	Shirley Phillips
Roy Davis	Larry Shimmins
Mary Ferdon	Don Siemens
Leonard Forsell	Curtis Smith
Larry Gulley	Don Smith
Billy Haggard	Pat Smith
Koran Haggard	Rudy Sobirai
Gary Hare	Perry Wilhite
Larry Hare	Jody Wills
Dave Hawkins	Charles Woodard
Sheila Hoffman	Juanita Woods
Patrick Horkheimer	LaVerne Melvin
Virginia Hunt	

WE WILL dismiss all intraunion charges filed against members who returned to work after we received their resignations from union membership.

LOCAL 449, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

Schurpack, Inc. *and* **Douglas Seiter.** Case 17–CA–12854

11 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 23 September 1986 Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Schurpack, Inc., St. Joseph, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We adopt the judge's conclusion that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by not considering employee Seiter for, and refusing to promote him to, a leadman position. In so doing, we find that the General Counsel has established a prima facie showing that Seiter's union activity was a motivating factor in the Respondent's decision. We, however, further find, based on the judge's crediting of the asserted business reason for the decision by the Respondent's owner, Harding, that the Respondent has demonstrated that it would have denied Seiter a promotion to a leadman position even absent his union activity. See *Wright Line*, 251 NLRB 1083 (1980).

[2] The General Counsel's exceptions urge modification of the recommended Order to include a provision for a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent pursuant to the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Order. Under the circumstances of this case, we find it unnecessary to include such a clause.

Constance Traylor, Esq., for the General Counsel.
William G. Haynes, Esq., Topeka, Kansas, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On a charge filed on 21 January 1986, by Douglas Seiter, an individual, against Schurpack, Inc. (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17 issued a complaint dated 4 March 1986, alleging violations by Respondent of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in St. Joseph, Missouri, on 7 April 1986, at which the General Counsel and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, is engaged, at its St. Joseph, Missouri, facility, in the manufacture of plastic film and sheeting. Annually, Respondent, in the course and conduct of its business operations within the State of Missouri, sells goods and services valued in excess of $50,000 directly to customers located outside the State of Missouri. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Teamsters Local 460, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent opened its facility in 1983, utilizing some 14 production employees. At present, there are 17 or 18 such individuals working at the plant, including 5 of the original workers.

On 2 September 1984, Soren Harding became Respondent's president. That month, he instituted lead positions, nonsupervisory in nature, and designated two production workers as leadmen. Thereafter, two additional positions were created and one of the original appointees left Respondent's employ. Accordingly, Respondent appointed leadmen on 12 December 1984, 4 February 1985, and 17 December 1985.

In the instant case, the General Counsel contends that Respondent violated Section 8(a)(3) of the Act by refusing to promote Charging Party Douglas Seiter to a lead position, in late December 1985, because of his activities on behalf of the Union. Respondent urges that Seiter was not considered for the position for lawful reasons, namely, his earlier use of illegal drugs while working at the plant. Also at issue is whether Respondent violated Section 8(a)(1) of the Act by informing its leadman, Steve Housewirth, in mid-December 1985, that he must forego union activity in order to continue in his duties as a leadman and whether, Respondent, in early January 1986, violated Section 8(a)(1) of the Act by telling Seiter

that he must forego union activity in order to obtain promotion to the leadman position.

B. *Facts*

Douglas Seiter has been employed by Respondent, as an extruder operator, since the day the plant opened in the middle of 1983. Seiter testified that, in September 1984, shortly after Soren Harding became Respondent's president, Harding met with Seiter in the presence of the plant production manager, Douglas Carver. Harding told Seiter that several employees had reported that Seiter was smoking marijuana in the plant. Harding, according to Seiter's testimony, further stated that he, Harding, had initially decided to fire Seiter but, instead, would give him another chance because he was a valuable employee. Harding told Seiter that he could keep his job if he behaved himself, straightened up, and did a good job. Seiter denied that he had smoked marijuana while at work.

Several days later, Seiter testified, he met with Carver. Carver asked the employee to confess to having smoked marijuana at work and Seiter said that he had nothing to confess. Carver said that four or five employees had stated that they did not like to work with Seiter because he was always high. Carver further said that Seiter would not be considered for appointment to future lead positions unless he confessed to smoking marijuana in the plant. Shortly thereafter, Seiter confessed.

A few weeks later, in October, 1984, Seiter and another employee contacted the Serial Workers Union for purposes of organization. They obtained authorization cards from that union and Seiter solicited the signatures of his fellow employees, at the plant, in the break room and in the parking lot. In all, some five or six employees signed cards at Seiter's behest. Seiter testified that, early in October, Carver asked him "when is the vote." Seiter asked "what vote" and Carver replied, "the union vote." Carver, according to Seiter, asked "who started this" and Seiter stated that that did not matter as it was already started. The employee told Carver that the workers wanted to meet with Harding.

The next day, Carver placed a telephone call to Seiter and talked about setting up a meeting with Harding. Seiter stated that a meeting was needed as the employees were upset about the way they were getting pushed around and threatened. When Carver asked if a meeting would do any good, Seiter said that if the employees got what they wanted from the meeting, there probably would not be a union. Carver stated that he would see what he could do and warned Seiter that if the employees signed union cards, they were subject to layoff or discharge.

Later in October, the employees ceased their organizational efforts on behalf of the Serial Workers Union and, instead, sought representation by Teamsters Local 460. On 11 October, the Union filed a representation petition with the Board and an election was conducted on 6 November 1984. Following a hearing on the Employer's objections to conduct affecting the results of the election, the Union was certified on 27 June 1985. During the course of the representation proceedings, Seiter was twice subpoenaed to testify and he showed the subpoenas to Carver. The employee did, in fact, testify on behalf of the Union at the hearing on objections.

After the Union was certified, it met with Respondent's officials, for purposes of collective bargaining, during a period of 6 to 7 months and an agreement was concluded on 1 March 1986. During negotiations, the Union's business agent, McMillan, was assisted by Seiter and employee Steve Housewirth, a leadman. On the day the contract was signed, the employees elected Housewirth as their shop steward and Seiter as assistant steward.

On 17 December 1985, Respondent decided to appoint employee Carey Williams to a lead position. Thereafter, early in January 1986, Seiter met with Carver and asked why he, Seiter, had not been awarded the position. According to Seiter's testimony, Carver stated that, as he had told employee Housewirth, "you can't be a leadman and a union steward at the same time." Seiter pointed out that he had not, at that time, been designated a steward and he asked Carver if the matter had anything to do with his union activities. Carver, Seiter testified, stated that Seiter should "take it for what it's worth" and added that "besides, I can work better with Carey Williams than I can with you." Seiter further testified that, on a prior occasion, Carver had told him that he had no chance for a lead position because he had smoked marijuana in the plant.

Steve Housewirth, like Seiter, has been employed by Respondent since the 1983 opening of the plant. In December 1984, he was appointed to a leadman position and, as noted, he served on the Union's negotiating committee, beginning in September 1985. Housewirth testified that he met with Carver in the middle of December 1985, at which time Carver told him, "By the way, Steve, if and when the Union does get in, you're going to have to make a choice. You either will have to be a leadman or shop steward. You can't be both." Housewirth responded, stating that the stewards had not yet been selected. Carver said that Housewirth would have to think about it. Housewirth further testified that, on 1 March 1986, the day he was elected Steward, he met with Harding and Carver and asked if this would cause any problems. Both Harding and Carver stated that there would not be a problem.

Carver testified that, at the time Harding assumed the presidency, in September 1984, Respondent was experiencing low productivity and running an inordinate amount of scrap. Shortly after Harding arrived, he told Carver that he had caught employees "smoking something" in the plant and that Seiter was involved.

Carver denied Seiter's account of their early January 1986, conversation. According to Carver, when Seiter asked why Williams had been chosen as leadman, Carver pointed to Williams' educational background and his experience as a tool and dye maker. Seiter asked if the fact that he, Seiter, had not been selected had anything to do with his union activities and Carver said, no.

With respect to the December 1985 meeting of Carver and Housewirth, Carver testified that, at that time, Housewirth asked if working as a leadman and, at the same time, serving on the Union's negotiating committee,

created a conflict of interest. Housewirth also stated that he feared that his union activities would prove detrimental to future advancement with the Company. Carver stated that he did not make decisions regarding promotions and he asked Housewirth why he felt there was a conflict. Carver further testified that, at the 1 March 1986 meeting, attended by Harding, Carver, and Housewirth, Housewirth spoke about his impending selection as steward and voiced the fear that there would be a conflict of interest in light of his leadman position. Harding said tht he saw no difficulty whatever and he assured Housewirth that the Company would work with him.

Harding, too, testified about the productivity and quality problems faced by Respondent at the time he assumed the presidency on 2 September 1984. He further testified that, in mid-September, he walked into the plant and believes he saw Seiter smoking marijuana. The next day, two employees reported to Harding that Seiter had, in fact, been smoking marijuana in the plant.[1] At that time, Harding decided to institute the lead positions "so that we didn't have the guys do things like that while they were supposed to work." Harding appointed the first two leadmen on 17 September, and he conducted an employee meeting at that time to announce the appointments. He also told the employees that Respondent would not stand for drug use in the plant and that, thereafter, individuals so involved would be discharged.

Finally, Harding testified that he had not given consideration to Seiter when he selected the leadmen. Thus, he testified, Seiter was the reason that the leadman positions were instituted in the first place, to prevent drug abuse in the plant following Seiter's activities in that regard.

C. *Conclusions*

Seiter and, particularly, Housewirth, impressed me as honest and forthright witnesses in possession of clear recollections of their December 1985 and January 1986 conversations, with Carver. Carver did not impress me as a witness attempting truthfully to relate the facts. His testimony concerning the conversations with Seiter and Housewirth was more vague than the testimony of those employees and Carver, generally, exhibited a selective memory of the details of events. In light of these factors, I credit the testimony of Seiter and Housewirth and, based thereon, find and conclude that Respondent, in December 1985 and January 1986, violated Section 8(a)(1) of the Act by informing employees that they must forego union activity in order to attain or retain the position of leadman, a unit position.

I found Respondent's president, Soren Harding, to be an honest and believable witness. His testimony was in harmony with the general flow of events and it contained the ring of truth. Harding's testimony establishes that, in September 1984, Respondent formed the belief that Seiter had engaged in serious misconduct. Thereafter, and during the periods both preceeding and following Seiter's union activities, Respondent did not give consideration to Seiter for leadman positions because of its belief that Seiter had engaged in misconduct. Thus, Respondent has shown that, even if Seiter had not engaged in protected activities following the September 1984 drug incident, it would have denied to him designation as leadman. I find and conclude that Respondent did not violate the Act in that regard.

[1] Harding later learned of Seiter's confession to Carver.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent, Schurpack, Inc., is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local 460, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By informing employees that they must forego union activity in order to attain or retain the position of leadman, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Schurpack, Inc., St. Joseph, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that they must forego union activity in order to attain or retain the position of leadman.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Post at its St. Joseph, Missouri, facility, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT inform employees that they must forego union activity in order to obtain or retain the position of leadman.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

SCHURPACK, INC.

Baton Rouge General Hospital *and* Service Employees' International Union Local 275, AFL-CIO. Cases 15-CA-8016, 15-CA-8050, 15-CA-8050-2, and 15-RC-6750

12 March 1987

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 9 July 1982 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order.[4]

[1] We deny as lacking in merit the Respondent's motion to dismiss or to remand the petition in Case 15-RC-6750.

We assert jurisdiction over the Respondent because we find that it was not, as alleged by the Respondent, a political subdivision of the State of Louisiana. See *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971). We note that jurisdictional concerns raised in *National Transportation Service*, 240 NLRB 565 (1979), recently reiterated in *Res-Care, Inc.*, 280 NLRB 670 (1986), are not present here given the record evidence and the nature of the Respondent's jurisdictional arguments.

[2] The judge erroneously stated that Charles Hamilton had occasionally written up employees for disciplinary action. We find the error to be nonprejudicial because Hamilton's duties were otherwise sufficient to establish his supervisory status.

The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's findings of 8(a)(1) interrogations, we rely on the standard set forth in *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), and *Rossmore House*, 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985).

Chairman Dotson disagrees with his colleagues' adoption of the judge's 8(a)(1) interrogation findings with respect to employees Jacqueline Jones, Bertha Smith, and Yolanda Scott. In accord with the principles of *Sunnyvale* and *Rossmore*, he would find that none of the three supervisor-employee conversations at issue took place in coercive circumstances.

Inasmuch as we agree with the judge's conclusions that the Respondent engaged in objectionable conduct when the Respondent threatened employees with the loss of benefits and coerced employees against the Union during the critical period, we find it unnecessary to pass on whether the Respondent's director of material management's comments about replacing employees if they went on strike were objectionable.

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) by threatening employees with loss of jobs if they joined or assisted the Union, Member Babson relies only on the remarks by Supervisors Alexander and Betz to employee Wilson on 12 February and in mid-February 1981, respectively.

[4] In response to the General Counsel's exceptions, we shall modify the notice to include a provision remedying the Respondent's unlawful assignment of more difficult jobs to employee Susan Quiett because she engaged in union activities.

[5] We agree with the judge that the Respondent committed objectionable conduct during the critical period that warrants setting aside the first election and directing a new election. In reaching that conclusion, we note that this case is distinguishable from *Clark Equipment Co.*, 278 NLRB 498 (1986), in which the Board found that certain isolated 8(a)(1) violations in a unit of more than 800 did not warrant setting aside the election. Here the violations included two violations of Sec. 8(a)(3)—the layoff of employee Warner Wilson because of his extensive union activities and the imposition of more onerous work assignments on employee Susan Quiett after she was seen handbilling in support of the Union. Such violations are, by their nature, not fleeting in their effects, and they are unlikely to escape the notice of fellow employees. This is thus not a case in which "it is virtually impossible to conclude that the misconduct could have affected the election results" (*Clark Equipment Co.*, supra, 278 NLRB at 505), and therefore not a case in which we may properly depart from our usual policy, set out in *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962), of directing a new election when an unfair labor practice has been committed during the critical period.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Baton Rouge General Hospital, Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice shall be substituted for the one recommended by the judge.

[Direction of Second Election omitted from publication.][5]

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate you about your union sentiments.

WE WILL NOT threaten you with loss of jobs if you join or assist Service Employees' International Union Local 275, AFL-CIO or any other labor organization.

WE WILL NOT threaten you that you will not be allowed to discuss work scheduling problems if the Union is selected as your representative.

WE WILL NOT threaten you that, if the Union is selected as your bargaining representative, you will not be able to work overtime, adjust work schedules, or come to supervision with your problems or complaints.

WE WILL NOT assign you more difficult work assignments because or your union activities.

WE WILL NOT layoff or refuse to reinstate you because of your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Warner Wilson immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make Warner Wilson whole for any loss of earnings he may have suffered by reason of our discrimination against him, with interest.

WE WILL expunge from our records any reference to the layoff of Warner Wilson and WE WILL notify him in writing of our action in that regard.

BATON ROUGE GENERAL HOSPITAL

Charlotte N. White, Esq., for the General Counsel.
James D. Carriere, Esq., for the Respondent.
Michael J. Meyers, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Baton Rouge, Louisiana, on February 8 through 11 and March 1 through 3, 1982. The charge in Case 15-CA-8016 was filed on January 27, 1981. A complaint in that case issued on March 3, 1981. The charge in Case 15-CA-8050 was filed on February 18, 1981, and amended on February 26, 1981. The charge in Case 15-CA-8050-2 was filed on March 29, 1981. The complaint in those two cases issued on April 10, 1981. An order consolidating the three above unfair labor practice cases issued on April 10, 1981. On June 19, 1981, a Supplemental Decision and Order directing hearing on objections issued in Case 15-RC-6750. On June 22, 1981, an order issued consolidating the three above unfair labor practice cases and Case 15-RC-6750. On January 27, 1981, the Regional Office issued amendments to the above-mentioned complaints.

The Supplemental Decision and Order directed a hearing on the following "objection to conduct of election" filed by the Union following a May 7, 1981 secret-ballot election conducted by Region 15 of the National Labor Relations Board:

> (1) Management, it officers, agents and representatives threatened employees with the loss of benefits and possible loss of jobs if they voted for SEIU, Local 275.
>
> . . . .
>
> (3) Employees were threatened with loss of previously enjoyed benefits for engaging in protected, concerted and/or union activities.
>
> . . . .
>
> (9) Agents of management continue to coerce workers against the union from about February 9, 1981, through May 7, 1981, reference:
> Consolidated Complaint No. 15-CA-8050 and 15-CA-8050-2 issued by the Regional Director, Fifteenth Region dated April 10, 1981.

The complaint alleged numerous independent 8(a)(1) violations and 8(a)(3) allegations including denying an employee a merit wage increase, laying off eight employees, changing work assignments of one employee, and terminating another employee.

FINDINGS OF FACT[1]

During the hearing the parties stipulated that the following individuals were, at material times, supervisors and agents:

David Frank Robertson[2]—(Housekeeping)
Gayle Caillouet—(Nursing Services)
Tom Alexander—(Vice President)
Gerald Colston—(General Stores)
Tom Webb—(Vice President of Employee Relations)
Claude Kilpatrick—(President-until January 1982)
Joann Lappin—(Nursing Services)
George Munn—(Director of Material Management)
Tom Sawyer—(Vice President)
Shelia Jacobs—(Public Relations Director)
Tom Hagen—(Vice President)
James Walters—(Administrative Director of Radiology)
Joyce Burkeen—(Director of Nursing)
William Snider—(Director of Environmental Services)
Dorothy Jones—(Director of Housekeeping)
Gladys Couraville—(Housekeeping)

---

[1] Through its answer as amended and through stipulations, Respondent admitted the commerce allegations in the complaint. The complaint alleges, Respondent admits, and I find that, at all times material, Respondent, a Louisiana corporation with a hospital facility located in Baton Rouge, Louisiana, provided nursing and health care services and, during the past 12 months, a representative period, Respondent purchased and received goods and materials valued in excess of $50,000 from points located directly outside the State of Louisiana.

At the hearing, Respondent also admitted, and I find, that the Charging Party (the Union) is, and has been at all times material, a labor organization within the meaning of Sec. 2(5) of the Act.

Despite the above, Respondent contends the Board lacks jurisdiction on the ground that it is a political subdivision of the State. Respondent offered evidence showing it benefited from a $20 million bond issue from the East Baton Rouge Parish Hospital Service District No. 2 and that authority, which is composed of five commissioners, was created by the East Baton Rouge city-parish government pursuant to authority created by an Act of the legislature of the State of Louisiana. All the five commissioners were, at material times, members of Respondent's (the corporation) 45-member board of trustees. Moreover, 4 of the 5 commissioners are on the 21-member board of Respondent's hospital (Baton Rouge General Hospital). However, there was no showing that District 2, or any other political subdivision controls, to any extent, Respondent's employees' terms and conditions of employment. In fact, the record clearly revealed, and I find, that Respondent retains sufficient control over its employees' terms and conditions of employment so as to be capable of effectively bargaining with a representative of the employees (*National Transportation Service*, 240 NLRB 565 (1979)). I find that Respondent is not a political subdivision but is an employer within the meaning of Sec. 2(6) and (7) of the Act, and subject to the Board's jurisdiction.

[2] Throughout the record this particular supervisor is identified as David Robinson. I have referred to him as David Robertson in view of his spelling of the name in conference reports signed by him.

Loren Beard—(Central Supply)
Nella Guilbeau—(Nursing Services)
Gloria Cyrus—(Housekeeping)
Hilda Dewesse—(Assistant Director of Nursing)
Louis Champagne—(Director of Personnel)
Larry Betz—(Laundry)
Robert Mancell—(Chief X-ray Technician)
Ernest Peters—(General Stores, Assistant Supervisor)
Linda James—(Assistant Director for Food Services)
Betty Falgout—(Director of Nursing CDU)
Linda Alumbaugh—(Director of Chemical Dependency Unit)
Era McRae—(Supervisor)
Melda Pace—(Director of Housekeeping)
George Miley—(Director of Laundry)
Eva Lewis—(Housekeeping)
Betty Ward—(Assistant Director of Nursing Services)

I. THE 8(A)(1) ALLEGATIONS[3]

The 8(a)(1) allegations are considered below regarding the named supervisors:

A. *Gerald Colston*

Former employee Yolanda Scott testified that she had a conversation with Gerald Colston in his office in "January 1981 about two or three weeks at the beginning of January," and "Mr. Colston asked me if I knew about the union and I said to Mr. Colston that I did, but I hadn't participated in the union activities because of the illness I had in my family." Scott also testified about Colston, "He also asked me if I knew Susan Quiett; and I told him that I did know Susan Quiett, personally I didn't; I knew her sister real well." She went on to testify Colston "asked me if I was for the union; and I told him that I hadn't made a decision yet, whether I was going to, you know, vote yes or no on that."

Scott stated, "After [Colston] asked me if I knew Susan Quiett and I said that I didn't know her personally, that I knew her sister—he said that some black people be going around talking about things they didn't know what they were talking about." Scott asked Colston, "What did he mean," and "He said when he worked at the Uniroyal plant that the black people, you know, black guys that he was working with were striking and didn't know what they were striking for." "And he said black people nowadays go around talking about a lot of things they don't know what they are talking about. And he said Susan going pushing the union and she doesn't know anything about the union or she doesn't know anything about what she is talking about." On cross-examination, Scott testified that Colston "Asked me if I had been to any of the union meetings and if I were for the union." "I told him that I hadn't been to any of the union meetings because I had illness in the family. My grandmother was real sick in the hospital at the time." "But I was communicating with the people that had been at the meetings every week. And he asked me if I was for the union. And I also told him that I hadn't made my decision yet, or whether I was for the union but I was best for whatever best for me."

Former employee Susan Quiett testified that she attended a meeting conducted by Gerald Colston and "also Donald from pharmacy" around the end of January or the beginning of February. Quiett testified that an assistant supervisor, Lawson, was also present along with five employees from housekeeping and nursing services. Quiett testified that Colston:

> Told us that he was involved in a chemical plant that had a union and that they were trying to get a union, but then things didn't go the way the union wanted. And he said that the union took the employees out on strike.
>
> He said the union could do all sort of things and some bad things. He told us that if the union comes in—if the union is voted in we would start out with zero—and he held up a blank sheet of paper. And he also told us that different companies that had unions or that was trying to get a union that the benefits we had now we won't have if the union is voted in. And that they will have people to replace us.
>
> He said people they would hire to replace us, they would be by the experience they had, would decide who would get our jobs.

Susan Quiett also testified she had a conversation with Gerald Colston about 2 weeks before she was laid off on February 20, 1981, that Colston approached her as she was coming out of the cafeteria. Quiett testified that Colston said to her:

> Susan, I would like to talk to you. So he brought me to the side and he asked me if I knew what I was doing. And I said yes. And he said, what do you think the union can do for you?
>
> And I said the union can do great things for me. And he said, well, why do you feel that the union can do good things for you? And I said, because the union can give me better working conditions. And he went on to say that the union can also take your job and he said when we go out on strike we will not get paid while we are on strike. He said that they will have people to replace us.

In regard to alleged conversations which Colston had with Yolanda Scott, Colston testified that he had conver-

[3] Numerous 8(a)(1) allegations were also alleged by the Union to constitute objectionable conduct. Those include allegations considered below regarding Supervisors Tom Sawyer, Betty Falgout, Hilda Dewesse, Tom Alexander, Tom Webb, Louis Champagne, Claude Kilpatrick, Larry Betz, David Frank Robertson, Loren Beard, Gayle Caillouet, Nella Guilbeau, and Shelia Jacobs. Additionally, it was alleged that Respondent committed objectionable conduct by changing its policy to provide free parking to its employees, by denying an employee a merit wage increase (also alleged as an 8(a)(3) violation), and by laying off eight employees (8(a)(3) allegations).

Note: Re Shelia Jacobs: The complaint allegations refer to Alexander Jacobs. However, the supervisory stipulation shows only Shelia Jacobs. The evidence demonstrates that two supervisors, Alexander and Jacobs, conducted one of the group meetings. As shown below, my findings herein reveal that the speakers at the group meetings whether Jacobs or other supervisors, used prepared text. Therefore, the confusion regarding Jacobs name neither adds nor detracts from my overall finding. My findings as to Jacobs are included within the section dealing with the allegations referring to Tom Alexander.

sations with Scott "But the same conversation I had with all the other employees I spoke to. So, if you're asking if whether or not Ms. Scott had a special conversation with me about the union, no." Colston was asked if he ever asked Scott "if she was for the union?" Colston replied that he had not. He testified that Scott would only say that "my husband does not want me to get involved with the union." Colston testified he did not ever recall asking Scott if she knew Susan Quiett and he testified that to the best of his knowledge that he never told Yolanda Scott that Susan Quiett does not know anything about the Union or does not know anything that she is talking about.

Colston admitted giving group talks to employees at the hospital but he testified that he simply read the material from the prepared text.

Colston denied having a conversation with Susan Quiett as she was leaving the cafeteria. He admitted that on one occasion he saw Susan Quiett on the elevator and that she was crying. Colston testified that he inquired of Susan Quiett about what was wrong and her answer was "That's why we need the union in this damn place. And that is as much as she would say." Colston asked Quiett if she felt like talking about it and she said no. According to Colston, that was the extent of this conversation with Susan Quiett. Colston was asked if he questioned Susan Quiett, "Why do you feel that the union can do good things for you?" He replied, "Not that I recall." Colston denied telling Susan Quiett in his conversation with her that the Union can take your job and that when you go out on strike you will not get paid and that they will have people to replace you.

Discussion

1. The group meetings[4]

Susan Quiett testified regarding a meeting she attended and conducted by Colston, which she referred to as the first of Respondent's speeches to its employees. The written text that Colston testified he read to the employees is in evidence. Quiett's testimony, although remarkably similar to the written text, contains comments by Colston that would constitute predictions of disadvantages which would result from unionization. According to Quiett, Colston indicated that employees would lose benefits and employees would be replaced.

On the other hand, the written text states, inter alia, that bargaining begins at the zero point and everything you currently have would go on the bargaining table and be subjected to the give and take of bargaining. The text then points to examples of loss of benefits, including a specific case where employees' pay was reduced through bargaining. The text also points out that the only weapon the Union has to try and force its demands is to strike. It then illustrates that strikers will not be paid nor will they receive other benefits and the employees "could lose your job" because they could be replaced during an economic strike.

I am convinced that Quiett's testimony reflects her recollection of what Colston meant in the group meetings. However, in view of Colston's testimony and the entire record, including my observations in footnote 4 above, plus the close similarities between the text and Quiett's recollection, I find that the text was actually followed by Colston.[5]

2. Yolanda Scott and Susan Quiett

Gerald Colston denied having conversations with Scott and Quiett to the extent of their respective testimony. I am persuaded, on the basis of the demeanor of the witnesses and the entire record, that Scott and Quiett should be credited over the testimony of Colston regarding those conversations. In considering this credibility issue, the background of the employees union activity is of particular importance. Susan Quiett was a visible union supporter. Perhaps her most visible activity was her handbilling for the Union across from the hospital by the "new parking lot." Her handbilling, which started on December 7, 1980, and occurred on three or four occasions before her February 20, 1981 layoff, was observed by supervisors of Respondent. Against that background,

[4] The unfair labor practice allegation apparently involved only the first of several addresses to employees. Although different groups were addressed at various times, the same address was used for each of these groups. Subsequently the same process was repeated with different speeches. A consensus of the testimony from witnesses of all three parties convinces me that in each of the first group of meetings several employees were addressed by two representatives of Respondent, and those representatives received from Respondent prepared texts for their addresses to the employees. Respondent's witnesses, identified as speakers in those meetings, indicated that they spoke from a prepared text which, on its face, dictated which of the two speakers presented pertinent parts of the address. Respondent's witnesses admitted answering employee questions during those meetings and one witness for the General Counsel, Warner Wilson, indicated in his testimony that he questioned the speakers during the course of the address. However, with the exception of Wilson, none of the witnesses for the Union or the General Counsel demonstrated by their testimony that the allegedly unlawful comments during the meeting arose in response to employee questions.

In considering the credibility of the group's meetings testimony, I must and do consider that the evidence establishes that all the speakers were presented with prepared texts for those meetings. Obviously, in the absence of other factors, a witness that has available for pretrial examination the text of the speech that he had before his speech and that he used during the speech would have a broader basis for accurate recall of the events during the speech than someone attempting to recall what he heard on the one occasion of the speech. I shall fully consider that point in determining the probability of the accuracy of the witnesses' recall. Due to consideration of the written text, I will be more reluctant to credit evidence that is contrary, but similar, to comments in the text (e.g., evidence that benefits will be lost as opposed to language in the text showing that negotiations may result in loss of certain benefits).

Moreover, although I shall consider the evidence in its entirety, I do not find totally determinative of the question of variance from the written text testimony that the speaker looked up at the audience or that the speaker did not appear to read from notes. The evidence did not reveal with precision the dates of the speeches. Those speeches were repeated, often times by the same speakers, to different groups of employees. Therefore, it is apparent that depending on how often the particular speaker had given the speech at issue, he may have been so familiar with the text at the time of the speech in question that frequent referrals to the text were no longer necessary.

[5] Concerning Quiett's testimony, I note that it is not disputed that various speakers made comments in the nature of answers to questions from employees that were not contained in the written text. However, in the case of Quiett's testimony, and on most other situations involving the speeches, the material comments (i.e., alleged illegal comments) are so similar to comments in the written text that I am convinced and find that actual remarks were taken from the text and were not made in response to employee's questions.

I find Yolanda Scott's testimony that, when Colston questioned her about the Union during 1981, he specifically asked about her acquaintance with Susan Quiett, gives a clear appearance of credibility. Scott's testimony in that regard evidenced a clear recollection of comments that would logically follow considering Respondent's knowledge of Quiett's activities. On the other hand, in consideration of whether Scott fabricated her version of the Colston conversation, I cannot conclude from the record that she was otherwise aware of Respondent's knowledge of Quiett's union activities. According to Scott's testimony, she had not, at that time, participated in union activities because of her grandmother's illness. Moreover, regardless of her knowledge of Quiett's activities, I find it unlikely that Scott could fabricate such a conversation by including references to another employee's union involvement that fits so reasonably into the established time pattern of Quiett's activities.

Additionally, a comparison of Scott's and Quiett's testimony showed a continuing pattern of comments by Colston—i.e., when Colston talked to Scott in January, he commented that Susan Quiett was pushing the Union and she does not know anything about "what she is talking about"; when Colston talked to Susan Quiett in February 1981, he asked her if she knew what she was doing; what did she think the Union could do for her.

Conclusions

The complaint alleges that Respondent's supervisor and agent, Gerald Colston, engaged in 8(a)(1) violations by orally interrogating employees concerning employees union activities on three separate occasions; creating the impression of surveillance of employees union activities; threatening that should the Union successfully organize, bargaining would commence with a blank sheet of paper; threatening loss of benefits if the Union was successful; and threatening that if the Union was successful, employees would be required to strike and would lose jobs.

Apparently the threats noted above allegedly occurred during a group meeting addressed by Colston. In view of my findings herein that material speakers at those meetings followed a written text and the evidence failed to establish that the speakers make arguably violative comments not contained in the text, I shall consider below all the allegations which arose during those meetings under a common heading.

Therefore, as to Colston individually, I shall now consider only the allegations of interrogations and impressions of surveillance. In essence, the credited evidence demonstrates Colston asked Yolanda Scott in his office during January 1981 if she knew about the Union, if she had been to any of the union meetings, if she was for the Union, and if she knew Susan Quiett. Colston also told Scott that Quiett was pushing the Union and did not know what she was talking about. Concerning Quiett, the credited evidence demonstrated that Colston talked to her outside Respondent's cafeteria in February 1981 and asked her if she knew what she was doing; what did she think the Union could do for her; and told her the Union could take her job and that she would not get paid although on strike; and people would replace the employees.

I see nothing in the above conversations that would support a finding that Colston created an impression of surveillance. He did imply knowledge of Susan Quiett's activities. However, the record clearly proved that Quiett's activities before that conversation, included handbilling for the Union in open view of employees and supervisors alike. Therefore, Colston's comments demonstrated awareness of nothing that was not common knowledge. I fail to see how a supervisor's comments indicating that he did nothing beyond observing such open activities could be considered coercive. I find that the General Counsel failed to prove that particular allegation. See *Regal Tube Co.*, 245 NLRB 968, 973 (1979); *Carrick Foodland*, 238 NLRB 568, 569 (1978).

On the other hand, I find Colston's questions to Scott and Quiett were coercive. In that regard, I note that Scott was questioned in Colston's office; his questions to Scott were extensive (i.e., if she knew about the Union; had she attended any union meetings; if she was for the Union; and did she know Susan Quiett, a known union advocate); and his comments included an implication that union advocate Quiett was engaged in union activities without being fully knowledgeable of the possible ramifications of that activity. I note that Quiett was queried on what she thought the Union could do for her; and if she knew what she was doing. Additionally, Colston threatened Quiett with possible loss of her job because of the Union. Both the Board and the courts have traditionally found such comments constitute an 8(a)(1) violation especially when, as here, they occur in an atmosphere of other violations. See *Agri-Seeds*, 237 NLRB 911, 916 (1978); *Backstage Restaurant*, 232 NLRB 1082, 1088 (1977); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 533 (3d Cir. 1977); *Jody Tootique*, 245 NLRB 734, 739 (1979); *Pelton Casteel, Inc.*, 246 NLRB 310 (1970); and *Cerro CATV Devices*, 237 NLRB 1153, 1156 (1978). Respondent proved no valid purpose behind its questioning of Scott and Quiett and the record indicated that no valid purposes existed. There was no showing, for example, that Respondent was checking on a union claim of majority status nor was any motive shown other than the one apparent in Colston's efforts to require the two employees to identify and support their respective positions. Additionally, Colston was not a low-level, firstline supervisor. Although the record did not fully reveal his position in Respondent's supervisory structure, it is apparent from his testimony that he supervised firstline supervisors.

Concerning Quiett, even though Respondent knew of her union activities, the Board has found similar questioning, as here, violative (*TRW-United Greenfield Division*, 245 NLRB 1135, 1139 (1979)).

B. *Gloria Cyrus*

Former employee Joann Tate testified that she had a conversation with Gloria Cyrus in the presence of two other employees on February 9, 1981, at the hospital. According to Tate, she and two other employees were talking when Cyrus came up and asked, "Were we discussing the union." The employees asked why and Cyrus stated, "Because every where she go people are talking

about the union." The employees then told Cyrus that they were talking about the Union.

Tate stated that later on that same day after she had returned to her work station, Cyrus came to her and asked Tate what she thought about the Union and was she going to vote for the Union. Tate testified that she replied, "Sure, if I thought it could get there." At that point Cyrus stated, "Well, that she didn't have anything else to do with it because she needed her job."

Gloria Cyrus testified that she did not have a conversation with Joann Tate and others about union activities. Cyrus testified that she did recall one conversation when she went to Joann Tate and Julia Kelly and asked them what they needed on the carts and that one of the employees asked her if she received a letter from the hospital. Cyrus replied that she said yes, Cyrus testified that Tate did not say anything about the Union, but that Tate said, "I don't know what they are sending me mine for because people are going to do what they want to do any way." Cyrus testified that was the end of the conversation. Cyrus testified that she did not ask Tate if she was going to vote for the Union nor did she ever ask Tate if she, Kelly, and Stevenson were talking about the Union.

Discussion

The dispute between the testimony of Joann Tate and Gloria Cyrus presents a difficult credibility problem. Although both witnesses evidenced good demeanor, they also demonstrated weakness in recollection during cross-examination. Concerning Tate, her testimony conflicted with her pretrial affidavit regarding the substance of the above-mentioned conversation with Cyrus and with her layoff interview. Cyrus' cross-examination demonstrated weak recollection in several areas, most noticeably in regard to union discussions at the hospital and the meetings held by the hospital regarding the union efforts. Moreover, Cyrus appeared to change her testimony on redirect regarding the practice of moving relief maids to another floor. Nevertheless, it remains the General Counsel's burden to prove its allegations by substantial evidence.

Due to the conflicts between Tate's testimony at the instant hearing and her pretrial affidavit, I am unable to find that the General Counsel has established through substantial evidence that the above conversation occurred as testified by Tate.

Conclusion

In view of my credibility findings above, I find that the General Counsel has failed to prove the 8(a)(1) allegations regarding Gloria Cyrus.

D. *Hilda Deweese*

Former employee Dorothy Huges testified that she attended a meeting conducted by Deweese and a man she did not know at the hospital on February 9, 1981. There were approximately 20 employees at the meeting. Huges testified, "They said if the union would come in they would call a strike—and we would lose our jobs—and our family would be deprived of needed things—and we would lose all our benefits." Huges said, "They said if the union came in we would automatically lose our jobs and all our benefits." Huges also testified, "They said if the union did come in they would call a strike; and we would lose our jobs." Later, under cross-examination, Huges was asked if the employees were told they would automatically lose their jobs and she replied, "Yes, and you would be laid off from work."

Hilda Deweese admitted giving group talks to employees at the hospital. However, she denied making the comments alleged in Huges' testimony. Deweese testified that she followed the script of the speech although she admitted answering employees questions.

Discussion

Again, as in the case of the address by Gerald Colston (above), Dorothy Huges' testimony is very similar to comments found in the written text. Although, I am convinced that Huges endeavored to recall what was said, her observations reflect her understanding of the message rather than the actual words. The text reveals that the actual speech was long, almost 20-typed pages, and contains specific examples underscoring possible consequences of unionization. I find it less than surprising that Huges and other employees came away from the speeches with the impression that they had been warned against certain dangers created by unions.

However, on the other hand, I find it unlikely that any employer would, in a situation like we have here when numerous mid-level and high-level representatives addressed employee groups, encourage the speakers to depart from the written text. Such a practice would most likely result in a confused and nonproductive message. I find it more probable that when, as here, both the employee witness and the speaker witnesses appear credible, the speech was actually given as written with the result that one or more of the listeners may have understood the speech's predictions to be more definite than actually expressed.

Conclusion

As indicated above, in view of my findings that Deweese followed the written text in her February 9, 1981 address to the employees, I shall consider this allegation below along with allegations going to other supervisors regarding the group meeting.

D. *Tom Alexander*

Former employee May Ella LaCour testified that she attended a meeting at the hospital around January 20, 1981, conducted by Alexander, Jacobs,[6] and a black man from purchasing. LaCour testified:

> Well, Mr. Alexander did most of the talking and he said that unions wasn't any good for hospitals and unions wasn't any good for patient care. And then he also talked about strikes, mostly, the two or three people were going out on strikes and that you can be at home and you wouldn't know anything

[6] Shelia Jacobs did not testify.

about it and he named several places that had had strikes and people lost their jobs. And then he said that—that you can lose all your benefits, that if the union would come in you wouldn't have no one to talk to. You'd have to go to the Board. And then he also told us—he held up a blank piece of paper—saying that you would have to start bargaining from a blank sheet of paper. And then he also told us that there was a big layoff coming up.

LaCour was asked if Alexander gave the reason for the big layoff and she replied, "He said a shortage of staff nurses."

LaCour testified that approximately 20 employees attended the above meeting.

1. Alexander's meeting with Warner Wilson

Former employee Warner Wilson testified that he was called into Tom Alexander's office on February 12, 1981, and in addition to Tom Alexander, Supervisors Bill Snider and Larry Betz were also present. Wilson testified Alexander told him, "We just got the result of who was eligible to vote yesterday. And you are a supervisor and you fall under management; therefore, you are not eligible to vote." Wilson testified that Alexander told him:

> You are a supervisor. You are not allowed to vote. I don't want you to say anything, speak up for the union. I don't want you to discuss the union with anyone or it could mean your job. I know how strongly—I know how strongly you feel about the union—you know, how strongly I feel about the union, you know, wanting it. So I personally called you up here to tell you not to discuss anything about the union, or not to say anything to anybody about the union, because it could mean your job.

Wilson stated that he asked Alexander, "Since I'm a supervisor, why aren't I drawing supervior's pay?" Alexander replied, "Well, you are going to have to take that up with Mr. Gene Miley, which is the laundry manager."

According to Wilson, Snider then said, "If you don't like the pay you are getting you can quit." Alexander stated, "Do you understand what I mean." Wilson replied, "I understand exactly what you mean."

2. Alexander and the director of nursing

Warner Wilson also testified about a meeting conducted by Tom Alexander along with a lady that he believes was the director of nursing. Wilson stated that other people in attendance included a lady named Louise Harold, a man that worked in maintenance, a lady from nursing service, and two other employees he did not know. Wilson's testimony about that meeting was as follows:

> During the course of the meeting the lady said, "Well, if the union win and we go to the bargaining table, we'll go with this." And she held up a blank piece of paper. So I asked her, I said, "Well, is it good faith to go to the bargaining table with a blank sheet of paper?"
>
> She said all that we have to do is go to the bargaining table. So I don't know which one said it, the next statement about—if it was Mr. Tom Alexander or the lady—but if we go the bargaining table and we can't reach an agreement then the union would call a strike.
>
> And I said, I told them, Well, the union can call a strike, the union members have to vote on a strike. And if they vote on a strike they have to give the hospital 90 days notice. And I think a 90-day and then a 30-day notice, and then 10-day notice. I think that's federal law.
>
> And if they don't reach agreement by then they are not bargaining in good faith. So, Mr. Alexander went on and was talking about this hospital in Lake Charles had voted a union in and wound up making less money. And he also was speaking about strikes. He said if the employees go on a strike they can bring in a catering service or whatever—you know, to replace the employees that's on a strike.
>
> And then after the strike is over—when the strike is over some of the employees might be out of a job.
>
> He also said that all the union wanted to do was take your money. They don't do anything for you. And I told them—I spoke up and I said, well, I would rather pay $6.00 or $12.00 a month union dues for job security because right now anyone can come in, you know, and tell me I am fired without any really good reason. And I would be out of a job. At least with the union I have some type of security. They would have to have a good reason to fire me.
>
> So they kept on talking. He said, well, you know—they kept on talking more or less like if the union came in there could be trouble. There could be violence and things like that, you could lose holidays.
>
> And they kept on talking and I just turned a deaf ear to the meeting at that point.

Wilson testified that the meeting conducted by Alexander was before Alexander told him that he was not eligible to vote.

Tom Alexander testified that he along with Edward Silvey, Louis Champagne, Shelia Jacobs, and the Company's attorney, Lindsey, participated in the formulation of a group of speeches to be delivered to the employees during the union organizing campaign. Alexander testified there were five or six speeches in all. Each of those speeches was presented to several groups of employees.

The first of the five or six speeches contained a reference to a blank sheet of paper. According to Alexander, he was one of the persons that presented that speech which was given on February 9, 1981, Alexander testified:

> We, of course, had a speech typed out. We followed it to the word. Basically, that speech said that if bargaining—if the union got in and bargaining commenced we would bargain in good faith with the union, but bargaining started at the zero

point, item by item and there was no guarantee that anyone would come out better or worse, during the bargaining process.

. . . .

The blank sheet of paper was held up and displayed that bargaining would start from zero point.

According to Alexander, there was reference during the speeches to Clarence Crayton, the secretary-treasurer and chief organizer for the Union at the hospital. He stated that the reference to Crayton was that Crayton was negligent in performing some of his duties in bargaining and it was questioned whether this negligent type of person was the kind of individual that Baton Rouge General Hospital employees would want bargaining on their behalf. In support of this position regarding Crayton, Respondent distributed to the employees during the speeches a letter purportedly from Crayton to the executive vice president of AMI in which Crayton indicated he was negligent because he failed to bargain properly on behalf of the employees.

Alexander denied that he participated in any meeting with Warner Wilson concerning Wilson's supervisory status and his working for the Union at Baton Rouge General Hospital. However, admitted Supervisor Larry Betz testified:

Q. Did you ever attend a meeting involving either Mr. Alexander or Mr. Munn or Mrs. Beard, or Mr. Snider where Mr. Wilson was present and he was told that he was a supervisor and that he could not participate in the union activities?

A. I remember a meeting.

Q. Did you attend the meeting?

A. Yes, I did.

Q. Who was present?

A. Mr. Alexander, Mr. Miley, myself and Warner Wilson.

Q. And what was told to Mr. Wilson?

A. That part of the conversation I really don't remember.

In regard to the speeches to employees, Alexander admitted that there were question and answer periods and that he answered questions extemporaneously. Alexander admitted discussing strikes and strike violence with employees during those meetings and showing clippings of strike violence to the employees.

Under redirect examination, Alexander denied that in answering any employee questions, he told the employees that they would lose their hospital benefits if the Union successfully organized the hospital. He also denied that in answering questions he told employees that they would no longer have anyone with whom they could discuss their problems and would have to go to the National Labor Relations Board. Alexander denied that he informed any employees that strikes would be provoked and loss of jobs would occur if the Union successfully organized. On recross, Alexander admitted that they did "Inject union stewards in this situation, and to whatever extent the steward would have to get involved [the employees] would have to involve him."

3. Tom Alexander re Charles Hamilton

In the General Counsel's case, Charles Hamilton was called and testified to a conference he had with George Munn, who Hamilton described as being over purchasing, housekeeping, and the laundry. Hamilton testified the conference was in Munn's office and included Harris and Beard. Hamilton was recalled during the rebuttal portion of the General Counsel's case and he testified that he then recalled that Tom Alexander was present along with Munn and Beard.

During the General Counsel's case-in-chief, Hamilton recalled that George Munn did the talking and that Munn told him that he heard rumors that Hamilton was affiliated with the Union but that he now knew for a fact because he had seen Hamilton on the property passing out leaflets. Munn told Hamilton, you know that you are a supervisor and supervisors cannot be affiliated with the Union. According to Hamilton, Munn told him, "You either leave the union alone or take a reduction in pay and continue with the union."

Tom Alexander admitted that he attended a meeting involving Hamilton along with Harris and Munn. Alexander recalled telling Hamilton, "That it had come to my attention that he was actively engaged in the union organizing campaign and we felt because he was a supervisor that he has the responsibility to uphold the hospital position." Alexander asked Hamilton to cease his activities as a union organizer. According to Alexander, Hamilton admitted that he was a supervisor, and that Hamilton felt like he knew he should not engage in union activities on hospital time but he thought he had the right to do it on his own time. Alexander told him that it was his responsibility as a supervisor to uphold the Hospital's position 24 hours a day, 7 days a week, and that, "We expected that of him." Alexander denied telling Hamilton that if he chose to continue organizing for the Union to take a reduction in pay, or he could stop being affiliated with the Union and keep his job as a supervisor.

Henry Harris, chief patient care assistant, testified that he attended the meeting involving Tom Alexander, George Munn, and Charles Hamilton in Munn's office.

Harris was asked what Alexander said to Hamilton about the Union. His testimony was:

Well, he told—he ask him was he a stewardess [sic] for the union, and Mr. Hamilton said yes.

And he said that from this point he would not hold anything against him for believing what he believes in, but at this point and time that he wants him to stand along with the hospital, being the supervisor.

Q. And did Mr. Hamilton respond?

A. Well, he just—nodded his head like he agreed and understood what they are saying.

. . . .

Q. And how long after the meeting did you go visit Mr. Hamilton.

A. Four hours later I went to Mr. Hamilton's house after the meeting.

Q. Now, as best as you can, would you tell us the conversation that you had with Mr. Hamilton.

A. I went to Mr. Hamilton's residence and I explained to him about the meeting we had earlier, did he understand what was said in the meeting from Doctor Alexander. And we elaborated on that and I told him that by being a company—he could understand that by being a company man he was suppose to stand with the hospital and not be with the union.

And some of that he disagreed. And I told him about that if he wanted to be with the union step back in the staff and renounce his position, he wanted to help the union. He couldn't be in the position that he had and be with the union.

On cross-examination, Harris testified that when he went to Hamilton's house following the meeting with Alexander, Hamilton told him that he still was going to fight for the Union.

George Munn Jr. testified that in November 1980 he was materials manager and director of pharmacy. Munn testified that he attended the meeting involving Hamilton, Henry Harris, and Tom Alexander and that the meeting occurred on November 26, 1980. Munn was asked, "What did Alexander say to Hamilton," and his response was:

Basically it was his position of assistant supervisor over other PCA's. He did know that Charles Hamilton was working with the union activity and for him to cease to do so because of the hospital's feeling toward unions.

And he just asked—because the hospital's attitude toward—their relationship with union activity—at that point we were against unions in the hospital. He, as a supervisor, was not eligible for, in our interpretation, to be involved in union activities. We requested that he not do so.

Q. Did Mr. Hamilton say anything about whether or not he was a supervisor?

A. No he was a supervisor.

Q. Did Mr. Hamilton acknowledge the he was a supervisor or did he deny being a supervisor?

A. He didn't deny it.

On cross-examination, Munn testified that they did not tell Hamilton that further disciplinary action would involve discharge but that they did tell him that if he did not agree to cease further union activities there will be disciplinary action in the future.

Discussion

4. The group meetings

As in the case of other witnesses, May Ella LaCour's testimony was in substantial accord with the written text of the first series of addresses. However, LaCour's testimony that was supported by her earlier pretrial affidavit testimony, indicated that Alexander made comments in addition to those that appear in the text. I note that LaCour recalled Alexander telling them that two or three people could go out on strike even though the employees who attended the meeting may be at home and not know about the strike.

I am convinced and find, for reasons outlined above regarding other group meetings, that Alexander read or gave the speeches stated in the text. However, I also find that he made other comments, whether or not in response to questions, that included the comment about two or three people initiating a strike. That statement appears reasonable in view of other comments that are included in the text regarding strikes. In view of my observation of LaCour's demeanor, I am convinced that she testified to the best of her recollection regarding the group meetings. Even though I find that her recollection did not establish statements that were made in direct conflict with the written text, I do credit LaCour's testimony that Alexander told them that two or three employees could initiate a strike.

Concerning the meeting attended by Warner Wilson, I noticed that Wilson's testimony appears to substantially in accord with the written text. Therefore, and in line with the reasons stated above regarding other meetings, I am convinced and find that Alexander, and the other speaker, followed the printed text on that occasion. I credit Wilson's testimony that he questioned the speakers during their presentation rather than afterwards.

5. The meeting with alleged Supervisors Wilson and Hamilton

In defense of alleged violations regarding Warner Wilson and Charles Hamilton, Respondent contends that both men were supervisors at material times and not subject to the Act's protection afforded employees. Both Wilson and Hamilton testified that they were cautioned by Tom Alexander to cease their union activities because of Respondent's assertion they were supervisors. Alexander denied having such a conversation with Wilson, but admitted having one with Hamilton.

I find Wilson's testimony believable on the basis of demeanor and the entire record. I noticed in that regard his recollection of Alexander's warning that he was a supervisor and should cease union activities was similar to what Alexander admittedly told Charles Hamilton. Additionally, Supervisor Larry Betz recalled attending that meeting between Alexander and Wilson.

Concerning Hamilton, Alexander and other supervisors admitted that Alexander called Hamilton in and cautioned him not to engage in union activities. Generally, I do not credit Hamilton's testimony to the extent it conflicts with other testimony regarding that meeting. Hamilton demonstrated in testimony during the General Counsel's case-in-chief and when called in rebuttal that his recollection was poor.

However, I do not credit Alexander's and Henry Harris' testimony that during their conversation, Hamilton admitted that he was a supervisor. I find the testimony of Materials Manager George Munn Jr. (another of Respondent's witness) more believable. Munn testified in response to the question did Hamilton acknowledge that he was a supervisor, "He didn't deny it."

I specifically discredit Hamilton's testimony that he was told during the meeting at the hospital that he should take a reduction to a unit job if he wanted to assist the Union. In that regard, I credit Chief Patient

Care Assistant Henry Harris' testimony that he, an admitted supervisor, made that suggestion to Hamilton, but that the suggestion was made after the meeting with Alexander when Harris visited Hamilton's home. Additionally, I specifically credit the testimony of George Munn Jr. that Hamilton was warned of further disciplinary action if Hamilton did not agree to cease his union activities.

Conclusion

6. The group meetings

In view of my findings that Alexander followed the written text in his addresses to employees and that he added a comment that a strike could be initiated by two or three employees, I shall make a determination on the allegations arising from those speeches, along with allegations regarding other supervisors' comments in their speeches, below.

7. The meetings with Warner Wilson and Charles Hamilton

In considering the import of comments made to Wilson and Hamilton, it is first necessary to consider whether Wilson and Hamilton were supervisors and not entitled to the Act's protection as employees.

8. The supervisory status of Warner Wilson

Warner Wilson testified that his stated duties for Respondent were those of washman in Respondent's laundry facility. Wilson testified there were 17 or 18 other employees in the laundry that worked with him on his shift. Wilson testified that he loaded dirty clothes up in the washer, would wash them by sending them through the wash cycle, then pull them out and load them on a conveyor where they would go to the rest of the workers to finish the laundry process. Wilson stated his pay came to $4.97 per hour. Wilson testified that he had no authority to hire, fire, or recommend that an employee be hired or fired. Wilson stated that he did not have the authority to either layoff or recommend employees for layoff; nor did he have authority to recommend an employee for a wage increase. Wilson recalled that he did not give written warnings to employees, discipline any employees, nor grant them time off.

Wilson's supervisors were Larry Betz and Gene Miley. Neither Betz nor Miley worked on weekends.

Wilson and three other laundry employees were classified as leadermen. Because both supervisors, Betz and Miley, were absent on weekends, Wilson and another leaderman, Fleming Fountain, rotated working Saturdays. Wilson testified that on those occasions it was his obligation to assist coworkers in getting the clothes out and that if there was a breakdown, he had a number to call a mechanic and if an employee failed to show up for work, he was instructed to call to see if other employees could come in. Wilson stated that he was never told that he had the authority to discipline employees; however, he testified, "If somebody messes up or somebody comes in late," he was to write a note and leave it on Miley's desk and Miley would take care of the situation. Wilson was asked if he had an occasion to write a note as indicated above, and his response was, "I don't think so." On cross-examination, Wilson was asked about an occasion, a Saturday, when an employee would just sit down and smoke a cigarette rather than work, and he responded that he could just tell them that they might do a little better or he would have to report it to Miley, but that he did not have authority to tell employees what to do.

Wilson indicated on cross-examination that he did not know whether he had attended any supervisory meetings.

Although Wilson admitted that Gene Miley told him that he could call for help if he was short-handed, he testified that he never received any telephone numbers of other employees he was supposed to call, and that during the times when they were short they either doubled up and did the work themselves, or when he knew that an employee was absent he may ask someone to come in and work that Saturday. On occasion he had called some of the employees that he knew to come in and work on Saturdays.

Gene Miley did not testify. Larry Betz testified that Warner Wilson's job was that of "leaderman, working washerman." Betz testified that on weekends Wilson's responsibility was to make sure he had a crew—working crew, designated places to work, etc. He testified that Wilson had authority on weekends to call other employees to fill a slot if someone did not show up without first calling a supervisor. Betz also testified that Wilson had the authority to reprimand employees if they were either late or had some adverse reaction during the day, but generally Wilson would send him home and report the incident to either him or the laundry manager the following workday. He testified that Wilson assigned different jobs on Saturdays.

On cross-examination, Betz admitted that he had never told Warner Wilson that Wilson had authority to reprimand employees. Betz also admitted that he did not know of any written warnings that Wilson had ever issued, nor did he know of anyone that Wilson had ever sent home. Betz also admitted that the only jobs assigned by Wilson on weekends were routine jobs of putting clothes in the washer, taking them out, putting them in the dryer, and folding them.

Although Betz testified that Wilson had the authority to give employees time off if they were sick, he admitted that he was not aware of a specific example of Wilson doing that and he had never told Wilson that Wilson had that authority.

I find that Wilson was not a supervisor at material times. The Board has consistently held that even though an employee may perform some supervisory functions, he will be found not to be a supervisor, when he lacks authority and independent judgment and spends a substantial portion of his workday performing rank-in-file work of a repetitive nature (*Air Filter Corp.*, 231 NLRB 782 (1977)). It was apparent that Larry Betz had no firsthand knowledge of what Warner Wilson had been told regarding his authority. Betz testified concerning his knowledge of Wilson's authority and activities. However, when examined by the General Counsel, Betz admit-

ted that he had no knowledge of Wilson ever exercising any supervisory authority over employees nor was he actually aware that Wilson had been told that he possessed such authority. Therefore, I shall fully credit Wilson's testimony regarding his authority and duties. That testimony revealed, and I find, that Wilson was nothing more than a leaderman and was not a supervisor as defined in the Act.

9. The supervisory status of Charles Hamilton

Charles Hamilton's duties differ somewhat from those of Warner Wilson. Whereas Wilson was one of four leadermen in his department, Hamilton was designated as the only assistant chief patient care assistant. Patient care assistant's duties included catheterizing patients, walking patients, assisting with patients' baths, dressing patients, restraining patients, and getting patients out of chairs. Both Hamilton and his immediate supervisor, Henry Harris, the chief patient care assistant, performed all the functions normally performed by patient care assistants (PCAs).

However, Harris and Hamilton were also charged with assigning jobs to available PCAs as the jobs appeared throughout the hospital. Although Hamilton spent most of his time during the week performing PCA duties, he also, during those periods, assigned jobs, trained employees, and on occasion counseled PCAs about their work performance. Hamilton admitted counseling employees Gerald McRay and Horace Johnson.

On Sundays and Mondays, Hamilton assumed the role normally occupied by Chief Patient Care Assistant Henry Harris. Harris did not work on Sundays and Mondays. On those occasions, according to Henry Harris' testimony, which I credit, Hamilton called in employees to replace no-show employees, granted employees permission to leave early, sent employees home for disciplinary reasons, had the right to and, on occasion, actually wrote up employees for disciplinary action, counseled employees about their job performance, and trained employees in their PCA duties. Hamilton testified that on Sundays and Mondays it was up to him to see that the job went on fine. Hamilton admitted that his pay was about $1.50 per hour higher than the highest paid PCA.

According to Loren Beard, the supervisor directly over Henry Harris, Hamilton was informed by her that he also had the authority to recommend discharge of an employee.

I am convinced on the basis for the record that Hamilton acted in a supervisory capacity. His supervisory duties were routinely administered on Sundays and Mondays when he was the only firstline supervisor on the job and, also, on regular occasions during his workdays even though less frequently because of the presence of the chief PCA. (See *Butler-Johnson Corp.*, 237 NLRB 688 (1978); *Flexi-Van Service Center*, 228 NLRB 956 (1977); *Elliott River Tours*, 246 NLRB 935, 943 (1979); *Famous Amos Cookie Corp.*, 236 NLRB 1093 (1978).)

10. Findings regarding Hamilton and Wilson

The complaint alleges that Alexander threatened an employee on February 12, 1981, with termination if the employees supported the Union.

Obviously, because Hamilton had been found to be a supervisor, I find no violation occurred during his meeting with Alexander nor was there a violation by Harris in his subsequent visit to Hamilton's home.

Concerning Wilson, his testimony, that I have credited, proves that during a February 12, 1981 meeting in Alexander's office he was told that he was a supervisor. Alexander cautioned Wilson not to speak up for the Union or it could mean Wilson's job. I find that constitutes a clear threat in violation of Section 8(a)(1) of the Act.

E. *Tom Webb*

Former employee LoRita Marshall testified that she attended a meeting at the hospital in the middle of February 1981 conducted by Tom Webb. Marshall testified as follows regarding that meeting:

> OK, he talked about how there had been violence in the unions. How the unions caused violence. He told us that if the employees would go on strike that we could lose our jobs.
>
> He said that the hospital had a contract with some other company and if we were on strike that they would supply the hospital with new employees. And he told us that in the past they had had violence, truck drivers would have guns and some people got shot.
>
> And he had some clippings on violence.
>
> . . . .
>
> Yeah, he told us that he wouldn't tolerate—that the hospital wouldn't tolerate having a union push it.

Louis Champagne, director of personnel, testified that Tom Webb was employed by the hospital as one of its vice presidents until January 30, when Webb was involved in a reduction in force. Champagne testified that Webb did not participate in any of the group talks that began on February 9, 1981. Champagne testified that he made up the schedule for the group meetings and he knew that Tom Webb was not present at the hospital and did not participate in any of those meetings.

Discussion

In view of the unrebutted evidence showing that Tom Webb was not employed by Respondent after January 30, and evidence that the group talks did not start until February 9, I find that LoRita Marshall was mistaken in her testimony that Tom Webb conducted a mid-February employee meeting that she attended.

Conclusion

In view of my credibility determination, I find that the General Counsel failed to prove that Tom Webb engaged in any activity violative of Section 8(a)(1).

F. *Louis Champagne*

Former employee Sharon Thompson testified that she attended a meeting of approximately 10 employees on February 12, 1981, conducted by Champagne, who told the employees:

> The bargaining would come to us with a blank sheet of paper. That the union would strike the hospital. And they would hire people in our places. And we would be put on a picket line. And if we tried to cross the picket line that we'd be hit over the head and our homes would be burned down.
>
> And they said we could lose our raises, our holidays and sick time, vacation. We probably wouldn't get none of this. They also said that Baton Rouge General didn't need a union and they didn't want a union.

Louis Champagne testified that he made up the schedule for the group talks and that the first of the group talks was presented during the period February 9 through 14, 1981. The text of the first of the group talks was received in evidence. Champagne testified that "the blank-sheet-of-paper" was included in only the first of the group talks. Champagne testified that he presented approximately six of the first of the group talks and that the script was followed. Champagne stated that each of the talks involved two individuals and that it was necessary to read the text because each person had a certain part to follow. During the presentation when the portion regarding the blank sheet of paper was read, he, along with the other speakers giving that particular talk, held up a blank sheet of paper. Champagne admitted that a question and answer period was held and that he responded to employee questions. Champagne denied making a statement during his presentation of the first of the group talks that "the union will strike the hospital." Champagne testified that there was a statement in the text indicating that the Union could strike the hospital. Champagne also denied that he ever made the statement that employees would be hit over the head or that houses would be burned down.

Discussion

Sharon Thompson's testimony regarding a group meeting addressed by Louis Champagne did not vary from the subject and issues covered in the text for the first series of meetings. In line with my reasoning mentioned above, I shall credit Champagne's testimony that he followed the text of that speech.

Conclusion

As in situations noted above, I shall consider the question of an 8(a)(1) violation regarding Champagne's address to employees in group meetings below.

G. *Claude Kirkpatrick*

Former employee Teresa Thomas testified that although she was handbilling for the Union across from the hospital parking lot, before Christmas 1980, Kirkpatrick came by and asked, "[C]an I see some of you [sic] propaganda?" Kirkpatrick read the leaflet and stated, "[I]t will never work." Thomas then said, "Well, there's nothing wrong with trying." Kirkpatrick laughed and walked on.

Kirkpatrick did not testify.

Discussion

Although Thomas' testimony was unrebutted, I shall credit her testimony as reflected above.

Conclusion

I see nothing coercive about Kirkpatrick's conduct related by Thomas, and the General Counsel cited no authority on which I can find his conduct violative. I find that nothing occurred on that occasion that violates Section 8(a)(1).

H. *Ernest Peters*

Yolanda Scott testified that she had a conversation with Peters on February 11, 1980, in the big storeroom at the hospital. Scott testified as follows:

> And I ask Mr. Peters—Mr. Peters didn't say anything—I ask him, you know, at the time, if he was for the union. And was he going to be able to vote.
>
> And he said he was not for the union. He didn't know if he was going to be able to vote. And he also stated that everything he had worked for he had gotten on his own. And he said unions could make it hard on you.

Ernest Peters did not testify.

Discussion

I shall credit Yolanda Scott's testimony regarding her conversation with Ernest Peters that is unrebutted.

Conclusion

The complaint alleges that Ernest Peters threatened to make work harder on an employee for supporting the Union. The testimony of Yolanda Scott fails to establish such a violation. I note especially significant the fact that Scott initiated the conversation about the Union with Peters by asking Peters if he was for the Union. Peters' position was such that neither he nor Scott knew whether he would be eligible to vote as an employee. Therefore, even though Peters was stipulated to be a supervisor he was a low-level supervisor. His response to Scott's question was limited to the scope of her query. Although the comment "unions could make it hard on you," could imply a threat, it seems more in line with Peters response to the Scott question (i.e., his feelings concerning the effect it may have on him and not the possible effect on an employee). I find that statement is innocuous.

I. *Larry Betz*

Warner Wilson testified that he discussed the Union with Larry Betz in either July or August 1980. Wilson testified that Betz said, "He hoped the Union would win

and come in." Wilson replied, "Well, don't worry; you know, they are going to do it. They are going to win."

Subsequently, in mid-February 1981, according to Wilson, he had another conversation with Betz in the laundry at the hospital where Betz told him, "Warner, you better watch yourself." Wilson asked, "What do you mean?" and Betz stated, "Well, they are out to get you—they are out to get your job." Wilson replied that, "as long as I do my eight hours and come to work there is not too much they can do about it; and if they harass me I know where to go." Betz stated, "Well, just watch yourself." Wilson testified that there was no mention of the Union during that February conversation.

Larry Betz denied that he ever told Warner Wilson that Wilson had better watch himself because the hospital was out to get him because of his union activities.

Discussion

I was generally impressed with Warner Wilson's testimony on both direct and cross-examination. Wilson was subjected to lengthy questioning and his response was usually clear without indication of reservation. On two occasions, Respondent's counsel cited apparent conflicts between Wilson's testimony and his pretrial affidavit, but in each of those instances Wilson's explanation appeared candid. Regarding his second conversation with Betz in consideration of whether Wilson fabricated that testimony, I note that Wilson testified that Betz did not mention the Union even though it was obvious that, had Betz coupled his warning directly to Wilson's union activity, the incident would have significantly benefited Wilson's discrimination case. That fact tends to indicate that Wilson's testimony was not a fabrication.

Betz, on the other hand, did not impress me with his demeanor. He appeared evasive and undecided especially when testifying about his knowledge of Wilson's union activity.

I find Wilson to be a credible witness and I credit his version of the conversations with Betz.

Conclusion

In view of the close proximity to the union organizing campaign; Wilson's outspoken queries at the time of Alexander's group meeting (see above under Alexander); the warning from Alexander to Wilson that Wilson must refrain from supporting the Union; and Wilson's February 20, 1981 layoff, it appears obvious, and I find, that Betz was threatening Wilson with loss of job because of Wilson's union activities. The complaint alleges that Betz violated Section 8(a)(1) by telling an employee that he had better watch himself because of his union activities. I find that Wilson's testimony, which I credit, proves that allegation.

J. Era McRae

Former employee Mary Ann Hickman testified that she had a conversation with Era McRae on October 20, 1980, at the hospital. Hickman's testimony in that regard was as follows:

> October 20, 1980, I went to Era McRae to see about changing my days to attend a friend's funeral in New Orleans. And we got that straight. And after that she say: Now may I talk to you.
>
> And she say: I know you heard about—I know you heard about what is going on about the union. I said: Wait a minute: Well, I've been out sick for a while, about a month and a half. And I don't know very much about what's going on.
>
> She said: Well, let me tell you about it. She said: If we had a union in here we wouldn't be able to talk like we are doing now. You wouldn't be able to talk about schedules. And then she said you might be bargaining with your benefits.
>
> She say: When they sit down to bargain they don't mean that the General has to agree with what they ask for. And after that she say you could lose your benefits.

Era McRae testified that she did not recall calling Mary Ann Hickman into her office about October 20, 1980, and she did not recall telling Hickman I know you heard about what was going on about the Union. McRae testified that she did not recall ever telling Hickman that if we had a union in the hospital that we would not be able to talk like we are doing now and that you would not be able to talk about schedules or that they would be bargaining about your benefits. She also indicated that she did not recall ever telling Hickman that when they sit down to bargain that they do not mean that the "General" has to agree with what they ask for and that the employees could lose their benefits.

Discussion

I was impressed with Hickman's demeanor. In regard to the alleged conversation with Era McRae, Hickman's testimony evidenced a clear recollection. Although Respondent examined her pretrial affidavit, no conflicts were evidenced between her testimony at hearing and the affidavit regarding her conversation with McRae. Moreover, several matters were mentioned by Hickman that could have been, but were not, disputed by documentary evidence. For example, Hickman testified that she went to McRae on October 20, 1980, to change "her days to attend a friend's funeral in New Orleans." Also, Hickman testified that she had been out sick before her conversation with McRae and, for that reason, she knew little of the Union. Obviously, if Hickman was mistaken, Respondent's records may have shown the mistakes. No documents were offered showing that McRae did not approve Hickman changing "her days" around October 20, nor was it shown that Hickman was not out sick before October 20.

On the other hand, Era McRae's testimony regarding the alleged conversation with Hickman was vague. In fact, McRae admitted that she did not recall whether she talked with Hickman on October 20. I find that admission significant because, as noted above, McRae had attendance records available that may have prompted her recollection. McRae did admit talking to employees about the Union in the fall and early winter of 1980

McRae testified that she had been instructed by Director of Nursing Joyce Burkeen to tell employees how the hospital felt about the Union. McRae also testified that she had approximately 175 employees "under her" and that she would not recognize Mary Ann Hickman if she saw her.

Against that background, I find that Hickman's testimony should be credited.

Conclusion

The complaint alleges that McRae created an impression of surveillance of the employees' union activities and threatened an employee that employees would not be allowed to discuss scheduling changes with supervisors if the Union was successful in organizing the employees.

I find nothing in Hickman's testimony that would support my finding that McRae created an impression of surveillance. Her comment to Hickman was simply, "I know you heard about what is going on about the union." The evidence proved that the organizing efforts were oftentimes open, with little or no effort being made to conceal those activities from supervision. Therefore, I cannot find that McRae's comment had the tendency to create, in Hickman's mind, the impression that Respondent was engaged in efforts to unlawfully observe the employees' union activities.

However, McRae's comments clearly imply that selection of the Union would remove the employees' privilege of resolving scheduling problems with their supervisors. Hickman was talking with McRae with an object of doing just that, i.e., changing her schedule to attend a friend's funeral, and McRae's comments included the threat to such actions would not continue if the Union was selected. See *J. P. Stevens & Co.*, 245 NLRB 198 (1979); *Tipton Electric Co.*, 242 NLRB 202 (1979); *Sturgis Newport Business Forms v. NLRB*, 563 F.2d 1252, 1256, 1257 (5th Cir. 1977); *Two Guys Discount Dept. Stores*, 242 NLRB 1139 (1979).

K. *Eva Lewis*

Susan Quiett testified that as she was handbilling for the Union on December 7, 1980, across from the new parking lot, several supervisors came out of the hospital and one, Eva Lewis, approached and asked Quiett if she knew what she was doing. Quiett replied, "Yes." Lewis walked away, came back, and asked again if Quiett knew what she was doing. Quiett replied, "Yes," and Lewis went into the hospital.

Housekeeping Supervisor Eva Lewis admitted that on an occasion when she was leaving the hospital Susan Quiett tried to give her a union leaflet. Lewis testified that she told Quiett, "No, indeed; I don't want this Susan. And you don't know what you're doing." Lewis then went back into the hospital to report the incident to her supervisor and as she walked away Quiett repeated what Lewis said to her in a "sarcastic way."

Discussion

I found Eva Lewis to be a credible witness. She admitted the above incident in substantial accord with Quiett's version and she also admitted reporting the incident to higher supervision. Because Lewis obviously found the incident an unpleasant one, I am convinced and find that her recollection remained vivid. Therefore, I credit her account of the incident.

Conclusion

I see nothing coercive in Eva Lewis' comment to Susan Quiett. It appears to constitute nothing more than a normal reaction without accompanying threats or interrogation. Therefore, I find that no violation occurred on this occasion.

L. *David Frank Robertson*

Former employee Jacqueline Jones testified that she had a conversation with Robertson at the hospital during January 1981. Jones testified:

> OK, he approached me, he said, Jackie, could I speak with you for a moment? I said, yes. He said, we supervisors are on a campaign at this time and asking those how do we feel about the union.
>
> I said, what do you mean how do I feel about the union? He said, well, some unions are good, some unions want you for your dues and some unions can really help you. He started talking about this place he once worked at which was called Payne and Keller. And he said that at the time he was working for them they were on strike. They tried to get the union into that. And I said, well, my father worked at Payne and Keller but I never heard him speak of a strike.
>
> And that time he said, well, he may have gotten hired during that strike time. And he said as far as he's concern they never got what they wanted, even though they had strikes.

Robertson denied that in January 1981 he went to Jackie Jones and told her that "We supervisors are on a campaign to find out how you feel about the union."

Discussion

Although David Robertson denied telling Jones that supervisors were on a campaign to find out how employees felt about the Union, he admitted he was instructed to discuss the union campaign with at least five employees. Robertson did not recall what those instructions included. He testified he was not instructed concerning asking employees about their union sentiments.

In view of Robertson's admissions, and in the absence of an explanation of what he actually told the employees he contacted regarding the union campaign, I credit Jones' testimony. Her testimony appears logical in view of Robertson's admissions and I was impressed with her demeanor.

Conclusion

The complaint alleges that Robertson unlawfully interrogated an employee about her union sentiments.

Robertson's comments served two purposes, they alerted Jones that supervisors were systematically inves-

tigating employees' union sentiments and they served to question Jones concerning her feelings about the Union. When considered against the background of other 8(a)(1) activity both at the time of the Robertson-Jones conversation (January 1981) and before, I find Robertson's comments constitute illegal interrogation as alleged.

M. *Loren Beard*

Mary Ann Hickman testified she attended a meeting conducted by Beard and a gentleman Hickman did not know around mid-January in a small conference room at the hospital. On direct examination, Hickman testified:

> Mostly in that meeting Ms. Beard was doing most of the talking. And she told us that the union could call us out on strike. And they could get someone off the street to come and to work. You wouldn't be drawing a paycheck; you wouldn't be—you wouldn't have any benefits. And you wouldn't be able to draw unemployment.
>
> And after the strike was over that didn't mean that they had to call us back to work. They wanted us to—they wanted us to vote, but they wanted us to vote no because Baton Rouge General didn't need the union.
>
> And then she told—then she told us that when they sit down to bargain they start off with a blank sheet of paper and that didn't mean that the General had to agree with them—what the union asked for. And said that we could, when they sit down to bargain, we could lose—we would lose our benefits such as sick leave, vacation, so on.
>
> And then she told us about a hospital in Lake Charles that—that had got rid of a union. And she told us about—they had clippings about other places—about strikes.
>
> And then she told us that all the union wanted was our money. That we'd pay like $10.00 a month union dues—from 100 to 120 thousand a year in dues. And that was mainly about all that conversation.

On cross-examination, Hickman admitted testifying in her pretrial affidavit to the Regional Office that Beard told the employees in the meeting:

> Things might go up or they might go down. You might be bargaining with your benefits. They might promise you this or that; that didn't mean that the General is going to give it to us. And when they sit down to bargain with we might lose our benefits.

Former employee Lily Cato testified that she attended a meeting conducted by Beard in a conference room about January 22, 1981, along with about 15 employees. Her testimony was as follows:

> Well, mostly she was talking about the union—if the union came in—if we got a union into the hospital it would go out on strikes. And these strikes would cause us to lose our jobs.
>
> And, you know, and if, you know, we didn't lose our jobs, and if we did have a union that we would have to pay union dues. And also, you know, that all the benefits that the hospital had given us that, you know, we would lose that and would start from, you know, start from the beginning.
>
> Q. What would you have to start over from the beginning with?
>
> A. Well, all the benefits that the hospital had given us, you know, that we would, you know, have lost all our benefits that we already had and then would start all over.
>
> Q. Was the subject of bargaining brought up in the meeting?
>
> A. Bargaining?
>
> Q. Bargaining between the company and the union. Was that discussed at the meeting?
>
> A. I think this is what she was really talking about, you know, because like when she was saying that if the union did get into the hospital then anything that, you know, that we would ask for, you know, the hospital would say no.
>
> And lots of times could have lost your job.
>
> Q. All right. Do you recall the subject of strikes being discussed at the meeting?
>
> A. Really, you know, really, I mean, I didn't—you know, really I didn't—really, I just was in the meeting, you know, to see what was the discussion about. But, like I said, in the beginning it was basically, mostly what she talked about, strikes.
>
> Q. Uh-huh.
>
> A. You know, what affect strikes would mean to us.

On cross-examination, Cato admitted that Loren Beard made the following statement during the above conference:

> Would you like to see a copy of the union contract in hospital if the union should win an election here? Let me show it to you—and she would hold up a blank piece of paper—there's nothing on it. If the union should win the election here, and we don't believe that's going to happen, but just assume for a moment that it did, the hospital would be obligated to bargain in good faith with the union. That is all. We would do that bargaining with the intention of reaching an agreement.

Although Cato admitted Loren Beard made the above statement, she denied that Beard held up a blank sheet of paper.

Loren Beard admitted giving group talks to employees at the hospital. However, she denied that any of those talks occurred in January 1981. Beard, along with other witnesses for Respondent, testified that the talks began in February 1981. Beard admitted that she discussed what could happen to benefits during negotiations. She testified that she followed the text of the speech. She testified that she described that bargaining would start from a blank piece of paper—the hospital would bargain in good faith but the bargaining would start from zero. Beard stated that she conducted a question-and-answer

session during her group talks and, of course, the answers were not prepared beforehand.

On cross-examination, Beard testified that she told the employees that anything the employees got would be bargained for—they could either get more or less than they had at the time. She denied that she told the employees that there would probably be strikes if the Union came in. Instead, according to Beard, she told the employees, "there was a possibility" of strikes. She also admitted telling the employees that there was a possibility of physical harm and a possibility that they could be replaced if there was an economic strike.

Discussion

Again, as in many cases discussed above, I note the attending employees' testimony is in substantial accord with the written text of the first of Respondent's series of speeches. The testimony of Mary Ann Hickman appears in line with the speeches concerning both the issues covered and the actual language used (i.e., Hickman recalls the speech included references to what *could* happen although Cato recalled predictions that certain disadvantages *would* occur).

I find, in line with my previously stated reasons, that the speech was given by Beard in accord with the written text.

Conclusion

See below regarding findings on the speeches.

N. *Gayle Caillouet*

Former employee Shirley Trosclair testified to a conversation with Gayle Caillouet around January 1981 at the hospital. Trosclair stated Salains, the assistant supervisor, was also present. Trosclair testified she was asked if she had heard of any union organizing in the hospital. Trosclair testified she replied no and she was then told, "Well, if you hear anything come and contact me in charge—Ms. Caillouet." Trosclair said that Caillouet told her "Don't talk to anyone outside, just come to them and talk."

Gayle Caillouet denied asking Shirley Trosclair if she had ever heard of any union organizing at the hospital and that she told Trosclair that if she heard anything to contact her. However, Caillouet admitted that she tried to talk to all her employees about the Union and that she told her employees that she wanted to tell them facts about the Union and this Union in particular. Caillouet admitted attending meetings with supervisors during which the estimated strength of various departments regarding employees' union support was discussed and it was her recollection that the strongest departments for the Union included housekeeping and nursing services.

Discussion

Although Caillouet denied the specific allegations of Shirley Trosclair, Caillouet admitted she tried to talk to all her employees about the Union. Moreover, Caillouet admitted attending supervisory meetings where the Union's strength in various departments was discussed. Those admissions lend strength to the likelihood that Trosclair's recollection was correct because the alleged comments by Caillouet were specifically directed toward learning about employees' activities. With that background, I am convinced and find that Trosclair's above-mentioned testimony should be credited.

Conclusion

The complaint alleges that Caillouet's comments constituted illegal interrogation.

It is noteworthy that Caillouet's conversation occurred around the same time that Supervisor David Robertson advised employee Jacqueline Jones that the supervisors were on a campaign to determine how Respondent's employees felt about the Union. Additionally, along the same line, Caillouet admitted attending supervisory meetings where the estimated union strength in the various departments was discussed. Those facts, which I also considered in making my credibility findings, would have the tendency to support a finding that interrogations have a coercive affect. In the case of Caillouet's conversation with Trosclair, Trosclair was not only questioned but she was also advised to inform the supervisor in charge of anything she learned about the union campaign. That comment places the employee in a position of either reporting her knowledge or running the risk of Caillouet discovering that the employee was holding out important information. I am convinced and find that Caillouet's comments constituted illegal interrogation.

O. *Nellie Guilbeau*

Former employee Ruth Stevenson testified that she was involved in a conversation with Guilbeau during the first week of February 1981. Stevenson placed that conversation in the coffeeshop on the fifth floor of the hospital. She said other employees including Elizabeth Day, Fanny Griffin, Georgia Payne, and Nancy, the secretary, were also present. Stevenson testified as follows:

> Ms. Guilbeau said she would like to tell us about the union. She said the union was bad and she said in her hometown one year a union went on strike and the people didn't have food to eat. Some lost their cars and home.
>
> And she said if we had a union we wouldn't be able to work overtime, adjust the schedule, or to come to her with our problems or complaints.
>
> Q. Was the topic of jobs mentioned in the conversation?
>
> A. Yeah, she said that we would lose our jobs while the union was out on strike. And we'd be replaced by, you know, other employees.

On cross-examination, Stevenson admitted that she testified in her pretrial affidavit as follows:

> Guilbeau said she would like to tell us how she felt about the union. She said that unions was bad. That in her hometown one year the union called a strike and the people didn't have food to eat. Some lost their homes and their cars. Guilbeau said that

she—Guilbeau said that if we went on strike we wasn't guaranteed our jobs once the strike was over and we would be replaced.

Guilbeau said, for instance, if we got the union we would be—wouldn't be able to work overtime, adjust the schedule, or come to her with our problems or complaints.

Nellie Guilbeau was called by Respondent and her testimony regarding the allegations of Ruth Stevenson was as follows:

Q. Did you ever tell this group of employees, and more specifically Ruth Stevenson, that the union was bad?

A. No.

Q. Did you ever tell these employees, including Ruth Stevenson, that if we have a union in the hospital that we wouldn't be able to work overtime, adjust schedules, or to come to you with their problems and complaints?

A. If I did speak to them on this issue, which I'm sure I probably did, it's my understanding on all three of those issues that if the union came into the hospital their time schedules, their grievances, their overtime would be negotiated between management personnel and our hospital and a union representative. And that was my opinion.

Q. Is that what you told those employees? Or is that what you told employees in general?

A. In general. That's my understanding. And when this would come and I was asked that's what I would say.

Discussion

Although Guilbeau denied telling Stevenson that the Union was bad, she admitted advising Stevenson and other employees that unionization could affect their benefits. Moreover, Guilbeau did not deny Stevenson's allegation that Guilbeau threatened her with loss of jobs while the Union struck. I shall credit Stevenson's version of the Guilbeau conversation to the extent of her pretrial affidavit testimony that appeared more logical than her testimony at trial.

Conclusion

The complaint alleges that Guilbeau threatened employees that should the Union be successful overtime would be eliminated, work schedules would not be adjusted, and employees would not be allowed to discuss complaints and problems with supervisors.

The credited evidence (i.e., Stevenson's pretrial affidavit testimony that was corroborated by her at the hearing) shows that Guilbeau told approximately five employees during early February 1981 that "[i]f [the employees] got the union [the employees] would be—wouldn't be able to work overtime, adjust the schedule or come to her with [employee] problems or complaints."

Again I note that these comments, like those from other supervisors, occurred around the same time that Respondent was engaged in other 8(a)(1) conduct. The credited evidence clearly reveals that Guilbeau expressed the threats alleged by the General Counsel and I so find.

P. *Joann Lappin*

Former employee Minnie Coleman testified that she was called into Lappin's office in late January or early February 1981. Coleman testified that in addition to Lappin, Lappin's secretary and the assistant supervisor were present for portions of the conversation. Coleman testified her conversation with Lappin was as follows:

She proceeded to tell me that, Minnie, you know that the union is coming into the hospital. And I said, no I don't know. The only thing I know is what you all tell me and the pamphlets I receive in the mail.

And she proceeded to say that the union was not good for me and I wasn't a person for the union.

And I said—so after that she told me that we would be—the hospital would run with us or without us. And I said that I didn't know anything about that.

So she proceeded to tell me that they would work night and day to keep the hospital going if we go out on a picket line or anything. And they would hire new people to replace us. And we would be—and then she proceeded to tell me that some of us would be laid off because of the union.

And I asked her—then she said, how do you feel about the union? And so I proceeded to tell her, I don't know how I feel about the union because I am only hearing one side of the story, that's what you all telling me.

And I said, well, why don't you all let the union come in and have a debate and let us hear the union's side of the story; and then we can decide.

And then she proceeded to tell me that they wasn't going to let the union come to the hospital but we got out and found time to seek the union, so get out and find time to see what it was all about.

Then she proceeded to tell me to go ahead on back to work.

Joann Lappin denied that she ever had a one-on-one conversation with Minnie Coleman regarding the Union. However, Lappin admitted that she had conversations with nurses aides, and especially with Minnie Coleman, when other nurses aides were present. Lappin admitted talking to the employees regarding the Union and telling the employees that the hospital would work night and day to keep the hospital going if the employees went out on the picket line. Lappin denied telling Coleman or any other nurses aides that the Union was not good—was not good for her and that she was not the person for the Union. Lappin denied threatening Coleman that she would be laid off because of the Union or questioning Coleman on how she felt about the Union. Lappin testified that Coleman never suggested to her that the Union be permitted to come and debate their side of the story. Lappin denied ever telling any employee that if the Union successfully organized the hospital, union membership would be mandatory.

Discussion

I was impressed with Joann Lappin's demeanor. Moreover, she appeared to testify candidly on both cross and direct. She admitted discussing the Union with Minnie Coleman although she denied it was a one-on-one conversation as related by Coleman and she denied some of the contentions by Coleman. I was also impressed with the openness with which Lappin responded to the General Counsel's questions about supervisory meetings regarding the Union. I shall credit Lappin's version of her conversation with Coleman.

Conclusion

I find nothing in the credited version of the Lappin-Coleman conversation that supports the General Counsel's allegations of impression of surveillance, threat of layoff, interrogation, and a threat that union membership would be mandatory should the Union win. I recommend dismissal of the allegations relating to Joann Lappin.

Q. *Robert Mancell*

Former employee Bertha Smith testified that she was approached by Robert Mancell in one of the X-ray rooms on December 10, 1980.

> He asked me had I heard whether they was trying to organize a union at the hospital. And he asked me how did I feel toward the union. I told him a union wouldn't be such a bad idea.
>
> And he went on to say that his son participated in a union and he said if they—if they get a union and they go out on strike that I might not get my job back.

Robert Mancell denied ever having a conversation limited to him and Bertha Smith during which the Union was discussed. However, Mancell admitted discussing the Union with a group of employees that included Bertha Smith. Mancell testified that he did not direct any question directly to Smith. On cross-examination, Mancell testified regarding his union conversations with the employees as follows:

> I would say, what is your view point on the union. What is your opinion? That was at this particular meeting—the one and only—that I had with them. And I just wanted to hear what they had to say. Not to ask whether they were going to join or not, just if they had an opinion. Everybody is suppose to have one.

Mancell also admitted approaching two other employees, Will Chapman and Thomas Jackson, and saying basically the same thing as above to those employees. Mancell denied he ever told the employees that if the Union came in the employees would go on strike. Instead, he testified that he told the employees that "[t]hey might have a strike."

Discussion

Despite his denial, Robert Mancell's testimony regarding the contents of his conversations reveals that he did interrogate employees concerning their "opinion" or "view point on the union." In view of that admission and my observation of Bertha Smith's demeanor, I shall credit her version of the conversation. Even though Smith was discharged by Respondent for alleged misconduct, she appeared to answer Respondent's questions about her discharge, as well as questions about her conversation with Mancell, candidly.

Conclusion

In line with my findings above, and in consideration of the credited testimony of Bertha Smith, and evidence of other violative conduct of Respondent during that same period of time, I find that Robert Mancell illegally interrogated employee Smith about her and other employees union activities.

R. *Edward Silvey*

Former employee Willie Freeman testified that he had attended an employee meeting at the hospital in the early part of February 1981, conducted by Silvey. Freeman testified:

> At this meeting Mr. Silvey said that the union can cause a lot of trouble. The union causes strikes and violence. We would be out without any pay. The union would set up picket lines and others would come across the line; this would be bad.
>
> He also added that we would be out without pay. All we would have would be bills. And he said have the union sign a statement as to what they can guarantee you. He held up a blank sheet of paper and said this is where you start with the union.
>
> He said the union can't force Baton Rouge General to do anything. Such as your raises and so forth.
>
> Then he had some newspaper clippings also he would like for us to read. I didn't read any of them. This meeting lasted about an hour, close to that.
>
> . . . .
>
> He said that—that Baton Rouge General would hire other people and if they could come into the hospital it would cause trouble.
>
> . . . .
>
> And strikes would, you know, have us out with no pay.

Edward Silvey admitted that he was one of the speakers during the group meetings to employees regarding union organization. Silvey was asked if he told the employees that if the Union was successful that bargaining would commence from scratch. He responded that he did not believe he said it like that but that he held up a piece of paper and said this is a blank piece of paper and that we would bargain in good faith and that benefits or wages could go up or down or they could remain the same.

Discussion

Willie Freeman's testimony appears to follow the general scope of issues covered in the written text. As in the situations noted earlier, I am convinced, and find, that Silvey's comments during this meeing were in accord with the written text.

Conclusion

I shall consider Silvey's presentation, along with addresses by other supervisors below.

S. *The Group Meetings*

1. The first series of group meetings

The record evidence reveals that the unfair labor practice contentions regarding the group meetings when speakers addressed groups of employees—(other than those indicated above where prepared texts were not used)—involved the first of Respondent's several speeches. That speech was used in meetings beginning on February 9, 1981.

As indicated above, I have credited evidence showing that the prepared text of that first series of meetings, which was received in evidence, was read to employees at the group meetings. A reading of the text reveals a clever antiunion speech showing that Respondent was strongly opposed to the union efforts of its employees. In fact, the speech clearly states that was Respondent's position.

However, no evidence was offered to show that any of the information revealed in the speech was untrue.

The speech was carefully constructed to show employees the dangers that may result from unionization. After identifying the object of the talk, the text states Respondent's position as being "100 percent against having a union in the Hospital." The text then summarizes the procedure for an NLRB election.

Next the text deals with the alleged union promises and counters with Respondent's version of what will occur if the Union wins the election, by asking, "Will you like to see a copy of the union contract in the Hospital if the union should win an election here?" The speaker holds up a blank sheet of paper, which is shortly followed by the following, inter alia:

> If the union should win an election here—and we don't believe that is going to happen, but just assume for a moment that it did—the hospital would be obligated to bargain in good faith with the union. That is all. We would do that bargaining with an intention of reaching an agreement. You should know, though, that there would be *no automatic* wage increases, *no automatic* benefits improvements, *no automatic* policies, *no automatic* anything else.
>
> We would start right from this blank sheet of paper, and *not one word, not one sentence, not one paragraph* would go on that sheet of paper unless the hospital and the union agreed that it should be on there. Bargaining begins at the zero point, and *everything* which you currently have—your paid holidays, your wages, your vacations, your hospitalization insurance, your retirement plan—*everything* would go on the bargaining table and be subject to the *give* and *take* of bargaining.
>
> Under the law, the only thing that the Hospital would be required to do should the union win the election, is to sit down and bargain in good faith over your pay and your jobs. We would do that. A union win, however, would mean an automatic increase in *nothing*! Here is the proof of what I am saying (hold up copy of Government leaflet). Let me read the section which is circled in red. (You read indicated phrase.) That's the law and we would obey the law.
>
> Before you think about voting for the union, you need to know *how bargaining works*. You should understand that bargaining can be *cold-blooded* and *impersonal*. Nothing is automatic about bargaining between a hospital and a union. No one knows what will happen or what will come out of bargaining. The union has made a lot of promises already and will probably be making more about their getting you more pay, more benefits, and that you will not have to work so hard. That's the name of the game with unions—promises. Under the law, there is absolutely no limit on how extravagant promises can be—the *sky is the limit*!

The cases have customarily found that threats to bargain from scratch, or from a blank sheet of paper, do not violate Section 8(a)(1), when the context of the statement shows the comments relate to the give and take of bargaining and when it is revealed that benefits may go up or down during negotiations. I find that to be the case here. *General Electric Co.*, 246 NLRB 1103, 1107 (1979); *Delchamps, Inc.*, 244 NLRB 366, 372 (1979); *Rapid Mfg. Co.*, 239 NLRB 465, 471, 472 (1978).

Following the above, the speakers cited cases indicating that an employer may inform its employees that bargaining would have to begin at the zero point and that bargaining may actually result in reduced benefits.

Subsequently, the speaker asked what may the Union do if its demands are rejected during negotiations and he responded that the "[s]trike is the only weapon." The speaker then points out, inter alia, that strikers do not get paid; that, in Louisiana, strikers do not get unemployment compensation; and that strikers could lose their jobs because Respondent has the right to replace strikers with new employees.

In considering this portion, I noticed that the speaker did not specifically contend that strikes were inevitable when a union is selected. Rather, the text indicates, inter alia:

> What would happen if we said *NO* to the union's demands? What *could* the union do? What *would* the union do? What could the union do to try to force us to give in to their demands. There's only one thing that the union *could* do to try to force us to give in to their demands—and that would be call *you* out *on strike*. The *strike* is the *only weapon* that

> the union has to try to force the Hospital into giving in to its demands—and *you* would be the union's *ammunition.*

The above statement may constitute an exaggeration. Although the power to strike, or the strike itself, may be one of the Union's strongest weapons, it is not the "only weapon" as indicated in the text. However, I find that statement does not constitute misrepresentation in view of the strike being the most likely recognized weapon available to labor organizations. Where, as here, the speech does not stress that a strike is inevitable, no violation is found (see *Tipton Electric Co.*, 242 NLRB 202 (1979)).

Moreover, an employer does not violate the Act by telling employees they will not receive pay during a strike and that it has the right to replace economic strikers.[7] (See discussion in *Puritech Industries*, 246 NLRB 618, 622 (1979).)

The speech then deals with the examples of strikers losing out—examples of strikers being replaced at work during a strike.

The text then addresses itself to violence in strikes with the statement, "Unfortunately, along with strikes very often comes violence." This is followed by specific examples of death and serious injury occurring during strikes.

Subsequently, the text advised the employees that it is difficult to remove a union once employees select one, but subsequently decide they made a mistake.

The speech then closes with the following:

> Mr. Kirkpatrick and Mr. Sawyer asked that you discuss this important matter among yourselves and with your supervisors. If any union pushers ask you to vote for the union, demand a *written, signed, notarized* guarantee that you won't lose your job—you won't be involved in a strike or in strike violence. Get it in writing—*demand proof!* You shouldn't take a chance on the outside union organizer and their strike—happy union. They have members out of work now and they are simply looking for someone—you—to make up the money which those out of work people are no longer paying. Make no mistakes—this whole thing is nothing but a big money deal for the union and the union's bosses. They plan on taking over and you are right to figure a hundred thousand dollars from *you, each* and *every* year, if they can get in here and can get their hands in your pockets.
>
> Well, that is all we have time to cover today. But—if you have any questions or comments about what was covered, feel free to ask those questions or voice those comments. We hope we have cleared up some of the mysteries surrounding what the union can and cannot do. If anything later, you are unsure of something we have covered *or* that the union has claimed—we encourage you to ask your supervisor or come by and see another member of management. We want to be sure you get all the *truthful answers to your questions before this election.*
>
> Are there any questions?

I find the above speech troublesome. It comes close to speeches found illegal by the Board and courts. Nevertheless, I am constrained to find that no violations were proved. The speeches do not advise the employees of the inevitable consequences of unionization. It does, with a heavy hand, alert the employees to some of the most blatant examples of what has occurred during other union campaigns. However, even in consideration of the entire text against the background of unfair labor practices found herein, I am unable to find anything that ventures into the area of illegal threats or coercion. *Reliable Mfg. Corp.*, 240 NLRB 90, 100 (1979).

2. Improved benefits

The General Counsel alleges that Respondent violated Section 8(a)(1) by changing from a retirement system that, among other things, required employee contributions to one requiring no employee contributions, and by changing its policy regarding employee parking in its garage to permit the employees to park free during the union organizing campaign.

There appears to be no dispute regarding the facts. Respondent learned of the union campaign on or before November 24, 1980, when the Union wrote Respondent advising it of the campaign and naming certain employees on the organizing committee.

By notice to all employees dated December 2, 1980, Respondent advised that effective with the pay period starting December 14 there would no longer be a charge to employees for parking in the parking garage.

By notice to all employees dated January 12, 1981, Respondent advised that "[e]ffective January 1, 1981, the Board of Trustees has approved a retirement program which is fully funded by the Hospital."

On January 15, 1981, the Union filed its representation petition.

Employer's are generally found to violate Section 8(a)(1) by announcing improved benefits during an election campaign unless the evidence reveals that the employer would have announced and granted those improved benefits even in the absence of the union. *Tekform Products Co.*, 229 NLRB 733, 742, 743 (1977).

3. The pension plan

Prior to January 1, 1970, Respondent, along with two other hospitals in Louisiana, was a Baptist institution and its retirement plan was administered by the Southern Baptist Convention. Even though Respondent ceased being a Baptist institution in 1970, the Southern Baptist Convention continued to administer its retirement plan. The Employment Retirement Security Act of 1974 (ERISA) granted certain exemptions to churches. Due to Respondent's unique position as a former institution of the Baptist Church, with its retirement plan currently administered by that church's governing body, questions, arose as to its entitlement to those exemptions.

[7] The text shows from its contexts that it was addressing economic strikes—the context indicates the speaker is referring to a strike resulting from rejection of the union negotiating demands.

By an August 9, 1978 letter from the Annuity Board of the Southern Baptist Convention's (Annuity Board) general counsel, Respondent was notified that the Annuity Board was seeking clarification from Internal Revenue Service and the Department of Labor, concerning its entitlement under the Internal Revenue code as a tax shelter annuity program. That letter advised that similar church plans had obtained favorable rulings from the government agencies.

By its letter to the Southern Baptist Annuity Board dated February 27, 1979, Respondent advised that it had learned that the two other Louisiana hospitals that were formerly Baptist institutions had withdrawn from the Annuity Board. The letter asked for an opinion concerning whether Respondent should also withdraw in light of decisions and problems regarding ERISA. The Annuity Board responded on March 8, 1979, by recommending that Respondent investigate withdrawal from the Annuity Board and advising that the ERISA questions had not been resolved.

Minutes from committees under Respondent's board of trustees and letters to outside agencies, that were received in evidence, show further study, investigation, and consideration was given to the possible withdrawal of Respondent's employees' retirement plan from the Annuity Board during the period May 4, 1979, through December 22, 1980.

The unrebutted evidence indicated that during the above-mentioned period of time, more and more attention was given to withdrawal from the Southern Baptist Annuity Board due to the ERISA problems and due to the low interest rate received from the Annuity Board.

Louis Champagne testified that Respondent was notified of an amendment to ERISA effective September 26, 1980. That amendment clarified Respondent's status. Whereas before the September 26, 1980 amendment, Respondent felt it may possibly "grandfather" under the ERISA exemptions as a former church institution, that amendment indicated that continued church exemptions were no longer possible for Respondent.

Against that background, the personnel committee of Respondent's board of trustees was notified on December 22, 1980, that retirement moneys would be placed with a private insurance company. By letter dated January 2, 1981, Respondent notified the Annuity Board of its decision effective January 1, 1981, to change its retirement plan and place the funds with Union Mutual Insurance Company. Union Mutual submitted its plan to Respondent on July 10, 1980.

The above evidence conclusively proves that initial events necessitating Respondent's change in the employees' pension plan predated the union organizing campaign by several years. Although some of the consequent events occurred after the Union first appeared, some of those material events, such as the September 26, 1980 ERISA amendment, were clearly beyond Respondent's control. Moreover, the actual plan that was adopted by Respondent was submitted on July 10, 1980. There was no showing that Respondent was aware of its employees' union campaign when it first considered Union Mutual's proposal.

Moreover, the timing of Respondent's change appears logical in view of the above evidence. The funds held by the Southern Baptist Annuity Board exceeded $2 million. In view of the facts establishing that Respondent received Union Mutual's proposal in July 1980, and the ERISA amendments becoming effective September 26, 1980, I do not find that Respondent unduly delayed implementation to coincide with the union campaign. The January 1, 1981 effectuation of the plan evidences prompt and reasonable action under the circumstances regardless of the timing of the union campaign. The evidence is convincing, and I find, that Respondent would have implemented the new plan on January 1, 1981, in the absence of the union organizing campaign. Therefore, I find that the General Counsel has failed to prove a violation by Respondent in implementing the new pension plan in January 1981.

4. Free parking

Respondent opened its parking garage in August 1977. By notice dated August 5, 1977, employees were notified of parking privileges in the garage with fees at the rate of $6.92 per pay period.

Through its news to employees publication, "The Vine," dated May 31, 1978, Respondent notified its employees of a reduction in parking fees to $4.62 per pay period.

Louis Champagne testified without rebuttal that by 1980 Respondent was providing free parking in the garage as an encouragement to the evening and night-shift employees to park in the garage as a security measure.

According to Respondent's comptroller, Lynn Lanoux, he learned that medicare was changing their attitude regarding accountability of reimbursable parking cost. Funds were available to reimburse hospitals for parking of staff and employees as opposed to visitors. The attitude change affected whether the hospital could simply allot certain areas to staff and employees parking as opposed to the old method of accounting for the parking on an individual-by-individual basis. Against that background, Lanoux was directed in the summer of 1980 to investigate whether it was beneficial to Respondent to continue the system of charging certain employees parking fees or changing to a system that would provide for medicare reimbursement—(allowable as cost attributable to that percentage of patient care that was subject to medicare reimbursement)—for all or a portion of the parking cost.

By memo to Respondent's president dated November 28, 1980, Lanoux advised that his study showed the parking garage could receive pro rata medicare reimbursement for staff employee parking of approximately $54,000 per year as opposed to fees currently collected from employees of $50,000 per year. Lanoux recommended that Respondent discard the procedure of charging fees to employees and seek reimbursement from medicare.

Subsequently, Lanoux' recommendation was approved and the employees were notified of the change on December 2, 1980.

Again, as in the case of the pension plan, I note that Respondent's actions that ultimately resulted in free parking for the day-shift employees commenced before it had knowledge of the union campaign. The employees other than day shift received free parking in the garage and Lanoux's study, which resulted in free parking for the day shift, all occurred before the union campaign.

The evidence reveals that Respondent acted properly and in a logical fashion following Lanoux's November 28, 1980 recommendation. I find, under the circumstances, that the facts demonstrate that the change in parking would have resulted absent the employees' union activities. Therefore, I shall recommend dismissal of the allegation.

II. THE 8(A)(3) ALLEGATIONS

A. *The Layoffs*

The complaint alleges that Respondent terminated or laid off employees Charles Hamilton, Ethyl Booker, Jacqueline Jones, Mae Ella LaCour, Susan Quiett, Ruth Stevenson, Teresa Thomas, Lucille Wilson, and Warner Wilson because of their protected activities.

The evidence conclusively proves, and the General Counsel concedes in its brief, that Respondent's decision to lay off a substantial segment of its work force during February 1981 was motivated by economic considerations. Due to a continuing decline in its patient census and its continuing inability to recruit and retain a sufficient number of registered nurses to support its employee complement, Respondent decided to lay off some 53 employees from all departments including 4 employees in housekeeping, 1 leaderman in the laundry, and 20 employees from nursing services.

The evidence revealed that an acceptable level of staff-to-patient census was in the range of 3.3 to 3.6 employees per patient. In December 1980, Respondent was operating at the level of 4.5 employees per patient. Although some reduction in the number of employees had been achieved through normal attrition, it became apparent during early 1981 that a layoff would be necessary in order to reach an acceptable level of employees.

In view of the unrebutted evidence and the General Counsel's concession that the overall decision was not discriminatorily motivated, I find that Respondent's overall layoff action was not illegal.

The General Counsel does contend and I shall now consider, whether Respondent engaged in illegal conduct by selecting for layoff, among others, the nine alleged discriminatees.

1. The nurses aides

The General Counsel contends that of all the nurses aides selected for layoff, the following would not have been selected but for their union activity: (1) Ethyl Booker, (2) Mae Ella LaCour, (3) Ruth Stevenson, (4) Teresa Thomas, and (5) Lucille Wilson.

Vice President Edward Silvey testified regarding the need to reduce the number of nurses aides. In the spring of 1980, Silvey, in consultation with Tom Alexander, decided a staff reduction was necessary. It was decided that the reduction, which would be attempted by attrition, should involve 60 nurses aides. However, by late 1980, 108 nurses aides were still employed. The reduction by attrition had been only partly successful. Forty of the needed 60 reductions had occurred through attrition. In December 1980, Silvey, along with Alexander, decided it would be necessary to lay off 20 employees in nursing services, 18 nurses aides, and 2 operating room aides.

Silvey advised the director of nursing services to select the employees for layoff based on job performance.

Joyce Burkeen was director of nursing services at material times. Burkeen testified that on being advised by Silvey to select employees for layoff, she discussed the aides' job performance with their supervisors and reviewed all the employees' personnel records. Through that initial process, approximately 40 employees were found to be outside the area of consideration for layoffs because of their good performance. Those 40 were thereupon eliminated from the selection process.

Of the remaining employees, Burkeen decided on a process of evaluating job performance on the basis of the employees availability at work. She elected to select those employees with the poorest absentee-tardy records. Each employee file was examined and a list established on the basis of the employees with the most absences and tardies over the past 1-year period. However, according to Burkeen, 3 of the top 20 were passed over and not selected for layoff.

Those three included one employee that was out sick because she had contacted hepatitis at work in the hospital and was drawing workmen's compensation benefits. Burkeen testified that she was advised that state law prohibited discharge of an employee because of illness that resulted in a workmen's compensation award.

Another of the three was a nursing student working as a nurses aide. Her absences were frequent because of class conflicts. Burkeen testified that arrangement was made when the employee was hired and the hospital was in hope of retaining the employee on her graduation as a registered nurse—a critical job that the hospital had trouble manning and that contributed to the need to lay off nurses aides. Therefore, Burkeen elected to excuse that employee's absences for purposes of layoff consideration.

The third employee passed over for layoff was an employee that frequently volunteered to work back-to-back shifts and received a number of tardies when she took too long returning after working consecutive shifts—i.e., 16 hours. Burkeen excused that particular type of tardiness due to the strain of working consecutive shifts and having only 8 hours before returning the next day.

In order to prevail, in view of my finding that the overall decision to lay off the employees in the nursing services was legally motivated, the General Counsel must now establish that either (1) the overall layoff selection process in nursing services was discriminatorily designed; or (2) the process was discriminatorily applied in such a fashion that Respondent was able to unfairly select the named discriminatees.

Regarding item (1) above, the General Counsel offers no evidence showing that Burkeen's decision to select

employees with the highest absentee/tardiness rates was discriminatorily designed. Obviously, other processes could have been used in measuring job performance, but no evidence was introduced illustrating that Burkeen's absentee/tardiness method was used because it provided a means to discriminate; nor was any other grounds offered on which I could find fault with Burkeen's system. Burkeen testified that she resorted to the absentee/-tardiness procedure after examining the personnel files and determining the employee evaluations were not sufficiently reliable to use in that process. She stated that unfortunately she discovered that personnel records were not "very well kept." Burkeen's absentee/tardiness system appears on its face to be a logical, although perhaps an inexact method of judging performance, i.e., an employee does not perform well when they are not on the job. Therefore, I find no basis to determine that the method of selection was discriminatory.

Next, I must look to see if the system was discriminatorily applied.

Regardless of the apparent inequities involved in selecting an employee, perhaps a longtime employee such as several employees involved, on the basis of her absentee and tardiness record, and regardless of the extent of the employee's union activity and other elements tending to show a prima facie case, I must conclude Respondent acted lawfully if the employee would have been selected under the Burkeen system absent their union activities (see *Wright Line*, 251 NLRB 1083 (1980)). I shall consider, in making this analysis, Respondent's union animus that has been illustrated through the supervisors' speeches to employees and the numerous 8(a)(1) violations that I have found herein. I am also mindful of the timing of the layoffs coming a little over a month after the Union filed its representation petition. Additionally, I am aware of the evidence showing that employees Ethyl Booker, Mae Ella LaCour, Ruth Stevenson, Teresa Thomas, and Lucille Wilson engaged in union activities. Three of the alleged discriminatees, Booker, LaCour, and Thomas were included on the Union's organizing committee list mailed to Respondent on November 24, 1980. Ruth Stevenson handbilled for the Union at the hospital during early February 1981, and was allegedly seen by supervision. The company knowledge element is weak as to alleged discriminatee Lucille Wilson. There was no direct evidence showing awareness of Wilson's union feelings other than an alleged conversation involving Wilson and alleged Supervisor Bogen.

However, the above facts establish to my satisfaction that the General Counsel should prevail if it is shown that the above alleged discriminatees were treated in a discriminatory manner. Obviously, regardless of animus, knowledge, timing, and employee union activity, no allegation of illegal termination should survive absent a showing that the alleged discriminatees were treated with disparity.

In the instant case, 18 nurses aides were laid off during February 1981. Prior to that time some 40 other employees from nursing services had been eliminated through attrition.

Respondent proved that of those employees listed as members of the organizing committee in the Union's November 1980 letters, 20 remained in Respondent's employ on May 7, 1981, the day of the NLRB election. Three of the remaining 10 from the organizing committee voluntarily resigned before May 7. One member of the committee was discharged for neglect on duty and that employee was not alleged as a discriminatee. The six remaining union committee members were included in Respondent's layoff. Three of the six were nurses aides Booker, LaCour, and Thomas. The remaining three were also alleged by the General Counsel as discriminatees (see below).

As indicated above, the employees involved in Respondent's February 1981 reduction in force totaled 53 from all departments.

Concerning the specific number of absences or tardies by nurses aides, counsel for the General Counsel was supplied with those records that she used in her Rule 611(c) examination of Director of Nursing Burkeen. There was no evidence offered showing that any of the five alleged nurses aides discriminatees failed to qualify for layoff on the basis of those absentee/tardy records for the year before the layoff.

Therefore, I must find that the General Counsel failed to establish that former employees Booker, LaCour, Stevenson, Thomas, and Wilson were treated in a disparate manner. It is well established that an employee does not receive immunity from personnel actions simply by engaging in union or protected activity. There must be a showing that the respective employee was treated differently. Here, that element was not proven. I shall recommend dismissal of the allegations regarding those five alleged discriminatees. *International Computaprint Corp.*, 261 NLRB 1106 (1982).

2. The housekeeping employees

The General Counsel alleges that Respondent laid off employees Jacqueline Jones and Susan Quiett because of their union activities. Both Jones and Quiett were employed as maids in housekeeping.

Jones and Quiett were among the four maids laid off during Respondent's February 19, 1981 reduction in force. As shown above, the force reduction, which included a total of 53 employees, was found to have been economically motivated. The sole question remaining is whether, as the General Counsel alleges, employees Jones and Quiett were selected for layoff because of their protected activities.

Bill Snider, hospital manager for the management service charged with overseeing Respondent's laundry and housekeeping department, testified that shortly after coming to the hospital in April 1980 he advised Tom Alexander that a reduction of housekeeping employees was necessary. However, by December 1980, Respondent had reduced the housekeeping complement by only five employees through attrition. In February, with housekeeping remaining overstaffed, the head of housekeeping, Melda Pace, was advised to reduce the housekeeping force by four through layoffs.

Pace, faced with an assignment similar to that of Joyce Burkeen in nursing, decided on a procedure of selecting those four employees with the largest number of discipli-

nary offenses in their personnel records. The four selected were Susan Quiett and Sharon Thompson with five conferences[8] each; and Jacqueline Jones and J. Tate with four and three conferences, respectively. A listing of the conferences among all housekeeping employees showed that no maid other than Thompson, who was laid off, received as many disciplinary conferences as alleged discriminatees Quiett and Jones.

a. *Susan Quiett*

Susan Quiett's personnel file included reports on conferences with employee dated December 30, 8, and 7, 1979, and July 16 and May 28, 1980. However, none of the disciplinary incidents were alleged as violations.[9] Moreover, the General Counsel does not argue and no evidence was offered to prove that any of those disciplinary actions were precipitated by Quiett's union activities. I make special note of that fact because the obvious concern dictated by an awareness that at least three of Quiett's conferences occurred after Respondent learned of Quiett's prounion position—i.e., on November 24, 1980, the Union notified Respondent that Quiett, among others, was on the Union's organizing committee. Thereafter, on December 7, 1980, and afterwards, Quiett engaged in handbilling for the Union near the hospital and her activity in that regard was observed by supervision. Two of Quiett's conferences occurred in alarming proximity to her initial handbilling activity. On December 7, the day she first handbilled, Quiett, along with four other employees, received a conference report from Supervisor David Robertson for overstaying their break. Nevertheless, Susan Quiett's testimony removed doubt regarding the integrity of that incident. Although Quiett testified that she was not shown the conference report, she admitted that David Robertson "did demand we get up. He said that we had over stayed our break." The record shows that Robertson also conferenced the other employees involved in that incident.

On December 8, Melda Pace completed a conference report on Susan Quiett for "late *12 times*, self-sick *9 times*, absent *9 times*, illness in family *15 times*."[10] When questioned about the December 8, 1980 conference report, Susan Quiett admitted the conference with Pace even though she testified that Pace told her the report would not go on the record if Quiett did not sign it.[11] Moreover, it appears that this was not an incident where Pace arbitrarily selected Susan Quiett for absentee counseling. Counseling reports were offered for the four housekeeping employees laid off in February. All four received counseling in December 1980 for attendance problems; Joann Tate on December 29, 1980; Jacqueline Jones on December 16, 1980; Susan Quiett on December 8, 1980; and Sharon Thompson on December 9, 1980.[12]

Likewise, concerning Susan Quiett's last conference report before she was laid off, when questioned about the December 30, 1980 conference report on the condition of her uniform, Quiett admitted the occurrence.

Susan Quiett also acknowledged awareness of her earlier conference reports dated before her union activity—a verbal warning on July 16, 1980, and a warning for smoking dated May 28, 1980. The May 28, 1980 conference was the only one of her five conference reports that was signed by Quiett.

Despite Quiett's candid testimony acknowledging her various conferences, I am deeply troubled by their timing, especially when viewed against Respondent's proven animus, Quiett's very visible union involvement and Respondent's knowledge of that involvement, and the overall 8(a)(1) activity, and Quiett's direct involvement in some of that activity. Moreover, as shown below, I am convinced that Quiett was awarded more burdensome work assignments following Respondent's learning of the union activities.[13]

I am also mindful of various devices by which warnings may be unduly increased during a union campaign, but the evidence does not establish that occurred here. Nor was there evidence that Susan Quiett's conferences involved occurrences for which employees were not routinely conferenced.

The bottom line here, as in the case of the nurses aides, is that the evidence failed to prove disparity. There was no showing that the selection process was discriminatorily designed and there was no showing that Susan Quiett was discriminatorily disciplined on the five occasions that led to her layoff. Regardless of my feelings of concern, I am not empowered to substitute conjecture and suspicion for evidence. Regardless of the difficulty of proof, the case must fail absent a showing of discriminatory treatment. (*International Computaprint Corp.*, 261 NLRB 1106.)

b. *Jacqueline Jones*

The record proved that Jones received four conference reports during the year before she was laid off.

On December 16, 1980, Jacqueline Jones received a conference report from Melda Pace for her attendance during the December 30, 1979, through December 8, 1980 period. The conference reflected "late *32 times*, self-sick 17 times, absent *7 times*, illness in family *4 times*. The conference report was signed by Jacqueline Jones.

On December 5, 1980, Jacqueline Jones received a conference report from Supervisor Jones for questioning

[8] Disciplinary writeups were referred to as conferences.

[9] The General Counsel does allege as an 8(a)(3) violation that, beginning in the first week of December 1980, Respondent changed Susan Quiett's work assignments because of her union activities. The evidence supports that allegation as shown hereafter.

[10] The conference report covered the December 30, 1979, through December 8, 1980 period. In addition to the above, the conference report showed, "maternity leave: January 26, 1980–April 8, 1980. Surgery leave: August 24, 1980–October 27, 1980."

[11] Although I found Quiett to be a credible witness, I do not credit her testimony in this regard. It simply makes no sense that the supervisor would reward an employee because the employee refused to sign a conference report. I am convinced that Quiett misunderstood what Melda Pace said on that occasion.

[12] Jacqueline Jones testified that December was the first time housekeeping employees had been called in and counseled about their attendance. However, Jones testified that the entire department was included in that procedure. Therefore, even if this conference report is discontinued regarding all employees counseled, there would be no change in the relative positions of the employees on the listing of conference reports.

[13] The General Counsel did not argue and the evidence failed to show that Quiett's changed work assignments contributed to any of the conference reports she received in December 1980.

her work assignments, telling supervisors that they were scared of another employee, and telling that employee that the supervisors must be "scared" of her. Jacqueline Jones acknowledged that particular incident in her testimony although she contested some of the facts related in the conference report.

On September 16, 1980, Jones was awarded a conference report for "not reporting to work" and "not giving correct information." Jones admitted the incident occurred as a result of her involvement in a police action at a party she attended that resulted in her not being able to work. Jacqueline Jones admitted receiving the conference report.

Jones denied knowledge of an incident and a conference dated September 20, 1980. That conference report was signed by Supervisor David Robertson.[14] Following Jones' testimony, Respondent called David Robertson, who testified as follows regarding the September 20, 1980 conference report:

> A. Yes, I went in and I told her that her break was over and it was time to leave. And as I was walking away she mumbled something and I turned around and said, what was that?
>
> And the words was, you're getting kind of smart here lately.
>
> Q. And did you write her up?
>
> A. Yes, I didn't write up—I wrote—what I did I just wrote the paper that I had warned her of overstaying her break. And as far as writing it up, it wasn't what you'd call a writeup, it was just a warning so I could know myself that I had told her about this incident.

On cross-examination, Robertson admitted that he did not tell Jones he had written the September 20, 1980 conference report. Robertson's above testimony is unrebutted because Jones was not called to deny his specific testimony regarding the incident.

As in the case of Susan Quiett, I find the record fails to justify a determination that Jones was treated in a discriminatorily manner. The only housekeeping employees with more conference reports than Jones were Susan Quiett and Sharton Thompson, both of whom were also laid off. The record fails to show that Jones' December 16, 1980 conference on attendance was discriminatorily awarded because there was no showing that any housekeeping employee with a worse attendance/trady record failed to receive a conference report. Moreover, there was no showing that any employee would not have been awarded conference reports, as Jones was on December 5, September 16, and September 20, 1980.

In view of the above, I reluctantly find that the evidence does not support a determination that either Susan Quiett or Jacqueline Jones was discriminatorily laid off.

c. *Charles Hamilton*

The General Counsel's case in support of Charles Hamilton is totally dependent on my determining Hamilton was not a supervisor. In that regard, counsel for the General Counsel contends, "Hamilton's refusal to withdraw support from the union was the precipitating event which caused his discharge." In view of my determination that Hamilton was a supervisor, the General Counsel's case must fail. An employer may legally discharge a supervisor for refusing to withdraw support for a union.

I am in agreement with counsel for the General Counsel's contention that Hamilton's extensive activities on the Union's behalf were known to management. Moreover, as shown above, I credit the testimony showing that Hamilton was warned to cease his union activities or risk further disciplinary action.

It is apparent from the record that Hamilton, a valued employee, was treated with disparity. But for my finding that Hamilton was a supervisor, I would have found a violation. The facts reveal that Hamilton was selected for termination because of his union activities. However, as shown above, that does not constitute a violation in view of his supervisory position. *Parker-Robb Chevrolet*, 262 NLRB 402 (1982).

d. *Warner Wilson*

Wilson, like Charles Hamilton, was cautioned by supervision to cease his union activities (see above). Wilson's union activities were extensive. He signed one, and distributed other, union authorization cards. As shown above, Wilson had conversations with Supervisor Betz about the Union and Betz cautioned Wilson that they were out to get Wilson's job. Also, as shown above, Wilson was an outspoken advocate of the Union during one of Respondent's group meetings. Therefore, the record establishes, as it did in all the termination cases discussed above, the elements of animus, knowledge, union activities, and timing. Additionally, Wilson was threatened with discharge because of his union activities.

Moreover, the evidence also revealed that Wilson was treated in a discriminatory fashion. There is no question but that Warner Wilson was a valued employee—Respondent did not argue otherwise. He held the responsible position of leaderman and, as shown above, on regular occasions he was the senior employee present on the job with significant responsibilities.

Respondent contends it was necessary to lay off one of its leadermen. However, no evidence was offered to show why a leaderman position was selected over another nonsupervisory position. Respondent alleged that Wilson was the junior leaderman. However, Wilson's testimony, which I credit as shown above, demonstrated that he was senior to the woman who occupied the leaderman position on the night shift. Wilson testified that he was never offered the opportunity to transfer to the night shift to avoid lay off.

---

[14] Jones did not sign her September 20, 1980 conference report and the document does not show that she refused to sign. However, the conference reports received in evidence on housekeeping employees Jones, Tate, Quiett, and Thompson (the laid-off employees) show numerous conference reports that do not contain either the employee's signature or a "refused to sign" notation. David Robertson issued conference reports to Jones, Quiett, and Thompson and none of his reports contain either the employee's signature or the notation "refused to sign." Also, Supervisors Johnson and Courville issued conference reports that do not include the employee's signature or an indication "refused to sign."

Therefore, the evidence is overwhelming and I find that Warner Wilson was laid off on February 20, 1980, because of his union activities.

e. Susan Quiett's change in work assignments

Susan Quiett testified that for the first time during her employment with Respondent, on December 8, 1980, the day following her first handbilling for the Union near the hospital, she was reassigned three different work areas during her shift. She was assigned 3d west, but subsequently sent to 4th west; later to 2d west and finally back to 3d west. Quiett complained that after December 8 she was assigned to clean and mop walls and to mop brick on the ground floor in pediatrics without assistance even though that work was normally performed by porters. She was also assigned to sweep and mop stairs from the fifth floor down to the ground floor. Additionally, Quiett was assigned to clean 42 rooms without help. According to Quiett, she had not received similar assignments before her handbilling activity. He request for assistance from Supervisor Cyrus was denied.

Melda Pace testified that "Hard cleanup jobs" such as scrubbing walls, were normally performed by both maids and porters. When asked if those jobs normally involved more than one person, Pace testified, "It would be according to how big an area it would be."

Respondent offered assignment records that appeared to show the general assignments of the relief maids, and contended that those records demonstrated that Quiett's project and patient room assignments had remained consistent.

However, I am convinced on the basis of Quiett's testimony, which I credit, that she was assigned more difficult jobs without assistance after being observed handbilling for the Union. Such activity provides a convenient means for an employer to express how adverse consequences may flow from union activity and that action is prohibited by Section 8(a)(1) and (3) of the Act.

B. *Denial of a Merit Wage Increase*

Counsel for the General Counsel contends that Ethel Booker was denied a merit pay increase in January 1981 because of her union activities. Booker testified that Supervisor Gillespie promised her an increase in January 1981, following an evaluation. When Booker did not receive the increase, she inquired of Gillespie and was referred to Personnel Director Champagne. However, Booker never had an opportunity to discuss the matter with Champagne.

Respondent, through documents (including checks signed by Booker), and testimony of Louis Champagne, offered evidence that Ethel Booker received a general increase in pay in September 1980, and a merit increase effective October 19, 1980. Champagne testified that the above increases brought Booker to the top of her pay scale, making her ineligible for an increase in January 1981.

I find Respondent's evidence convincing. The General Counsel did not overcome the evidence that Booker was ineligible for a January raise due to her earlier increases. Therefore, I find that if Booker was informed by Gillespie that she was scheduled to receive another wage increase in January, that information was incorrect. I am inclined to believe that Booker was mistaken and that she confused the time she received information about her merit raise. In any event, I credit the evidence showing that Booker was not denied an increase, which she would have received but for her union activities.

III. ADDITIONAL OBJECTIONS EVIDENCE

At the beginning of the hearing, the Union called three witnesses that it relied on, in addition to evidence offered during the unfair labor practice case mentioned above,[15] to support its objections.

A. *Margaret Walter*

The first witness for the Union, employee Margaret Walter, testified she attended several meetings regarding the union campaign, which were conducted by Respondent at the hospital. Walter testified the first of those meetings was held in February and Sawyer and Walters (from X-ray) spoke. Walter recalled Sawyer mentioning the following:

> And then if they a union come in the first thing it would do was to call us out on strike. And, then, if we went out on strike our time that we go out on strike wouldn't—we wouldn't be paid for. And they would have somebody to come in and replace us.
>
> Q. Okay. What else did he say about strikes?
>
> A. Well, I think, you know, I think at that meeting that was mainly all that he said.
>
> Q. All right. Did he cite any examples of strikes?
>
> A. Well, Mr. Walters read some things about strikes happening in other hospitals over the state. And one particular one, I think, was about employees who had been off 107 days or so. And he told how much money the people had lost from being out on strike. And that we wouldn't get paid if we go out any certain length of time like this. And that they would have to come in and replace us because they couldn't stand for us to be out.
>
> Q. Okay, you said he read from something. Did he have some document in his hand that he was reading from?
>
> A. Well, he had some type of paper, yes. I don't know exactly what it was.
>
> Q. All right. Did you get a copy of anything to read while this was going on?
>
> A. No.
>
> Q. Okay. Did he—Mr. Sawyer indicate what the—if the union won the election, how the hospital was going to bargain with the union?
>
> A. Well, he said that they would start off with—all of the benefits that we had then, we would have nothing. We would start off with a blank sheet of paper when they would sit down to the bargaining table.

[15] See fn. 3 above.

And we would start there and we would—it was no guarantee that we would get anything if they bargained with the union.

Q. Do you recall that Mr. Sawyer said what would happen if there was a strike and when it was over—what the consequences of the strike would be once it was over?

A. Well, he said if we were called out on strike and we went out and struck, then, the time that we were out we didn't get paid for. And then we wouldn't be able to come back to our jobs.

Q. You would not—

A. We

Q. You would not be able to come back to your jobs?

A. Right, because they would replace us.

Q. All right. When is the—that was the first meeting that you can remember. Did Mr. Walters say anything at this first meeting?

A. Well, he read from the paper about the strikes and he talked about—you know, he talked about the same thing; about strikes, during that meeting.

Walter attended a second meeting, some 2 or 3 weeks after the first. The speakers at that meeting were Munn and James (assistant director of food services). Her testimony was that Munn spoke first:

A. Well, he told us—the first thing that I can remember—he said his father was a member of a union but—which was no good—and that he thought unions was no good and it wasn't a good idea for us to have a union in the hospital.

Q. Okay, was he reading from something, as well?

A. Yeah, they did have a—some type of paper.

Q. I see. Did they hand out anything for you to read at this meeting?

A. Yeah, they gave us a booklet when we went in.

Q. Did the book have a title or a name?

A. I don't remember the title or name of it, but in the book they had all the different types of articles about striking in different places in different cities, hospitals and what not, for the unions.

Q. As best you can recall, can you tell us some of these places, what the book said, what it was about?

A. No, I can't remember exactly some of the places. But one particular picture in the book they talked about because it was a picture of violence being carried on at a strike. And they made the remark that would we want this to happen—that some of the people in this picture at this strike was killed at the time of the strike. And they said we didn't want that to happen here in Baton Rouge.

Q. I see. Again, at this meeting was anything said that if there was a strike, about what the consequences would be, once it was over, to you?

A. Well, Mr. Munn, he say that if we got the union in and they come to the bargaining table and they would bargain in good faith. But he also said that when you bargain in good faith it didn't really mean that we would get more than we had been. Probably it would mean that we would get less than what we had now.

Q. All right. That was his position on bargaining. What about on the—at the end of—if there was a strike, what would be the consequence to you as an employee?

A. Well, he said that if there was a strike and we would definitely be replaced and would not get our jobs back.

Q. You would not get your jobs back?

A. No.

Q. All right. Was that all that Mr. Munn said at the meeting?

A. Well, I think so.

Q. Okay, did Ms. James say anything, the assistant director of food services?

A. Yes, she read some documents about strikes at different places. And I can't remember where it was. But it was different cities and states, over a period of time. At different times they had strikes and things that happened during the strike.

Q. Okay, what—did she read from the same book that you—that they handed out at the meeting?

A. Well, I couldn't follow her in the book.

Q. Uh-huh.

A. I can't say for sure she wasn't reading from it, but when I tried to follow what article she was reading in the book I could never find the place she was reading from.

On the day before the May 8, 1981 election, according to Walter, she attended a third meeting. The speakers were Alexander and Jacobs. Shelia Jacobs spoke first:

A. Well, she gave us the procedures for voting and how—just what you do when you vote. Showed us a sample ballot and how to go about marking it.

Q. Okay, did she say anything else at this meeting?

A. Well, she said if the employees were off on election day—to come in and clock in and out—that they would be paid for it.

Q. I see. Did she say anything else?

A. Well, not too much more than that.

Q. Okay, then who spoke next?

A. Mr. Alexander.

Q. And what did he say?

A. Well, he talked mainly about Mr. Crayton.

Q. Who is Mr. Crayton?

A. Well, Mr. Crayton was one of the union representatives.

Q. Okay, go ahead.

A. He told us about Mr. Crayton being evicted or fired or something, from Lake Charles, during the strike. I don't know—he said something he didn't go for the Lake Charles peoples. And he didn't think he was the man that he would want to represent him.

B. *Brenda Brown*

Employee Brenda Brown also testified about the group meetings held by Respondent. Brown recalled that the speakers at the first meeting she attended in January 1981 were Betty Falgout and another counselor. Her testimony regarding that meeting was:

Q. All right, who spoke first?

A. The counsellor.

Q. All right, what did this counsellor say?

A. Well, he began talking on strikes out of a booklet, "Tell It Like It Is." And then they started talking about strikes.

Q. "Tell It Like It Is" was the name of the booklet?

A. Yes.

Q. All right. As close as you can recall, will you tell us what the counsellor said about strikes and how he used the booklet?

A. Well, as close as I can recall, strike—was saying that how it can hurt your family and can hurt you, may cause you to lose your job, someone causing you to lose your life or someone of your loved one's life. And it's just a whole tragedy in your life and your family.

Q. Did he say anything else about strikes, give any names of any hospitals or—

A. Well, he gave the name of one hospital. I don't recall—one in Lake Charles.

Q. Uh-huh.

A. I don't recall the name but somewhere in Lake Charles.

Q. Did they—did he bring out any other examples of the consequences of strikes?

A. Well, something—not just, you know, you could get hurt and while you are striking they can hire someone else to take your place. And he might even work for less to get the job while you're on strike. And that sometime some outsider can come in and cause a disturbance that will cause you to get into a disturbance and you might lose your life or a member of your family or something.

Q. Did the counsellor discuss—that spoke—discuss anything about the bargaining that would occur if the union won the election?

A. Yes.

Q. What did he say?

A. He said that if the union won the election they would go to the bargaining table with a blank sheet of paper and start from scratch.

Q. When you say "they" who do you mean?

A. I guess administration when you say "they."

Q. Okay. Would go with a blank sheet of paper with—what else did he say about that?

A. They would start from scratch and they don't have to agree to anything that would be said. They don't start from where your present salary is or anything. They start all over from the beginning. They will work up; they don't have to agree to anything.

Q. All right. Did he make any predictions about the results of this bargaining would be, for the employees?

A. He said it would be bad; you would come out with less than what you had from the bargaining. It could happen that way.

Q. Did the counsellor say anything about a union card—about signing a union card?

A. Yeah, that was at the second meeting I went to.

Q. All right. Well was there anything the counsellor said at the first meeting?

A. Well, they talked about strikes at manufacturing companies, and strikes at a hospital that he once worked for and the tragedy there.

A. What did he say?

A. People lost jobs; some was hired back, wasn't too many. And some lost their jobs. Some homes was burned or something or other. Exactly whose home it was I don't recall but he said that he recalled that happening. It was just an upset.

Q. I see. Did Ms. Falgout say anything at this meeting?

A. No, she didn't say anything until her turn came.

Q. All right. When her turn came did she say anything?

A. Just emphasized on what the counsellor said.

Brown attended a second group meeting in March 1981, and the speakers were Tom Hagen (vice president, chemical dependency unit) and Linda Alenbaugh (a head over nursing services). Tom Hagen spoke first:

A. Well, first he gave out "Tell It Like It Is." And they were reading from off some papers they had. And then they told us to open up the booklet. And they started—open to certain pages. And the page we opened up was to the salaries of the international union. And it showed the salaries people made.

Q. Uh-huh.

A. —That was being paid, how much these people was paying. And that's what it was, salary, first we talked about.

Q. Okay, what else did he say at the meeting?

A. He talked about Mr. Crayton and said that—that we—union dues—the dues that we paid would buy Mr. Crayton black cadillacs, and we could be buying our own needs for our purpose of life. And he was saying that how much money that they were making compared to what we were making. And instead of giving our money to them—union dues—how often they wanted it to be giving it to them—

Q. Uh-huh.

A. —to keep them in black cadillacs.

Q. All right. Anything else Mr. Hagen said at this meeting?

A. Well, yeah, he said that he would like everyone to come and vote and if you didn't have a way that they had some that would be working that day

and just call—call and someone would pick you up and bring you and take you back.

Q. All right. Did—

A. But—

Q. Okay, excuse me. Did he say anything about negotiations at this meeting, bargaining?

A. No.

Q. Anything about strikes?

A. No.

Q. Did Ms. Alenbaugh spoke—speak at this meeting?

A. Yes.

Q. What did Ms. Alenbaugh say?

A. She spoke about fines and assessments.

Q. What did she say about fines and assessments?

A. She was telling us that if the union should get in and you signed cards for union dues to be paid, if you didn't pay your union dues in a certain length of time they would fine you. And you have to pay all that money at one time you'd lose your $100 something or other they give you—$100 death or something or other, you know, death of a family member, you know, if you're a union member.

C. *Roger Thomas*

Former employee Roger Thomas attended a group meeting in March 1981. The speakers were Tom Sawyer and Jim Walters. Thomas testified that Sawyer spoke first:

A. Well, it all begins about the union. And they passed out booklets telling—"Tell It Like It Is" booklets. And they discussed that—about how our benefits, we'd lose everything we have and we would start from a blank sheet. You know, they showed us a blank sheet of paper.

Q. Okay, is—when he brought up about the benefits and the blank sheet of paper can you tell us, as near as you can remember, exactly what Mr. Sawyer said about that?

A. Well, first he say that if the union get in we have to start all over again, blank sheet of paper. We'd lose everything.

Q. Uh-huh.

A. —our benefits. And the union's not going to promise anything that we should get it. We might get less or we might get more. But we will lose our benefits.

Q. Okay.

A. We'd start from zero and the union can't promise us anything.

Q. Uh-huh.

A. And in the booklet it showed strike, Coca Cola, and, you know, several people pushing and fighting on the strike. And this was discussed.

Q. Do you recall anything specifically in terms of what strike—did they mention any names of the hospitals or towns, or hospitals?

A. Well, it was in Lafayette. It was a picture of Coca Cola. It was East Jefferson Hospital and it was in Lafayette.

Thomas attended the second meeting 3 or 4 weeks after the first, which was also conducted by Sawyer and Walters:

Q. What did Mr. Sawyer say at the second meeting?

A. Well, basically on the same thing, benefits, a blank sheet of paper and about strikes.

Q. All right. What did he say about benefits?

A. Well, we can lose everything we have now and we'll have to start all over from zero.

Q. Okay, what did he say about strikes?

A. He really didn't say too much about strikes. The strike was the key word and the pictures. The pictures and strikes is what, you know, like using to upset a lot of people, you know. That we don't need the union here and if we go on strike this is what would happen, people fight among each other. Your car and something—you know, burn down your homes and all that. That was the thing that was used.

Q. Okay. Did he use the—at the second meeting did Mr. Sawyer say anything about the blank sheet of paper as he had in the first meeting?

A. Yes, he did.

Q. What did he say about that?

A. Well, he said that—okay, we would start all over from a blank sheet of paper. The union can't promise us anything; that they don't have to negotiate with the union or give anything. They have to start from blank. And we'll lose benefits; we'll start from zero. We might get more, we might not.

Q. Did you attend any other meetings?

A. No.

Discussion

The evidence is substantial that the "blank sheet of paper" comments were included in only the first of the group talks. I have credited testimony that the written text was used on that occasion. With that background, I am convinced that Roger Thomas was confused in his testimony regarding the subjects covered in the second group meeting that he attended. It appears, and I find, that his testimony in that regard actually refers to the first series of meetings. Therefore, I shall not credit his testimony to the extent it involves meetings other than those of the first series. Concerning the first series, I find the written text was used.

I was impressed with the demeanor of witnesses Margaret Walter and Brenda Brown and I credit their testimony regarding meetings after the first series. However, I see nothing in Brown's testimony that reveals objectionable conduct by Respondent during any of the subsequent meetings.

Regarding Walter, she testified that she attended a second group meeting some 2 or 3 weeks after the first and the speakers were Munn and James. According to Walter, Munn told the employees, among other things, "That if there was a strike and we would definitely be replaced and would not get our jobs back." Although

Munn testified, he did not deny that he made the comment. I credit Walter's testimony in that regard.

Objections Findings

As shown above, the Union's objections include allegations of Respondent threatening its employees with loss of benefits, possible loss of jobs, and loss of previously enjoyed benefits. Also alleged are the matters included in the April 10, 1981 complaint in Cases 15–CA–8050 and 15–CA–8050–2

The petition in Case 15–RC–6750 was filed on January 15, 1981. The election was conducted on May 7, 1981.

My above findings concerning the alleged unfair labor practice allegations reflect that several 8(a)(1) violations occurred during the above-mentioned critical period.[16] Those violations that I find also constituted objectionable conduct, including the following:

(1) Gerald Colston interrogated employee Susan Quiett about 2 weeks before February 20, 1981 (sec. I,A, above).

(2) On February 12, 1981, Tom Alexander cautioned employee Warner Wilson to cease his union activities and threatened Wilson with discharge if he did not do so (sec. I,D, above).

(3) In mid-February 1981, Larry Betz cautioned employee Warner Wilson to watch himself because they were out to get him because of Wilson's union activities (sec. I,I, above).

(4) In early February 1981, Supervisor Nellie Guilbeau threatened employees that if the Union got in the employees would not be able to work overtime, adjust work schedules, or come to supervision with employee problems or complaints (sec. I,O, above).

Additionally, as shown above under "Discussion," I credit the testimony of Margaret Walter that she and other employees were told by Munn in a group meeting that they would be replaced and would not get their jobs back in the event of a strike. I find that statement constitutes objectionable conduct within the scope of Objection 1. In that regard, I note Respondent's continued emphasis to its employees of the likelihood of a strike (see above). Walter's total testimony reveals that group meeting was held in February or March 1981.

In view of my findings above, I recommend that Objections (1), (3), and (9) be sustained and the election set aside and a new election ordered.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Service Employees' International Union, Local 275, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees about their union activities; threatening its employees with discharge if the Union was successful in organizing its unit employees; threatening employees that they would not be allowed to discuss work-scheduling problems if the Union was selected; and threatening employees that if the Union was successful, employees would not be able to work overtime, adjust work schedules, or come to supervision with employee problems and complaints, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By laying off its employee Warner Wilson on February 20, 1981, and, thereafter, failing, refusing, and continuing to fail and refuse to reinstate Wilson, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By changing the work assignments of employee Susan Quiett to more onerous jobs about December 8, 1980, and continuing to assign more difficult work to Susan Quiett until her layoff on February 20, 1981, because of Quiett's union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. Respondent did not otherwise engage in unfair labor practices as alleged in the complaint.

The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent unlawfully laid off employee Warner Wilson, I shall recommend that Respondent be ordered to offer Wilson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make Wilson whole for any loss of earnings he may have suffered as a result of the discrimination against him. Backpay may be computed with interest as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRE 651 (1977).[17]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Baton Rouge General Hospital Corporation, Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed to them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by interrogating its employees concerning its employees union activities, by threatening its employees with discharge if the Union was successful; by threaten-

[16] Several of the matters, including from example Gerald Colston's interrogation of Yolanda Scott, were placed as occurring in January 1981. Because the evidence failed to show those matters occurred on or after January 15, I have not found them to fall within the critical period.

[17] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ing its employees that the employees would not be allowed to discuss work scheduling problems if the Union was selected; and by threatening its employees that if the Union was successful, employees would not be able to work overtime, adjust work schedules, or come to supervision with employee problems or complaints.

(b) Changing work schedules of its employees because of its employees' support for the Union.

(c) Laying off and thereafter refusing to reinstate its employees because of the employees' union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Warner Wilson to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority, or other rights and privileges.

(b) Make Warner Wilson whole for any loss of pay he may have suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Remove from his files any reference to the layoff of Warner Wilson on February 20, 1981, and notify him in writing that this has been done and that the evidence of his unlawful layoff will not be used as a basis for future personnel actions against him.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Baton Rouge, Louisiana facility copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Otis Elevator Company, a wholly owned subsidiary of United Technologies *and* Local 989, United Automobile, Aerospace & Agricultural Implement Workers of America. Case 22–CA–8507

13 March 1987

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 25 March 1981 the National Labor Relations Board issued a Decision and Order[1] in this proceeding (*Otis Elevator I*) finding the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by: (1) refusing to bargain with the Union over the Respondent's decision to transfer and consolidate certain unit work from its Mahwah, New Jersey facility to other facilities in East Hartford, Connecticut; (2) refusing to provide the Union with information relevant to the Respondent's decision; and (3) refusing to bargain with the Union over the effects of the Respondent's decision.

The Union and the Respondent filed petitions for review of the Board's Decision and Order with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement of its Order. On 12 August 1981 the court granted the Board's motion to remand the case to the Board for reconsideration in light of the Supreme Court's decision in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981).

On 6 April 1984 the Board issued a Supplemental Decision and Order[2] (*Otis Elevator II*) finding, contrary to its original Decision and Order, that the Respondent did not violate Section 8(a)(5) and (1) by refusing to bargain with the Union over its decision to transfer and consolidate unit work, or by failing to provide the Union with certain information. The Board in *Otis Elevator II* found that the earlier Board relied substantially on its conclusion that the Respondent unlawfully refused to bargain over its decision to transfer and consolidate unit work to find it also unlawfully refused to bargain about the effects of that decision. In light of its conclusion that the Respondent did not unlawfully refuse to bargain over the decision, the Board in *Otis Elevator II* remanded the effects-bargaining allegations of the complaint to the administrative law judge for further consideration.

On 31 January 1986 Administrative Law Judge Irwin Kaplan issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision and to adopt the recommended Order.

Contrary to the judge, we find the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union over a relocation package for those employees the Respondent chose to transfer from its Mahwah, New Jersey facility to its facilities in East Hartford, Connecticut.

The facts are largely set forth in *Otis Elevator I*[3] and *Otis Elevator II*[4] as well as in the judge's supplemental decision. The Union discussed or wished to discuss with the Respondent two general transfer effects issues—the relocation package to be offered to the transferred employees and the selection criteria the Respondent would use to invite employees to transfer. We agree with the judge that the Respondent unlawfully refused to bargain with the Union about transfer selection criteria and unlawfully dealt directly with those employees whom it selected. Accordingly, we shall repeat here only those facts relevant to the parties' bargaining over a relocation package. Any additional facts we have added are based on uncontradicted record evidence.

United Technologies acquired Otis Elevator Company in 1975. Dr. William M. Foley thereafter conducted a study for the Respondent concluded that much of Otis' engineering activity was diffuse and duplicative. The Respondent's management believed Otis' engineering effort would be strengthened if research and development were conducted closer to Otis' research already conducted in Connecticut, and to other United Technologies development groups. The Respondent also concluded its Mahwah, New Jersey facility was outdated and inadequate. For these reasons, it decided to transfer its Mahwah product improvement group to Connecticut immediately and consolidate it with similar efforts already there. It also decided it would move its entire research and development, engineering, and cost-reduction efforts to Connecticut by mid-1979.

On 2 December 1977 Dr. Foley told the Union of the Respondent's plans. He stated certain

[1] 255 NLRB 235.
[2] 269 NLRB 891.
[3] Supra, 255 NLRB 235.
[4] Supra, 269 NLRB 891.

changes were effective immediately "organizationally," but that "the physical change will be much more prolonged." He further stated 15 employees would be transferred from Mahwah to Connecticut within the next 5 months and that those chosen would be notified within the next 8 weeks.

On 17 January 1978[5] the Union gave Respondent Industrial Relations Manager J. J. Cronin a letter demanding that employees be contacted through the Union about "possible job opportunities at locations other than Mahwah." The Respondent rejected the Union's demand and on 25 January offered 13 unit engineers jobs in East Hartford, Connecticut.[6]

The parties thereafter met on several occasions in February and early April during which the Union demanded the Respondent negotiate its decision to transfer work, the effects of that decision, and recognition at the Connecticut facility. The parties did not substantially discuss at any of these meetings whether the Respondent would pay the employees' relocation expenses, give the employees time off to look for housing in Connecticut, or other issues associated with physically relocating from New Jersey to Connecticut. Although the Union on 27 April asked for certain reports that had an impact on the Respondent's decision to move, for information about the inducements that the Respondent offered to encourage employees to accept the Connecticut job offer, and for information on working conditions in Connecticut, it did not request information at any of these meetings specifically bearing on physically relocating to Connecticut.

On 27 April the Respondent also gave the Union a booklet detailing a relocation package "handled by an outside group called 'Trels.'" It offered this package to those employees it invited to transfer to Connecticut in January. Although the package was not made part of the record, certain facts about the package are known. Thus, the package provides, inter alia, that the Respondent will pay for two home-finding trips from Mahwah to Connecticut that may last a total of 6 days and 7 nights. Another provision states that the Respondent will pay for meals and lodging for relocating employees for up to 90 days, and for up to 30 additional days for their families. The Respondent also offered to pay one-half to 1 month's salary for miscellaneous expenses.

Although the Respondent stated in December 1977 there would be only two "waves" of engineers from Mahwah to Connecticut—immediately and again in mid-1979—the Respondent on 24 May announced for the first time an additional 15 engineers would be invited to transfer within the next 2 days.

The parties next met 29 June. The Union asked if the Respondent planned a "third wave." The Respondent's representative stated, "[W]hile that was our original plan, it's still being reviewed . . . . As soon as a definite answer is reached, we will be talking to you . . . ." The Respondent also stated it would not transfer any technicians.

On 4 August the Respondent offered a Mahwah technician a position in Connecticut. On 9 August it met with the Union to notify it that it had made the offer. The Union stated, "We're finding it very difficult to structure our demands the Company keeps changing position."

On 15 September the Union presented a "Partial List of Demands."[7] The Union demanded, inter

[5] All dates are 1978 unless otherwise indicated.

[6] Eleven accepted, including one who accepted a transfer to a supervisory position.

[7] *Partial List of Demands*

1) Update Trels Report to reflect current conditions.

2) Employee's relocation policy guide to be offered to all employees who relocate. This policy to be modified to include all demands put forth by Local 989, U.A.W.

3) Relocation package to be available for up to two (2) years after man starts work in Connecticut.

4) Pay any security and finders fees required on rentals.

5) Pay all temporary housing costs as required in both Connecticut and New York metro. area.

6) Pay entire cost of motel and associated costs including meals for employees who choose to reside in motels during the week and commute home on weekends.

7) Provide adequate time off for employees relocating to permit finding and purchasing the new residence as well as time off for the move.

8) Pay all moving costs.

9) Assist employee in obtaining nortgages.

10) Provide compensation payment for increased mortgage rate (use formula Government uses for condemnation proceedings) and increased cost for housing.

11) Make lump sum payment to apartment dwellers equal to first two years difference in rent.

12) Each employee who moves shall receive two months salary to cover misc. expenses.

13) Company shall pay all transportation cost in excess of employee's cost to new location for one (1) year, after which it will be included in employee's salary. Transportation cost shall include the following items:

A) 20 [cents]/mile and all tolls for those who drive to new location.

B) All fare cost for those who use public transportation.

C) Equal time off or payment for additional time used to commute to new location.

D) Cost to garage additional automobile used for transportation to new location.

E) Increased cost of automobile insurance.

F) Cost of renting a car while your car is in for repairs

14) Due to the higher risk of accident and the greater traveling time required to commute to the new facility, the Company shall:

A) Increase medical coverage.

B) Increase accident and sickness benefits.

C) Provide life insurance covering employees while traveling to and from work similar to that provided for employees while traveling on company business.

D) Pay cost of L.T.D. plan.

Continued

alia, reimbursement for certain costs associated with finding housing in Connecticut, compensation for added living and travel expenses, helicopter or airplane service to Connecticut, and a 20-percent salary increase for those transferred. It also demanded that senior employees be given the first opportunity to transfer, and that the Respondent accept all requests for voluntary layoff. The Respondent asked the Union to clarify certain demands, but made no counterproposals at this meeting.

The Respondent responded to the Union's demands at a meeting held 6 October. The Respondent's representative began by stating:

> I have reviewed the demands and in all fairness I would like to say I was disappointed in what was presented. I expected you to put together something more allied to something we hopefully could reach agreement upon. I said at the last meeting that I would probably have negative responses to several of your demands and I feel it's only fair to tell you that a number of your proposals will receive no answers.

Despite its statement to the contrary, the Respondent answered every demand, rejecting all but two. In response to the Union's demand that it accept all requests for voluntary layoffs, the Respondent said it would agree subject to "procedural clarification." In response to the Union's demand that the Respondent reimburse employees for certain transportation costs, the Respondent offered $60 per month for a year for those employees who would have to commute for more than 1-1/2 hours to the new location. The Respondent also stated:

> We are unwilling to modify the [Trels] package, but . . . in individual cases we would consider time extensions and minor adjustments and modifications, but we will not modify the entire policy.

The Union modified some of its demands at a meeting held 31 October, dropping its demands that the Respondent reimburse employees for garaging an additional automobile used for transportation to the Connecticut facility, pay increased automobile insurance costs, and pay rental costs while an employee's car is being repaired. The Union also stated it would accept bus service in lieu of helicopter service. The Respondent rejected the Union's demands as modified, but proposed procedures for accepting requests for voluntary layoff from the Mahwah facility. The Respondent also stated it had no information whether there would be a "third wave" of engineers to Connecticut.

The Union again modified its proposal 1 December, this time dropping its demand for "L.T.D. PLAN" reimbursement, and its demand for airplane service to Connecticut.

The parties last met on 30 and 31 January 1979. The Respondent then announced that within the next 2 days it would offer transfers to 20 engineers to fill 16 positions. If all 20 accepted, all would be permitted to transfer. If none accepted, it stated it would lay off 16 engineers from the Mahwah facility. The parties did not bargain over a relocation package at these meetings.

We conclude the Respondent violated Section 8(a)(5) and (1) by offering the Trels package directly to employees offered transfers in the first and second "waves." We regard that conclusion as encompassed within our finding that the Respondent unlawfully dealt directly with unit employees. We do not agree with the judge, however, that the Respondent failed to bargain about the relocation package it would offer those engineers who were to transfer to Connecticut in January 1979.

In finding a violation, the judge relied on his findings that the Respondent offered the Trels package on a "take-it-or-leave-it" basis, made no formal counterproposals, and rejected outright almost all the Union's demands. The judge also relied on the fact that the Respondent failed to timely provide meaningful information.

Hard bargaining alone, however, does not violate the Act. "A party . . . is entitled to stand firm on a position if he reasonably believes that it is fair

---

15) All salary offers made to employees who were offered jobs in Conn. will be given to them whether or not they go to Connecticut. Those employees who go shall get an additional 20% salary increase.

16) The most senior employees will be given the first option on jobs in Connecticut.

17) The Company will supply free helicopter or airplane service from central locations to Connecticut.

18) Severance pay for those laid off shall be four weeks pay for each year of service. Those employees eligible for an unreduced pension shall also be eligible for severance pay.

19) Special early retirement shall be offered to all employees age 55 and over.

20) Employment in other divisions of Otis and U.T.C. (length of service and benefits to be maintained).

21) Company will help find other employment outside of U.T.C. by use of a consulting firm.

22) Adequate time off will be given to find other jobs.

23) Tuition refund plan to be expanded to cover any type of training and reimbursement to be 100%.

24) Accept all requests for voluntary layoff. These employees to receive severance pay and retain their recall rights.

25) Employees forced on layoff will receive a salary supplement for five years equal to the difference between their new jobs salary and their present jobs salary if their new jobs salary is lower. This supplement will be revised annually to reflect inflation.

26) Company shall supply the Union in writing, a 10 year guarantee that Mahwah will remain open and will specify in detail the tyep of work to be performed.

The Union reserves the right to add to, subtract from or otherwise modify these proposals as the occasion demands.

and proper or that he has sufficient bargaining strength to force agreement by the other party."[8] The question is whether the totality of the Respondent's conduct demonstrates it unlawfully frustrated the possibility of arriving at any agreement rather than its having lawfully engaged in hard bargaining.[9]

We recognize that the Respondent unlawfully offered the Trels package directly to the first wave of engineers offered transfers in January 1978 and to the second wave in May. We also recognize that the Respondent failed to apprise the Union in a more timely fashion of each of its decisions to transfer employees. We do not, however, find the Respondent thus intended to frustrate, or in fact frustrated, bargaining from September through January 1979 over a relocation package.

When the Respondent offered its Trels package directly to those employees whom it chose to transfer to Connecticut in January and May, the Union had not yet provided its demands. Thus, its direct dealing at that time, while separately violating Section 8(a)(5) and (1), did not indicate that the Respondent would fail to negotiate with the Union once the Union had presented its demands.

The fact that the Respondent did not timely notify the Union of its decision to transfer employees also did not frustrate bargaining over a relocation package from September through January 1979. Although the Respondent's failure to notify the Union excused the Union's substantial delay in coming forward with proposals, the Union ultimately formulated its demands and the Respondent bargained with the Union once the Union presented them.

There are no other indications the Respondent lacked good faith. The Respondent met with the Union several times after the Union presented its demands in September, the Respondent answered each demand and agreed in principle with one of them, and made a limited financial offer in response. Although the Respondent remained steadfast in its insistence that the Union otherwise agree to its Trels relocation package, this alone cannot support a finding that the Respondent failed to bargain in good faith.

Accordingly, we find the Respondent did not violate Section 8(a)(5) and (1) by failing to bargain in good faith with the Union over a relocation package for those employees the Respondent chose to transfer to Connecticut in January 1979.[10]

[8] *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973). Sec. 8(d) of the Act states that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." See also *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

[9] *NLRB v. Advanced Business Forms*, supra, 474 F.2d at 467; see *Sunbeam Plastics Corp.*, 144 NLRB 1010, 1013 (1963).

AMENDED CONCLUSION OF LAW

Delete paragraph (a) of Conclusion of Law 5 and reletter the subsequent paragraphs.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Otis Elevator Company, a wholly owned subsidiary of United Technologies, Mahwah, New Jersey, and East Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN DOTSON, dissenting.

Contrary to my colleagues, I find the Respondent did not violate Section 8(a)(5) and (1) by failing to bargain with the Union about the effects of its decision to transfer unit work from its Mahwah, New Jersey facility to facilities in East Hartford, Connecticut, because I find the Union waived its right to bargain in its collective-bargaining agreement with the Respondent.

The parties' contract, which was effective 1 April 1977 through 31 March 1980, reserved for the Respondent the rights to "transfer"; "to schedule and assign the work"; "to assign employees among departments, offices or plants"; and "to determine the location of all Company offices."[1] Ac-

[10] Unlike our dissenting colleague, we do not find the Union waived its right to bargain over the effects of the Respondent's decision.

The parties' collective-bargaining agreement, on which our dissenting colleague relies, reserved for the Respondent the rights to "transfer"; "to schedule and assign the work"; "to assign employees among departments, offices or plants"; and "to determine the location of all Company offices." While the contract may or may not waive the Union's right to bargain about the Respondent's decision, it in no way "clearly and unmistakably," *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963), waived the Union's right to bargain about all of the effects of the Respondent's decision.

Westinghouse Electric Corp., 206 NLRB 812 (1973), which the dissent cites, does not support finding waiver here. In that case, the Board found the employer's contractual right to "direct employees in the available work" waived the union's right to bargain over the identity of those employees the employer would select for transfers to a new facility within the same unit. That case does not suggest, as the dissent's analysis implicitly assumes, that the reserved right to "direct employees in the available work" waives the union's right to bargain over every effect of that decision and not just the identity of those to be chosen. Further, that case involved an intraunit transfer, not a transfer, like the one here, to jobs outside the unit and which will necessarily result in a loss of unit jobs.

[1] *Management Clause*

Except as specifically limited by any provision of this Agreement, it is agreed that the management of the Company's business is the sole and exclusive right and responsibility of the Company and that this management right includes but is not limited to the right to employ, promote, demote, transfer, retire in accordance with the Company's established retirement plan' to discharge or discipline for

Continued

cordingly, I find the Respondent was clearly privileged to transfer unit work without bargaining with the Union.

Despite the contract's clear language, my colleagues find the Respondent had a duty to bargain with the Union about the relocation package the Respondent would offer to employees chosen to transfer, the baiss on which employees are to be given the opportunity to transfer, and the identity of those employees. They argue that the contract's language, regardless of whether it would waive the Union's right to bargain abot the decision to transfer unit work, did not waive the Union's right to bargain about the effects of that decision.

I find, however, tha the parties' clause clearly contemplated that the Respondent could "transfer" work unhindered by bargaining with the Union. To read the clause as pertaining only to the decision itself, and not the decision's effects, is to hold that the Respondent may not freely transfer work.

Not only must the Respondent bargain with the Union under my colleagues' analysis, current Board law demonstrates that the Respondent must necessarily do so before it effects the transfer.[2] Thus, pursuant to the majority opinion, the Respondent is subject to a substantial bargaining obligation despite the fact that it reserved for itself the right to "transfer" work.

The principle I suggest is not a new or novel one. Thus, in *Westinghouse Electric Corp.*,[3] the Board in 1973 held that the employer's contractual right to "direct employees in the available work" waived the union's right to bargain over the identity of employees the employer would transfer to a new facility.[4] The facts in *Westinghouse* are stunningly similar to those in this case and *Westinghouse* should therefore control the result here.[5]

I would dismiss the complaint.[6]

---

cause; to maintain discipline and efficiency of employees; to lay off or recall employees in connection with a reduction or increase in the necessary working force; to schedule and assign the work; to assign employees among departments, offices or plants; to determine the location of all Company offices, the control and regulation of use of all equipment and other property of the Company; to increase or reduce working hours and workweek and to determine and establish any Company policy.

[2] See *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986). I dissented in *Metropolitan Teletronics*. I would not hold that an employer's failure to give notice before it makes the change necessarily violates Sec. 8(a)(5) and (1).

[3] 206 NLRB 812 (1973).

[4] Id. at 812 fn. 1.

[5] My colleagues unpersuasively attempt to distinguish *Westinghouse* on the ground that *Westinghouse* involved an intraunit transfer and not, like here, a transfer outside the unit. Neither the contract in *Westinghouse*, nor the contract here, made such a distinction. Instead, in both cases the contracts broadly reserved for the employers the rights to "direct employees in the available work" or the right to "transfer," "schedule and assign," and to "assign employees amont . . . plants."

My colleagues' decision to read into the contract a distinction between intraunit transfers and other transfers is inconsistent with the contractual analysis in *Indianapolis Power Co.*, 273 NLRB 1715 (1985), remanded sub nom. *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1986), in which the Board refused to assume that a broad no-strike clause did not encompass sympathy strikes. See also *Milwaukee Spring Division*, 268 NLRB 601 (1984) (refusing to imply a work-preservation clause in a contract silent on the issue).

[6] I agree, for the reasons cited in the majority opinion, that the Respondent did not in any event violate Sec. 8(a)(5) and (1) by failing to bargain in good faith with the Union over a relocation package for those employees the Respondent chose to transfer to Connecticut in January 1979.

J. Michael Lightner, Esq. and *Thomas W. Cestare, Esq.*, for the General Counsel.

Edward J. Dempsey, Esq., of Washington, D.C., for the Respondent.

Mr. Robert Kushnir, president, of Yonkers, New York, for the Union.

SUPPLEMENTAL DECISION ON REMAND

DECISIONAL BACKDROP

IRWIN KAPLAN, Administrative Law Judge. On 29 November 1979 I issued my initial decision upholding the allegations in the amended complaint (JD-823-79). In essence, I found that the Respondent (Otis Elevator Company, a wholly owned subsidiary of United Technologies) violated Section 8(a)(5) and (1) of the Act, by failing to bargain with the Union (Local 989, United Automobile, Aerospace & Agricultural Workers of America), over its decision to discontinue its research and development activities in Mahwah, New Jersey, and to consolidate them with its operation in East Hartford Connecticut; by refusing to furnish the Union with the "Booz-Allen and Cole reports," admittedly relevant to Respondent's decision; and by failing and refusing to bargain over the "effects" of its decision on unit employees.

In connection with the "effects bargaining" allegations (the subject of this supplemental decision), I found initially, that Respondent not only failed to bargain in any meaningful fashion, but also that Respondent unlawfully bypassed the Union by unilaterally determining both the criteria for selecting employees for transfer to Connecticut and the employees who were offered such job opportunities. In this latter regard, I further found that Respondent unlawfully denied the Union a presence at these transfer interviews. On 25 March 1981 the aforenoted findings were affirmed by the Board in *Otis Elevator Co.*, 255 NLRB 235 (1981) (*Otis I*).

Shortly after *Otis I* issued, the Supreme Court decided *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). There the Court held that an economically motivated decision to shut down part of a business is not encompassed by terms and conditions of employment under Section 8(d) and, as such, it (the "decision") is not deemed to be a mandatory subject for bargaining purposes. On 6 April 1984 the Board, in light of the principles set forth in *First National Maintenance*, on reconsideration, issued a Supplemental Decision and Order reversing, in part, its earlier decision (*Otis I*), and finding, inter alia, that the Respondent was not obligated to bargain over its "decision" to discontinue certain functions in Mahwah, New Jersey, and to transfer those functions

to its facility in East Hartford, Connecticut. *Otis Elevator Co* (*Otis II*), 269 NLRB 891 (1984).[1]

Further, the Board, having determined that Respondent was not required to bargain over its decision, concluded, a fortiori, that Respondent was not required to furnish the Union the Booz-Allen and Cole reports. Id. at 984. Still to be disposed of were the effects bargaining allegations, which had been upheld by the Board in *Otis I*. These allegations were remanded to me and form the subject of the instant supplemental decision.

In *Otis II*, the Board noted that the earlier Board "relied substantially on its holdings that the Respondent unlawfully refused to bargain over its consolidation decision and unlawfully withheld information from the Union."[2] As those holdings were subsequently reversed, the Board remanded the outstanding effects-bargaining allegations for my further consideration in light of the decision in *Otis II*.

For my reconsideration and preparation of this supplemental decision, I have reexamined the entire original record as well as the postremand supplemental briefs.[3]

Having done so, I reaffirm my initial credibility resolutions. In my original decision, I rejected certain representations mady by Respondent's chief witness, Dr. Foley, as conclusionary and not supported by documentary or other corroborative evidence. (See, e.g., 255 NLRB at 246.) I was also otherwise unimpressed with Dr. Foley as a witness. The record disclosed that at times he was evasive and equivocal and less than responsive or forthright. For example, Dr. Foley, when asked on cross-examination whether he knew at the 24 May bargaining session, the identities of the new group of engineers to be invited to transfer, he responded, "Not exactly. Earlier we [the Company] had a group, but we had an additional group we were going to ask." However, Dr. Foley, when asked the next question, admitted that in fact he had a list of names at that meeting. According to Dr. Foley, his memory was refreshed by counsel for the General Counsel. However, based on my observation of Dr. Foley, I find it more likely that it represented an effort by him to be less than candid or responsive. Similarly, I found Jack Williams, Respondent's other witness, to be conclusionary and unreliable.

On the other hand, I was impressed with Allan Newell, the Union's chief witness, as responsive, consistent, and forthright. In this latter regard, it is noted, inter alia, that Newell readily acknowledged that Respondent "discussed" all the Union's proposals (although for reasons explained, infra, this does not mean Respondent "negotiated"). I also note that Newell's testimony was substantially corroborated by Respondent's minutes. (G.C. Exh. 2.) In sum, on reconsideration, after carefully reviewing the entire transcript and the record as a whole, I credit Newell over Dr. Foley and Williams in all material respects.

A. *Overall Effects-Bargaining*

In finding in my original decision that Respondent failed to fulfill its bargaining obligations over the "effects" of its decision to transfer certain engineers (product improvement group) from Mahwah, New Jersey, to the Hartford, Connecticut area, I relied, inter alia, on the Board's retionale in *Ozark Trailers*.[4] There, I found instructive that the Board recognized situations in which "the effects are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a decision which cannot be revised." Id. at 570. However valid this proposition may be, the Board in *Otis II* determined that the "decision" was not a mandatory subject within the meaning of Section 8(d)[5] and, as such, Respondent was not obligated to bargain thereon. This left open whether, in the circumstances of *Otis*, "meaningful" negotiations over "effects" were possible and, if so, whether Respondent met its "effects" bargaining obligations. With regard to the former, I find a plethora of valid reasons, supported by the record, justifying a response in the affirmative.

It is unidsputed, the record supports, and I find that the decision clearly impacted on unit employees. Not only were unit employees to be permanently transferred, but their jobs (product improvement group) would eventually be lost. As for the employees remaining in Mahwah, inter alia, an indeterminate number of them faced "possible" layoffs. As pointed out by Dr. Foley in his speech on 2 December 1977, "as the development ac-

[1] While *First National Maintenance* dealt basically with a partial closing, the Board in *Otis II* decided to take a lead from the Court's overall discussion to exclude from coverage under Sec. 8(d) those decisions which "affect the scope, direction or nature of the business" (269 NLRB at 893). On reconsideration, the Board found that the "essence of the decision" turned on a fundamental change in the nature and direction of the business, and thus (unlike "labor costs"), was not amenable to bargaining. (*Otis II*, 269 NLRB at 892–893). In short, the "decision" was not a mandatory subject.

[2] The composition of the Board in *Otis II* with the exception of Member Zimmerman had changed. Although Member Zimmerman joined the Board majority in *Otis I*, he concurred in the result with the Board plaurality in *Otis II* vis-a-vis the decision. On the other hand, Member Zimmerman would have affirmed the effects-bargaining holdings of *Otis I* and therefore dissented with regard to the remand.

[3] The Board's Order remanding this proceeding provided, inter alia, "any party . . . the opportunity to adduce further evidence on [effects-bargaining] allegations." Thereafter, I conducted an all-party telephone conference and all parties agreed that the record in *Otis I* was sufficient to decide the remand allegations without the need to reopen the hearing for the production of further evidence. In a position paper dated 2 May 1985 counsel for the General Counsel moved to amend the outstanding effects-bargaining allegations of the instant case with later-filed unfair labor practice charges. The motion was opposed by Respondent. I denied the motion noting, inter alia, that the later-filed unfair labor practice charges covered events subsequent to my original decision and, in part, related to matters not cognizable under the scope of the remand order. The order setting time for supplemental briefs and denying motion to amend complaint and consolidate cases is marked ALJ Exh. 1 and the positions papers submitted by the parties in connection therewith (attachments A, B, and C) are made part of the record.

[4] 161 NLRB 561 (1966).

[5] The duty to bargain as defined by Sec. 8(d) of the Act in relevant part is as follows:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

tivity moves to Hartford, the test effort will also shift there leaving us with a *possible* excess of technicians and clerical personnel in Mahwah." (G.C. Exh. 2, p. 8, emphasis added.)

Noting that the "decision" impacted on unit employees, I find that matters involving, inter alia, the order of layoffs, recall, severance pay, input in the selection process, the transfer package, i.e., moving expenses, and a host of related considerations, particularly meaningful to the Union and the unit employees affected. This is so, and these matters are amenable to the bargaining process exclusive of the Union's power or right to reverse Respondent's "decision." The Supreme Court in *First National Maintenance* treated a decision involving a change in the scope and direction of the enterprise (as found herein in *Otis II*), as a nonmandatory subject. However, the Court also noted that "[a]t the same time, *the decision touches on a matter of central and pressing concern to the Union and its member employees.*" (452 U.S. at 677, emphasis added.) It is now beyond dispute that the Respondent is under a duty to address these concerns by bargaining over the results or effects of such decision. Id. at fn. 15.

Having determined that the circumstances were conducive to meaningful bargaining over "effects" (exclusive of the "decision"), the case now turns on whether Respondent fulfilled its obligations. The Respondent, in its opening statement "readily concede[d]" its obligation to bargain over the impact of its decision but asserted that such obligation was fulfilled. Whether the Respondent engaged in "hard bargaining," but in "good faith" on one hand or "bad faith" or "surface bargaining" on the other, is determined on a case-by-case basis from an examination of the totality of the circumstances. See *Chevron Chemical Co.*, 261 NLRB 44, 45 (1982); *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1348 (9th Cir. 1978).

It has long been noted that a take-it-or-leave-it posture constitutes evidence of bad faith. See *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960); *General Athletic Products Co.*, 227 NLRB 1565, 1574 (1977). Although the Board in *Otis I* agreed with my rationale and reliance on *Ozark Trailers*, supra, concerning Respondent's failure to bargain over "effects," it also went further, characterizing Respondent's overall conduct as "a kind of 'take it or leave it' bargaining." In support thereof, the Board, in pertinent part, noted as follows:

> Thus, the Union sitting at "the bargaining table" was never certain about what actions Respondent was taking in effecting its reorganization; nor would Respondent commit itself to a timetable for anticipated changes in the bargaining unit. As a result of its uncertainty concerning what changes would occur, and when any changes would take place, the Union submitted its "Partial List of Demands" some 9 months after Respondent's announcement of its plans. Respondent made no formal counterproposals, and, in fact, rejected outright almost all of the Union's demands. Indeed, Respondent's answer to the Union's demands was that it was disappointed with what the Union presented, and that it had hoped that the Union would have submitted a request more closely aligned with what Respondent wished to accomplish. It thus becomes clear that Respondent engaged in a kind of "take it or leave it" bargaining, whereby Respondent would agree to clarify its actions "after the fact," but where meaningful bargaining seemed to have no place in Respondent's grand design.

255 NLRB at 237.

On reconsideration, after carefully reviewing the entire record, I find myself in total agreement with the Board's remarks describing the Respondent's failure to engage in "meaningful bargaining." Clearly, the Board was justified in ascribing the Union's delay in presenting its "Partial List of Demands" to the confusion, uncertainty, and failure of Respondent to timely provide meaningful information.

Thus, in addition to the reasons cited by the Board, it is also noted that at the time Respondent announced its decision to move to Hartford, "many of the details and background . . . were not covered." (G.C. Exh. 2B, p. 3.) Thereafter, the Union's efforts to learn more about Respondent's plans in order to structure its demands were continually frustrated by Respondent's unwillingness or inability to provide concrete or reliable answers. For example, at the 3 April bargaining session, the Company was asked by the Union whether lab mechanics and technicians would be leaving Mahwah and was told, "We do not know what is going to happen but we are in the process of analyzing and formulating plans." (G.C. Exh. 2A, p. 6.) Although at a subsequent session the Respondent informed the Union that technicians were not going to be transferred (G.C. Exh. 2E, p. 15), approximately a month later, Respondent decided to invite William Altridge, a technician, to relocate to the Respondent's research center in Hartford. (G.C. Exh. 2F.)

The Union expressed surprise at the offer to Altridge and questioned the Company regarding its intentions to invite other technicians and also engineers.[6] In response thereto, the Respondent's manager of industrial relations, J. J. Cronin, stated, "I don't know at this point if the Company has plans in either case." (G.C. Exh. 2G, p. 5.) Cronin's response was the same when questioned about draftsman and designers. (Id.) In circumstances when, as here, the Respondent provides little or no information on critical subjects, while at the same time undergoing changes in those areas regarding its originally announced plans, I find, in agreement with the Board, that the Respondent was at fault for any union delay in submitting

[6] Regarding engineers, the Respondent had initially advised the Union that it would physically transfer the product improvement group in the middle of 1979. This was to be accomplished in two stages: The first group of engineers was going to be invited to transfer to the Hartford area by late January 1978; the second group in January 1979. (G.C. Exh. 2A, pp. 5–8.) However, at the 24 May 1978 meeting, the Union was notified that still another group of approximately 15 engineers would be asked to transfer within a few days. (G.C. Exh. 2C.) As for the engineers who were supposed to be asked to transfer in January 1979 ("third wave"), little or no information was provided, although the Union continued to press the Respondent to state its intentions. (See, e.g., G.C. Exh. 2M, p. 1.)

its demands. Further, I find that such conduct tends to reflect adversely on Respondent's good faith.

I reject Respondent's notion that the Act requires merely that a company "discuss the impact of its decision to satisfy its bargaining obligations." (Supp. Br. 19–20.) Thus, I do not find it overly significant, contrary to Respondent, that I had concluded in my original decision that "*Respondent discussed all these items* ('Partial List of Demands') *with the Union* although only marginal agreement was achieved." (*Otis I*, supra at 248, emphasis added.) Rather, it is of greater significance, that I found there, and I now reaffirm that Respondent failed to negotiate in any meaningful fashion. The term "discuss," unless used in an agreed on context, does not, without more, mean "negotiate" as contemplated by the Act.[7] Compare *National Metalcrafters*, 276 NLRB 90 (1985). Although the Act does not compel the parties to make concessions, it does mandate that they bargain in "good faith" for the ultimate purpose of reaching an agreement. See *NLRB v. American National Insurance Co.*, 343 U.S. 395, 403–404 (1952); *NLRB v. Insurance Agents*, supra at 485.

In the circumstances of this case, I join in the Board's assessment that "meaningful bargaining seemed to have no place in Respondent's grand design." (*Otis I*, supra at 237.) As the Board noted, inter alia, "Respondent made no formal counterproposals, and, in fact, rejected outright almost all of the Union's demands." Id.; compare *Mack Trucks*, 277 NLRB 711 (1985). The Union, for its part, as noted in my original decision, modified or eliminated many of its demands and conveyed a willingness to discuss and bargain over its entire package. As such, and on the total state of this record, I find that Respondent failed to make any reasonable or genuine effort to reach common ground on the outstanding proposals.

In short, I find that the record clearly established Respondent's bad faith with regard to overall effects-bargaining in violation of Section 8(a)(5) as alleged.

B. *Selection Criteria Bypassing the Union and Dealing Directly with Employees*

It is undisputed that Respondent unilaterally determined the selection criteria for the employees invited to transfer. Although the Respondent eventually informed the Union of certain factors comprising the selection process (longevity was not a consideration), this was expressed in the most general terms some 3 months *after* the first wave of engineers had already been selected for transfer and interviewed. (See generally G.C. Exh. 2B; G.C. Exh. 6.) It is also noted, as to this group of engineers, that the Union did not know their identities until long after the interviews had been conducted.[8] Further, Respondent concedes that concerning this group of engineers, it did not advise any of them of a right to have union representation at the interviews. However, Respondent asserted (and not controverted by the record), that the engineers selected for interviews in June 1978 ("second wave") were asked whether they wanted union representation but all of them declined. In any event, it is undisputed that the Union's insistence that it be permitted to attend all transfer interviews was refused by Respondent.

The Respondent defended its position mainly on the basis that the transfers involved employment at a different company location, in nonbargaining unit jobs. For reasons noted in my original decision and affirmed by the Board in *Otis I*, I found there, and on reconsideration reaffirm, that the Respondent unlawfully foreclosed the Union from effectively representing the bargaining unit as a whole in violation of Section 8(a)(5) as alleged. In rejecting Respondent's position insofar as denying the Union any input in the selection process, I relied in part on considerations assessed by the Court of Appeals for the Second Circuit in *Cooper Thermometer Co. v. NLRB*.[9] There the court dealt with this matter in pertinent part as follows:

> [T]he Board may reasonably interpret § 8(a)(5), as explicated in § 8(d), as requiring an employer relocating his plant not merely to give reasonable notice to a recognized union . . . *but also to discuss with it the basis on which employees may transfer and, in that connection, to give information as to jobs in the new plant essential to the intelligent formulation of the union's requests.* The most improtant interest of workers is in working; the Board may reasonably consider that an employer does not fulfill its obligation under § 8(a)(5) if he refuses even to discuss with employees' representatives on what basis they may continue to be employed . . . . While Cooper was not bound to agree to the Union's demand that the Pequabuck employees "be taken" to Middlefield with everything unchanged or even to less burdensome proposals, *the Board could properly fault it for an attitude which, in effect, ousted the Union from any role in negotiating what might be offered to employees desiring to transfer.* [Emphasis added.]

Here, too, the Union was wrongfully foreclosed from any role in the selection process and denied a presence at the transfer interviews. At the time Respondent commenced these interviews, the Union was the "exclusive" bargaining agent for the unit employees at Mahwah and had been for over 30 years. The transferees, as well as those employees not invited to transfer, were then still members of that unit. The Union's responsibilities ex-

[7] Clearly, the Respondent did not treat the terms synonymously at the bargaining table. While Respondent carried on discussions, it dodged the Union's inquiry regarding its "intent to reach an agreement" from these discussions. Thus, Thomas Bouchard, Respondent's vice president of personnel and industrial relations, responded, "They [the discussions] could, but it is too early for a yes or no to that question." Bouchard, in differentiating the term negotiate from discussion, opined, "For me, negotiations implies an adversary climate." (G.C. Exh. 2A, pp. 10–11.)

[8] Respondent's reliance on *Westinghouse Electric Corp.*, 174 NLRB 636 (1969), ignores some material differences. For example, there, unlike the situation with the first wave of engineers in the instant case, the employees who transferred did so with the knowledge and consent of the union. Moreover, in *Westinghouse*, the changes did not "affect either the continuity of its operations or the employment of its employees." (Id. at 638.) In *Otis*, it is noted, inter alia, that in January 1979 respondent threatened to lay off some 16 engineers if a sufficient number of them failed to voluntarily transfer. (Tr. 36–37.) Some employees had already been laid off. See G.C. Exh. 15.

[9] 376 F.2d 684, 688 (2d Cir. 1967).

tended to all of them. See also *Continental Insurance Co.*, 204 NLRB 1013, 1014 (1973), enfd. 495 F.2d 44 (2d Cir. 1974). Surely, the Union was vulnerable to failure-to-represent charges, if it refused to render any assistance requested by the transferees regarding such items as moving expenses and time off to look for new residences.[10] Indeed, subsequently, Respondent apparently recognized that an offer of prospective nonunit jobs to still current unit employees does not per se strip the Union of its bargaining role. Thus, Respondent began to ask engineers comprising the "second wave" (unlike the "first wave"), whether they desired to have the Union in attendance at the transfer interviews.

The Union's exclusivity, however, is predicated on majority support as defined by Section 9(a) of the Act[11] and does not turn on the whim of individual employees. While the Union's representative standing is limited by the first proviso to Section 9(a) insofar as permitting unit employees an option to adjust grievances on their own; significantly (as noted in my original decision), the second proviso protects the Union's overall exclusivity by providing that it be given "the opportunity to be present at such adjustment." The Union's presence enables it to monitor direct dealings between management and individual employees to frustrate "under the table" arrangements at the expense of other unit employees or the unit as a whole.[12]

In sum, on reconsideration, and in the absence of any waiver (and none found herein to exist),[13] I reaffirm my original effects-bargaining findings (upheld by the Board in *Otis I*), and consistent with the remand by the Board in *Otis II*, I do so for reasons independent of Respondent's refusal to bargain over the "decision."

CONCLUSIONS OF LAW

1. Otis Elevator Company, a wholly owned subsidiary of United Technologies Corporation is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Local 989, United Automobile, Aerospace and Agricultural Implement Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. All classifications of employees employed in Respondent's Engineering Division located in Mahwah and Harrison, New Jersey, and Yonkers, New York, in the classifications described in Appendix A of the collective-bargaining agreement effective 1 April 1977 to 31 March 1980, but excluding nontechnical, secretarial, clerical employees not described in Appendix A, maintenance employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. Since sometime prior to 1 June 1950, the above-named Union has been, and is now, the exclusive representative of all the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act by

(a) Failing and refusing, on request, to engage in any meaningful good-faith negotiations with the Union concerning the effects of its decision on the employees in the unit described above in paragraph 3.

(b) Failing and refusing, on request, to permit the Union an opportunity to bargain about the basis on which employees were to be given the opportunity to transfer from its Mahwah, New Jersey facility to other of its facilities in Connecticut and on the identity of the employees selected for transfer interviews.

(c) Dealing directly with employees and failing and refusing to permit the Union the opportunity to be present at employee interviews that involve the loss of unit work and the transfer of employees from Respondent's Mahwah, New Jersey facility to Respondent's unrepresented facilities in Connecticut unless requested by the employees interviewed.

THE REMEDY

I will recommend that the Respondent be required to bargain in good faith with the Union over the effects on unit employees of its decision to transfer and consolidate. In this connection, I will recommend that Respondent's obligation include permitting the Union an opportunity

---

[10] To induce these employees to transfer, Respondent offered them a relocation package sometimes referred to as the "Trels Package." Trels is an outside contracting service that publishes a booklet reflecting monetary and benefit inducements in the Greater Hartford area. Under Respondent's agreement with Trels, all employees asked to transfer through November 1979 were offered the Trels relocation package. The Respondent refused to negotiate any modifications thereto, only a willingness to consider certain "extenuating circumstances" or "hardships" on an individual basis. (G.C. Exh. 2L, pp. 3–5; G.C. Exh. 2B, p. 9.)

[11] Sec. 9(a) in its entirety reads as follows:

> Representatives designed or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

[12] See *Valencia Baxt Express*, 143 NLRB 211 (1963). See also *Westinghouse Electric Corp.*, 206 NLRB 812, 822 (1973). While in *Westinghouse* the Board found merit in Respondent's exception to the judge's findings that Respondent was obligated to notify the Union of the positions in Manassas and bargain collectively concerning the identity of employees at Laurel who would be notified of the availability of the positions, it did so because the Laurel facility constituted an accretion to Manassas and, therefore, management's right to select employees for transfer was governed by contract.

[13] During the course of negotiations, Respondent defended its refusal to bargain with the Union over the transferees because they were to be employed at a location outside the bargaining unit. The Respondent did not then contend, as it apparently does now, that the Union waived by contract any role in bargaining over transferees. In my original decision, I noted that "a waiver to be effective would have to be clear and unequivocal and the record is devoid of evidence tending to show that this was done." *Otis I*, supra, 255 NLRB at 247 fn. 26. Noting that the Respondent has not proffered additional evidence, but relies solely on the original record, I reaffirm my original finding. Compare *Mack Trucks*, 277 NLRB at 711, in which, inter alia, virtually all of the so-called effects-bargaining subjects were secured within the master shop agreement and relevant supplements. There, the Respondent's outright rejection of certain union proposals was privileged under Sec. 8(d) of the Act.

to bargain about the basis on which employees are to be given the opportunity to transfer from its Mahwah, New Jersey facility to other of its facilities in Connecticut and on the identity of the employees selected for transfer interviews. I will also recommend that Respondent cease and desist from bypassing the Union in derogation of its exclusive bargaining status by dealing directly with employees concerning the transfer of unit jobs.

As for backpay, I find, in the circumstances of this case, that a traditional bargaining order without a limited backpay requirement will not effectuate the purposes of the Act. The record disclosed that some employees were laid off with others to follow as a result of Respondent's "decision."[14] Concerning such individuals, the Board has observed, "meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union." See *Gar Wood-Detroit Truck Equipment*, 274 NLRB 113 (1985). I therefore recommend that Respondent be required to compensate the affected laid-off employees in a manner similar to that required in *Gar Wood*. Thus the Respondent should be required to pay the affected employees backpay at the rate of their normal wages when last in Respondent's employ from 5 days after the date of the Board's Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of its transfer and consolidation decision on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the Board's Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the subsequent failure of the Union to bargain in good faith; but in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Otis Elevator Company, a wholly owned subsidiary of United Technologies Corporation, Mahwah, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Local 989, United Automobile, Aerospace and Agricultural Implement Workers of America as the exclusive bargaining representative of the employees in the unit found appropriate herein over the effects on unit employees of its decision to transfer and consolidate certain of its engineering operations, including unit work from its Mahwah, New Jersey facility to other facilities in Connecticut.

(b) Failing and refusing, on request, to permit the Union an opportunity to bargain about the basis on which employees are to be given the opportunity to transfer from its Mahwah, New Jersey facility to other of its facilities in Connecticut and on the identity of the employees selected for transfer interviews.

(c) Dealing directly with employees and failing and refusing to permit the Union a full opportunity to be present at employee interviews that involve the loss of unit work and the transfer of the employees from Respondent's Mahwah, New Jersey facility to its unrepresented facilities in Connecticut.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the Union's request, bargain collectively with the Union as the exclusive bargaining representative of the Respondent's employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment.

(b) On the Union's request, bargain with the Union concerning the effects on unit employees of its decision to transfer and consolidate unit work from Mahwah, New Jersey to other of its facilities in Connecticut.

(c) On the Union's request, bargain with the Union about the basis on which employees in the appropriate unit are to be given the opportunity or required to transfer to its facilities in Connecticut and on the identity of these employees.

(d) Pay the laid-off employees their normal wages in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Mahwah, New Jersey facility and those facilities in Connecticut wherein unit work from Mahwah has been transferred, copies of the attached notice marked "Appendix."[16] Copies of the notice, on

---

[14] Respondent's contention in its supplemental brief that the closing of the Chemical Laboratory and the status of technicians were not encompassed by the pleadings or litigated, and therefore are not elements in this case, is without merit. For example Newell's uncontroverted and credited testimony disclosed that at the 24 May effects-bargaining session, Foley advised the Union that the Company would probably close down the machine shop and "probably cause a layoff of a lab mechanic and also some technicians." Foley also advised that the Chemical Laboratory would close down with the layoff of chemists. (Tr. 30.) Further, the record disclosed that Foley, in downplaying the impact of Respondent's "decision," advised the Union at that 24 May session that "*only some things like the Chem lab* which did not do engineering support work in the first place will really be effected." (G.C. Exh. 2C, p. 6, emphasis added.) However, as noted by the Board in *Otis I*, the record is not clear whether the classification of "chemist" is included in the bargaining unit herein. I recommend that this, as well as the identities of all unit employees laid off as a result of Respondent's "decision," be deferred to the compliance stage of this proceeding. (*Otis I*, 255 NLRB at 238.)

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Nation-

Continued

forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

al Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain collectively in good faith with Local 989, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America as the exclusive representative of our employees in the appropriate unit set forth below concerning the effects on unit employees of our decision to transfer and consolidate certain of our engineering operations, including unit work, from our Mahwah, New Jersey facility to other facilities, including our facilities in Connecticut. The appropriate unit is:

> All classifications of employees employed in our Engineering Division located in Mahwah and Harrison, New Jersey, and Yonkers, New York, in the classifications described in Appendix A of the collective-bargaining agreement effective April 1, 1977, to March 31, 1980, but excluding non-technical, secretarial, clerical employees not described in Appendix A, maintenance employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse, on request, to permit the Union an opportunity to bargain about the basis on which employees are to be given the opportunity to transfer from its Mahwah, New Jersey facility to other of its facilities in Connecticut and on the identity of the employees selected for transfer interviews.

WE WILL NOT bypass the Union as the exclusive bargaining representative of the employees in the unit described above, and deal directly with employees concerning their transfer and the transfer of unit work from our Mahwah, New Jersey facility to our unrepresented facilities in Connecticut.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on the Union's request, bargain collectively with the Union as the exclusive bargaining representative of our employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment.

WE WILL, on the Union's request, bargain with the Union concerning the effects on unit employees of our decision to transfer and consolidate unit work from Mahwah, New Jersey, to other of our facilities in Connecticut.

WE WILL on the Union's request, bargain with the Union about the basis on which employees in the appropriate unit are to be given the opportunity or required to transfer to our facilities in Connecticut and on the identity of these employees.

WE WILL pay the laid-off employees their normal wages, as set forth in the Decision and Order.

OTIS ELEVATOR COMPANY, A WHOLLY OWNED SUBSIDIARY OF UNITED TECHNOLOGIES

Continental Radiator Corporation and Great Lake, Inc. *and* Kenneth Dailey *and* John Kuzdzal *and* Laura Polight *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Cases 7-CA-23796, 7-CA-24140, 7-CA-24260, 7-CA-24712, 7-CA-25305, and 7-CA-25450

16 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 6 May 1986 Administrative Law Judge David L. Evans issued the attached decision. The Respondents, Continental Radiator Corporation (CRC) and Great Lake, Inc. (GLI), filed exceptions and a supporting brief. The Charging Parties filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

The consolidated complaint alleges that Respondents CRC and GLI are alter egos and/or a single employer and that they engaged in various acts violating Section 8(a)(1) and (3) of the Act. The judge found that CRC and GLI engaged in the alleged unlawful conduct as a "joint or single employer." The Respondents have excepted to the judge's finding of joint liability. We have carefully considered the Respondents' arguments and agree with the judge that CRC and GLI violated the Act as alleged[3] and that the facts support the judge's finding that CRC and GLI are a single employer under the Board's standards.[4] However, as explained below, we conclude that regarding joint liability for the remedy, Respondent GLI is also, as alleged in the complaint, the alter ego of Respondent CRC.[5]

In *Advance Electric*, 268 NLRB 1001, 1002 (1984), the Board stated that it will find alter ego status where two employers have "'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." In addition, the Board considers whether there has been any hiatus in operations, whether the companies use the same building, and "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act."[6] No one factor is determinative of alter ego status.

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

While not affecting our decision, we correct the following factual errors contained in the judge's decision: (1) In the introductory paragraph the judge found that the charge in Case 7-CA-24712 was filed on 17 June 1984 when it was in fact filed on 17 June 1985. (2) In the first paragraph of sec. III,A,2 of his decision, the judge states that the Union filed a petition to represent CRC's production and maintenance employees on 7 July 1984. We find instead that the petition (in Case 7-RC-17352) was filed on 17 July 1984. (3) Regarding the contents of sec. III,A,4,e,1, we find that the conversation between CRC President Karl Geiger and employee Kenneth Heidel occurred on 20 June 1985, not 20 June 1984. Likewise, regarding sec. III,A,4,e,2, we find that the events involving employee Jeffrey Toomer occurred in May and early June 1985, not 1984. (4) In the first paragraph of sec. III,B,3, of his decision, the judge attributed to CRC Plant Supervisor Donald Mooney the reference to discriminatee Kenneth Dailey as "loud mouth Ken." However, the record and the judge's discussion of the facts reveal that the statement was made by CRC Vice President Harold Nichols.

[2] The judge granted the General Counsel's request that the order include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondents under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the order. We have concluded that under the circumstances of this case such a clause is not warranted. We shall modify the recommended Order to delete the visitatorial clause and also to conform to the violations found by the judge. Further, we shall include injunctive language prohibiting any "like or related" misconduct. It is unnecessary to modify the notice.

[3] Contrary to the Respondents' contentions, we find that the judge's recommended remedy and Order are consistent with the terms of the parties' settlement agreement. Allegations of unlawful 8(a)(1) conduct predating discriminatee Kenneth Dailey's discharge on 27 August 1984 and the status of the Respondents as alter egos and/or a single employer were not disposed of by the settlement agreement to the extent they "have any bearing on the Dailey discharge or remedy therefore." As found by the judge, the predischarge violations of Sec. 8(a)(1) establish animus and unlawful motivation, essential elements of the General Counsel's prima facie case. Further, a finding of joint liability protects Dailey's reinstatement and backpay remedies. In concluding that the judge acted within the bounds of the settlement agreement, we note also that the agreement prohibits the General Counsel from seeking any remedial provisions for conduct "expressly disposed of by settlement herein." A careful review of the agreement and its corresponding notice demonstrates that although postermination allegations of violative 8(a)(1) conduct were settled, no pretermination allegations of 8(a)(1) misconduct were "expressly disposed of" or in any way remedied by the settlement. Accordingly, we conclude that the General Counsel's request that the unlawful pretermination conduct be remedied and the judge's agreement with that request are within the scope of the settlement agreement's terms.

[4] Nominally separate business entities may be regarded as a single employer under the Act where there is functional integration of operations, centralized control of labor relations, common management, and common ownership or financial control. *Radio Union v. Broadcast Service*, 380 U.S. 255, 256 (1965); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1121-1124 (3d Cir. 1982); *Weldment Corp.*, 275 NLRB 1432 (1985).

[5] In light of our conclusion that Respondents CRC and GLI are alter egos, we find it unnecessary to rely on the judge's finding that the two entities constitute a "joint employer," a theory of employer liability not alleged in the consolidated complaint. In doing so, we note that the concept of joint employer should not be confused with the theories of single employer or alter ego. See, e.g., *NLRB v. Browning-Ferris Industries*, supra at 1121-1124; *Apex Decorating Co.*, 275 NLRB 1459, 1462-1463 (1985). We also find it unnecessary to consider the judge's discussion and application to the facts of this case of *O. Voorhees Painting Co.*, 275 NLRB 779 (1985).

[6] 268 NLRB at 1002, quoting *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984).

As set forth in the judge's decision, the record establishes that CRC was created in 1976 to manufacture and distribute automotive radiator cores and related parts. At all material times, Karl Geiger was president of CRC and owned 65.625 percent of its stock. CRC's vice president, Harold Nichols, and secretary-treasurer, Martin Ewald, each owned 6.25 percent of the stock. The remaining stock was owned by Assistant Secretary-Treasurer Ron Weigand (3.125 percent) and Richard DeSiro (18.75 percent). From 1976 until January 1984,[7] CRC occupied a building it owned on 17th Street in Detroit, Michigan. In January, due to allegedly deteriorating conditions at the 17th Street facility, CRC moved 2 miles to a facility on 2000 Beard Street which it leased until 1 February 1985 from its owner, Karl Geiger.

In July 1984, the Union began an organizational campaign among CRC's production and maintenance employees that culminated in a majority of employees voting for the Union in a representation election on 24 August.[8] On 27 August, the first workday following the election, active union supporter Kenneth Dailey was terminated. In addition to finding this discharge an 8(a)(3) violation, the judge concluded that CRC violated Section 8(a)(1) of the Act on numerous occasions both before and after the representation election.

In November, Geiger received a petition, signed about 28 August by 16 CRC employees, requesting that the Union's election victory be set aside on various grounds.[9] About 30 November, while CRC's election objections were pending before the Board, Geiger incorporated GLI, with himself as sole officer and owner, to engage in the manufacture, assembly, and distribution of automotive radiator cores and related products. Between November and 31 January 1985, GLI employed only three to five employees. Although it is unclear precisely what work the employees performed, other than possibly producing a few radiator or car tube "pilot" models, it appears the employees received training (for such tasks as soldering) at the 17th Street facility vacated by CRC[10] and that some of them also worked at the Beard Street facility.

On 31 January 1985, CRC posted a notice informing its employees that "due to circumstances beyond our control," the Company was "forced to move our operation to 17th Street." Twenty-three of its twenty-six employees were immediately laid off. On 1 February 1985, GLI commenced operations at the Beard Street facility pursuant to a 1-year lease executed 25 January 1985 by Geiger on behalf of GLI. Of the 23 employees laid off by CRC, 14 were hired immediately (or within days) by GLI. In addition, those GLI employees working at 17th Street were transferred to the Beard Street facility. Of the three employees retained by CRC to complete remaining orders at Beard Street, two soon became GLI employees. By about 6 February 1985, GLI had a complement of 26 employees, CRC's exact complement at the time of the mass layoff. All CRC employees who signed the postelection petition to overturn the Union's victory were, by 6 February 1985, again actively employed. Conversely, and most importantly, the only CRC employees not hired by GLI or retained by CRC were active union supporters.[11] These employees, seven in number, were not recalled by CRC until about May 1985.

The record establishes that most former CRC employees hired by GLI performed the same duties on the same type of equipment (if not the exact machines) during the same working hours previously in effect at CRC. The close relationship between CRC and GLI is evidenced by employee Laura Policht's testimony regarding her conversation on 4 February 1985 with CRC's former vice president, Nichols. Policht reported to GLI that day as requested earlier by Geiger. Upon arriving, Policht encountered Nichols, who informed her that CRC had "diversified" and was now GLI. He presented her with the choice of being laid off or working for GLI doing the "same job" she had done for CRC. Policht learned, upon inquiring, that she would receive the same wages and benefits at GLI that she previously received at CRC and that her CRC seniority would transfer to GLI. Policht decided to work for GLI. Nichols then asked Policht, who did not sign a union card or engage in any other union activity, if she was a friend of former CRC employee Sharon Osborne, who had been an active union supporter and with whom Policht shared a machine at CRC. When Policht replied "no," Nichols said "good." Further, while Policht and other selected employees (who were outwardly antiunion or whose union preferences were unknown) were approached to work for

[7] All dates are 1984 unless otherwise indicated.

[8] The Union, which won the election by one vote, was certified by the Board on 10 December 1985.

[9] There is no evidence the petition was at any time presented to the Board's Regional Office.

[10] We reject the Respondents' contention that GLI is a corporate successor to Great Lakes Industries, a sole proprietorship owned by Geiger's brother, Heinz Geiger. As found by the judge, Heinz operated his business under an assumed name from August 1983 until 21 March when he filed a certificate "discontinuing business" under that name. Karl Geiger's attempts to continue business under the sole proprietorship's assumed name failed. In any event, we find particularly illustrative of the lack of merit in the Respondents' argument Geiger's admission that GLI had no employees prior to the fall of 1984.

[11] This number excludes two CRC employees not hired by GLI or retained by CRC for reasons unrelated to the matters at issue here.

GLI, Osborne's attempts merely to enter the Beard Street shop on 7 February 1985 were thwarted.[12] Policht continued to work for GLI until 29 May 1985, when she reported, as instructed, to the 17th Street facility and became a radiator assembler for CRC, with the same benefits, wages, and seniority received at GLI.

Addressing the elements of an alter ego determination, we find, based on Geiger's proprietary interests in CRC and GLI, substantially identical ownership between the two enterprises. Leases between Geiger and the two entities were signed by Geiger on behalf of himself and as president of the two corporations. Geiger clearly was the dominant force in establishing the business purpose of both companies.

Concerning the element of common management, the facts reveal that as of 1 February 1985, CRC's former officers became GLI's managers. Moreover, with the exception of Mooney, every CRC supervisor became a supervisor for GLI. Mooney returned to the 17th Street facility to supervise CRC's severely diminished work force. In light of the above, we find that CRC and GLI had substantially identical management and supervision.

Regarding equipment, the record shows that both CRC and GLI lease equipment from Kar Tool, a company owned by Geiger. While CRC occupied the Beard Street facility it used two baking ovens, the newer of which remained at Beard Street for use by GLI. Likewise, two of the four fin machines used by CRC on Beard Street were left behind for GLI's use. In fact, there is no evidence that GLI had any equipment of its own when it took over the Beard Street facility. Concerning stock and supplies, employee testimony establishes that GLI used CRC's purchase order and other forms (with a superimposed sticker), commingled GLI's and CRC's stock and finished products for single shipments to customers, and used GLI employees to deliver CRC supplies. In addition, radiator cores manufactured by CRC at the 17th Street facility were sometimes packed and stored in boxes marked "GLI." While GLI purchased large numbers of CRC radiator cores, it also produced its own cores for subsequent assembly into complete radiators. These facts reveal an overlapping and integration of operations between the two entities and clearly support a finding of alter ego status.

The record also establishes that GLI and CRC share a substantially identical customer base. In fact, two-thirds of GLI's customers in February 1985 were CRC's customers in January 1985. Moreover, GLI and CRC used substantially the same suppliers in 1984 and 1985 for numerous items, including solder, tubing, acids, and "leaders."

The final factor to be considered in an alter ego analysis is employer motivation. In addressing this factor, we begin by noting the similarity of business purpose and operations between the two entities. As found above, both companies engaged in the business of manufacturing, nonretail sale, and distribution of automotive radiator cores and related products. Although GLI manufactured additional products and engaged in distribution on a larger scale than did CRC, these facts do not preclude a finding of alter ego status. On the contrary, GLI's increased distribution and manufacturing function provides some insight into employer motivation in that the increase is due in large part to GLI's expansion into more lucrative, but related, areas. Thus, while CRC continued for a time to produce old-style, less marketable radiator cores, GLI manufactured more modern, technologically competitive radiators and components. The Respondents failed to explain why GLI was created to occupy CRC's former Beard Street premises, largely with CRC's former employees and equipment, to engage in newly assigned work on an expanded scale while CRC returned with a skeleton crew to the formerly abandoned, smaller, dilapidated 17th Street facility. Geiger testified that CRC moved back to 17th Street as part of an overall plan to increase "efficiency" and "reduce overhead." However, the Respondents failed to proffer evidence as to what financial benefits resulted from the move and whether any of the physical problems at the 17th Street facility which necessitated CRC's move to Beard Street in the first place were ever remedied. The evidence leads to the conclusion that GLI was formed to continue CRC's operations in a disguised form while causing the demise of CRC, all in an attempt to avoid any union obligations or responsibilities under the Act.[13]

We find further evidence of unlawful employer motivation in the Respondents' hostility towards the Union. GLI was incorporated 3 months after the Union prevailed in the representation election and only weeks after Geiger received an employee petition seeking to overturn the Union's election

[12] In addition, rather than hire Osborne to work together with Policht on the same fin machine used by them at CRC, GLI hired a new employee.

[13] Following GLI's formation, CRC's production was apparently at a virtual standstill until early May 1985, allegedly due in large part to litigation over, and the need for subsequent repairs to, an indispensable baking oven. As stated above, a newer, operative baking oven was left behind at Beard Street for GLI's use. While CRC had a work force of about seven or eight employees in October 1985, it ceased doing business the following month. Although it appears CRC is in receivership, we agree with the judge that CRC's continued existence can be presumed in the absence of any evidence of corporate dissolution.

victory. The formation of GLI allowed CRC to follow through on its preelection threats not to bargain with the Union and effectively to close shop if the employees selected the Union as their collective-bargaining representative. Animus is apparent in additional unlawful campaign conduct, such as threats of reduced wages, unlawful interrogation, and solicitation of grievances. When CRC lost the election, the unlawful conduct continued. Thus, union supporter Dailey was unlawfully terminated and, as found by the judge, 1984 Christmas bonuses were withheld from organizing committee members, employees were interrogated and threatened, efforts were made to induce employees to withdraw charges pending before the Board, and seven union supporters were laid off for about 3 months (and then recalled to the dilapidated 17th Street facility) while those employees who signed the petition to overturn the election immediately returned to work.[14] Such extensive misconduct underscores the depth of the Respondents' commitment to avoid unionization.

Based on our consideration of all the factors outlined above, we find and conclude that GLI is the alter ego of CRC. In so concluding, we rely particularly on the timing of GLI's emergence to coincide with the demise of CRC and on the employment by GLI of a majority of former CRC employees to perform the same tasks on the same or similar equipment and machines, at the same premises, for substantially the same customers, with no hiatus in operations. We rely also on the fact that Respondents CRC and GLI have substantially identical ownership, management, and supervision and share a substantially identical business purpose. Finally, we note the strong pattern of discrimination against CRC's prounion employees and the evidence of unlawful employer motivation. In short, we find that GLI was formed to accomplish a shift of work from CRC in an attempt to rid the Company of its prounion work force and avoid any responsibilities arising under the Act.

Having found that GLI is the alter ego of CRC, we conclude that GLI violated the Act as alleged and, accordingly, is obligated, jointly with CRC, to remedy the violations found in this decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Continental Radiator Corporation and Great Lake, Inc., Detroit, Michigan, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraphs 1(f) and (g).

"(f) Discharging or otherwise discriminating against employees with respect to their hire or tenure of employment or any term or condition of employment because of their union activities or other exercise of their rights under the National Labor Relations Act.

"(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(e).

"(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents has taken to comply."

K. C. Hortop, Esq., for the General Counsel.
Robert L. Hindelang, Esq., of East Detroit, Michigan, for the Respondents.
Nancy Schiffer, Esq., of Detroit, Michigan, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter was originally tried before me on 7 through 11 October 1985 in Detroit, Michigan. The hearing was reopened, and reclosed, on 1 April 1986. The pertinent docket entries are as follows: The original charge in Case 7–CA–23796 was filed by Kenneth Dailey against Respondent Continental Radiator Corporation (Continental) on 29 August 1984[1]; the original charge in Case 7–CA–24140 was filed by John Kuzdzal against Continental on 24 December; the original charge in Case 7–CA–24260 was filed by Kuzdzal against Continental and Respondent Great Lake, Inc. (Great Lake) on 5 February; and the original charge in Case 7–CA–24712 was filed by Laura Policht against both Respondents on 17 June. The original complaint and notice of hearing issued on 1 October; an order consolidating cases and amended complaint and notice of hearing issued on 11 February; an order consolidating cases and second amended complaint and notice of hearing issued on 25 March; and an order consolidating cases and third amended consolidated complaint and notice of hearing issued on 7 August 1985. These complaints allege that Continental and Great Lake constitute a "single integrated business enterprise and/or single employer" or that they are "alter egos" of one another, and these complaints further allege that the Respondents have committed various violations of Section 8(a)(1) and (3) of the National Labor Relations Act. One such allegation involves the discharge of Dailey on 27 August. Other allegations include threats, interrogations, and an unlawful solicitation of grievances before Dailey's

[14] As noted in the judge's decision, and above in fn. 3, the allegations of misconduct occurring after Dailey's discharge on 27 August were disposed of by settlement agreement.

[1] All dates herein are between 1 June 1984 and 31 May 1985 unless otherwise specified.

discharge. Still other allegations concern conduct occurring after Dailey's discharge, including threats and an interrogation regarding charges filed and testimony given under the Act, an unlawful withholding of a 1984 Christmas bonus, and an unlawful mass layoff of Continental employees on 31 January. Respondents timely filed answers that deny that they constitute a single employer, or alter egos, under the Act, and they further deny all alleged violations of the Act. These matters were tried before me at the original hearing.

After the original hearing, the General Counsel, the Charging Parties, and the Respondents submitted briefs that have been carefully considered.[2]

On 12 December International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (the Union) filed the charge in Case 7–CA–25305. The complaint on that charge issued on 24 January 1986. On 31 January 1986, the Union filed the charge in Case 7–CA–25450, and the complaint on that charge issued on 6 March 1986. The latter complaints allege the facts that on 24 August 1984 the Union won a Board-conducted representational election and that 10 December 1985 the Board certified the Union as the collective-bargaining representative of the production and maintenance employees of Continental. These latter complaints further allege that, by virtue of the certification, the Union is the exclusive collective-bargaining representative of the production and maintenance employees of Great Lake, as well as those of Continental, because those two corporate entities are, as had been alleged in the first set of complaints, alter egos or they constitute a single employer. These latter complaints further allege, inter alia, that on 15 November 1985 the two corporations laid off Continental's employees in violation of Section 8(a)(3) of the Act, that on the same date Continental ceased operations, and that after the 10 December 1985 certification Great Lake refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act. Great Lake duly filed answers to these latter complaints, but Continental did not. After motions to further consolidate cases and reopen the record were filed by the General Counsel, the hearing was reopened on 1 April 1986, as previously mentioned. At the beginning of the reopened hearing, Counsel for the General Counsel represented that the Union had submitted a request to withdraw all 8(a)(5) charges; he further moved to dismiss all such allegations, and he announced that the General Counsel, the Charging Parties, and Great Lake had entered into a written settlement agreement.[3] The settlement agreement provides for a Notice to Employees, backpay for certain individuals, and further provides:

> The parties agree that this Settlement Agreement disposes of all allegations of these cases except for [sic] the discharge of Kenneth Dailey, the alleged violations of Section 8(a)(1) which predate Mr. Dailey's discharge and the allegation that Continental Radiator and Great Lake, Inc., are alter egos and/or a single employer as they have any bearing on the Dailey discharge or remedy therefore. The parties agree that in deciding these issues the administrative law judge may base his decision on the entire record in this proceeding; however, the Regional Director and General Counsel will not seek any remedial provisions [for] the conduct expressly disposed of by settlement herein provided compliance is maintained.

I approved the settlement agreement at the reopened hearing; therefore, the only violations for which remedy shall be ordered are those specified in the above-quoted paragraph of the settlement agreement, to wit Dailey's discharge and those violations that occurred before it. However, it is necessary to consider the violations that occurred after Dailey's discharge because they demonstrate the animus possessed by Continental's chief executive, Karl Geiger. As I find, Continental withheld the 1984 Christmas bonuses from the most active prounion employees, and it conducted a mass layoff of prounion employees in February 1985. Furthermore, it is factually undenied that Geiger threatened and interrogated employees, in the clearest of terms, with reprisals because they had filed charges under the Act. These outrageous unfair labor practices bespeak of deep-seated antiunion hostility and willingness to violate the law. Respondents did not develop this animus overnight, and it would be fatuous to ignore these violations that occurred subsequent to Dailey's discharge in attempting to determine the real reason for that discharge.

Therefore, although an order covering them will not issue because of the settlement agreement, the proven[4] postdischarge violations will be considered to shed light on the issue of Continental's motivation in its discharge of Dailey.

On the record as a whole, including my observation of the witnesses and on consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Although Continental is no longer operating and, according to documents submitted by Great Lake,[5] is in receivership, it has not been dissolved according to any evidence presented herein. Therefore, Continental's continued existence is presumed.

---

[2] The General Counsel has moved to strike certain extra record factual representations in Respondents' brief. Respondents did not oppose, and the motion is granted.

[3] No one appeared on behalf of Continental at the reopened hearing and Continental is not a signatory to the settlement agreement.

[4] At the reopened hearing, no evidence was offered regarding the 15 November 1985 layoff or any other issue.

[5] Continental was created in 1976; Great Lake was incorporated in November 1984. Both entities are Michigan corporations that have operated from facilities in Detroit. Respondents manufacture (or have manufactured) and distribute (or have distributed) automobile radiators and related parts from these facilities. During 1985 each Respondent received gross revenues in excess of $1 million and purchased directly from suppliers located outside the State of Michigan goods and materials valued in excess of $50,000. Therefore, both Respondents are now, and have been at all times material herein, employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Background and supervisors involved

Karl Geiger owns 65.625 percent of the stock of Continental Radiator. The remainder of the stock is held thusly: Harold Nichols holds 6.25 percent; Ron Weigand[6] holds 3.125 percent; Martin E. Wall holds 6.25 percent; and Richard DeSiro holds 18.75 percent. When Continental began operations in 1976, it utilized a building that it owned on 17th Street in Detroit. In January 1984, when the 17th Street facility was in a state of advanced decay, according to the testimony of Geiger, Continental moved into a building on Beard Street, Detroit, which is 2 miles from the 17th Street location. Continental did not buy the Beard Street building; it leased it from its sole owner Karl Geiger. By its terms, the lease was to terminate on 1 February 1985.

Continental employed about 25 employees at Beard Street until 31 January at which time it laid off 23 of its 26 employees. Continental returned to the 17th Street location, leaving the Beard Street building to Great Lake. Supervisors of Continental while it was located at Beard Street were Geiger, the president; Harold Nichols, vice president; and Donald Mooney, plant supervisor and sales representative. The complaint alleges, and Respondents deny, that Franklyn Reed, marketing director and administrative assistant to Geiger, was a supervisor of Continental within Section 2(11) of the Act. Employee Luis Luciano testified that in November 1984 Reed gave him a written warning notice, but the notice was not placed into evidence, and there is no evidence of who authorized the notice. Two other employees, Adolph (Blackie) Seledon and Policht testified that they considered Reed to be a supervisor, but the bases for their conclusions were not elicited, except that Policht testified that she once asked Reed to implement a raise for her; however, the raise had previously been promised by Geiger. During the campaign preceding to the 24 August election Reed did hand out Respondent's antiunion propaganda, but there is no evidence that he was performing anything other than a delivery function. Therefore, it appears from this record that Reed performed no more than ministerial administrative functions for Continental; that is, there is no evidence that he was vested with any of the supervisory indicia enumerated by Section 2(11) of the Act, and I find and conclude that the General Counsel has failed to prove that Reed was a supervisor or agent within Section 2(11) or (13) of the Act.[7]

2. Alleged predischarge violations of the Act

Employees of Continental began distributing authorization cards on behalf of the Union in early July. An organizing committee was formed, and employee-members wore buttons identifying them as such. Employees who were members of the organizing committee were Sharon Osborne, Seledon, John Kuzdzal, Luciano, Ronald Sheridan,[8] and dischargee Kenneth Dailey. On 7 July the Union filed a petition to represent Continental's production and maintenance employees. Pursuant to this petition an election was scheduled for 24 August.

Seledon testified that about 3 weeks before the election he and employee Alfredo (Freddie) Aponte were working together on a radiator. Nichols approached Aponte and stated that if the Union were voted in "some of the people making $5.50 an hour they will be having their wages cut and the people [who] are [making] less they won't lose anything if the Union got in." Seledon testified that at the time he was making $5.50 an hour. Nichols did not testify.[9]

Seledon further testified that a week later he and Nichols were talking on the shop floor when he remarked to Nichols that Continental would have to negotiate with "the people" if the Union were selected. Nichols replied, that Geiger would negotiate, but, "Mr. Geiger would never come to an agreement with you people."

Osborne testified that a week or two before the election she was at her machine when she was engaged with Nichols in a conversation. She testified that Nichols was speaking against the Union and stated:

> . . . that if the people went out on strike, they would not have a job. The ones that would come to work would be continually working. And the ones out on the street would not be having a job, because there is no UAW in the shop at that time. . . . He also told me that if they wanted to, him and, I guess, Mr. Geiger, wanted to take the shop and move it down South. That they could do that for cheaper wages for people to work . . . if the UAW got in that they could do that very easily.

Kuzdzal, who is of Polish descent, testified that a week before the election Reed called him to the lunchroom at a time when no one else was present. According to Kuzdzal, Reed asked why "I am starting this Union stuff"? Kuzdzal replied that he had not started it but he was supporting the Union even though he was no longer on the organizing committee. Kuzdzal replied that it made no difference because "unofficially I was still supporting the Union." Reed further asked Kudzal if he knew what happened to union supporters in Poland; Kuzdzal replied, "No," and Reed replied, "they locked

---

[6] Employee witnesses referred to Weigand as "Wagon-head" at the hearing.

[7] *Walter Garson, Jr. & Associates*, 276 NLRB 1226 (1985), relied on by the General Counsel is distinguishable. In that case the disputed agents also served as a conduit for dissemination of the employer's propaganda, but in doing so they conducted systematic group meetings with employees, the first of which was attended by an owner of the employer. In such circumstances the Board held that the individuals in question were "clothed by Respondent with the apparent authority of its agents and agent with respect to personnel matters and particularly with respect to the Union organizing efforts." Such is simply not the case here.

[8] Sheridan quit Continental in October.

[9] Aponte did not testify either; Seledon testified, without objection or contradiction, that Aponte is now in the armed services.

them up." (Before this incident Kuzdzal had worn T-shirts that bore the legend "Solidarity" in Polish.) Reed did not testify, so Kuzdzal's testimony is unrebutted. Although I found Kuzdzal credible it is to be noted that, as I have held above, the General Counsel failed to prove that Reed was a supervisor of Continental.

Kuzdzal further testified that about 2 days after the preceding conversation with Reed, he was called to the office by Nichols. At that time according to Kuzdzal, "he asked me why I am doing this? Why didn't I come speak to him first?" Kuzdzal did not reply. Nichols then asked if Kuzdzal knew that his wife, a worker in the office, had received certain benefits from Continental. Kuzdzal replied that he did. Nichols did not testify, and I find Kuzdzal's testimony of Nichols' questioning to be credible.

On the day before the election Geiger gave a speech to an assembly of all employees in the lunchroom. According to Dailey, Kuzdzal, and employee Kenneth Heidel, Geiger told the employees that they did not need a union and that they could come to management with their problems and it would take care of them. Although Geiger testified, he did not deny the statements attributed to him by these three employees whom I found credible.

3. Discharge of Dailey

The complaint alleges that Continental discharged employee Kenneth Dailey in violation of Section 8(a)(3) and (1) of the Act. Continental answers that none of its supervisors or agents knew of Dailey's union activities and that Dailey was discharged for cause.

Dailey was hired by Respondent on 11 June and discharged on Monday, 27 August, the first workday after the Friday, 24 August, election. Dailey was an unskilled worker, 26 years of age. He was assigned to learn to solder radiator corners under the tutelage of Seledon. Seledon held no title but did train one or two new employees a year for Continental. In addition to soldering, Dailey, on two occasions, was assigned the job of cutting brass tubes to length for employees who placed them into the radiator cores. Before his last day of his employment Dailey was not warned or otherwise disciplined for any offense.

On 11 July Dailey signed an authorization card for the Union. Thereafter he began distributing literature for the Union and solicited support for it among the other employees. He wore two union buttons. At first he wore a button that was 1-1/4 inch in diameter that bore the legend "JOIN—VOTE UAW." Later, after he joined the organizing committee, Dailey wore a button that was 2-1/2 inches in diameter that said "Organizing Committee" at upper and lower arcs in addtion to the legent "UAW" in the middle.[10] Respondent called two supervisors to testify about the Dailey discharge; these were Geiger and Plant Floor Supervisor Don Mooney, both of whom denied seeing the buttons and further denied any knowledge of Dailey's union activities or sympathies.

The General Counsel presented the following evidence to support his contention that Respondent did know about Dailey's union activities: Employees Luis Luciano and Seledon testified that they saw Dailey wearing the buttons from time to time. Dailey further, credibly, testified that during the campaign, on an occasion when Mooney was handing out Respondent's campaign literature, he told Mooney that he was for the Union. Finally, Sharon Osborne, who was employed by Continental at the time of the hearing, testified that about 2 weeks before the election she and Continental's vice president, Nichols, had a conversation about the amount of a raise Osborne had recently received. The conversation drifted over to the topic of the Union. According to Osborne:

> . . . he also said to me that he wanted to know if I wanted Ken—loudmouth Ken and punk Ron [Sheridan] and John Kuzdzal, or however you say his last name, to be my representatives for the UAW. And I said, I happened to be on the committee also. . . . I said, "Who is Kenny?" and he says, "The boy that works in the back with Blackie [Seledon] with the red hair."

Nichols did not testify; therefore, this testimony stands unrebutted, and I find it credible. Dailey, who has red hair,[11] was working with Seledon at the time.

Dailey was discharged at the end of the workday on 27 August. Dailey's timecards reflect that he was late on the following days immediately preceding his discharge: Monday, 20 August, 3 minutes; Tuesday, 21 August, 1 minute; Wednesday, 22 August, 3 minutes; Thursday, 23 August, 7 minutes; Friday, 24 August, 14 minutes; and Monday, 27 August, 20 minutes. Mooney testified that when Dailey arrived at work on 27 August he asked the employee why he was late, but Dailey did not answer. Mooney told him, "Look, this is the third time in a row. Consider this a warning." Mooney further testified:

> At the end of the day, I called him in the office and I told him, I said, "Kenny, you are just not working out. You are not the man I am looking for. If you need to use us for a reference, feel free." And that was that. He turned and left.

In addition to this, Dailey credibly testified that he asked Mooney if there were not another reason, but Mooney just repeated his statement that he was not the man he (or Continental) was "looking for."

The General Counsel contends that Dailey was discharged because of his union activities and that Respondent selected Dailey to inflict retribution on the employees for having selected the Union as their collective-bargaining representative in the election conducted on the

[10] Apparently Dailey did not wear a union button every day; Continental produced a photograph of Dailey and other employees as they listened to Geiger's speech mentioned above, and Dailey did not have a union button on at that time. However, this fact does not require the conclusion, advanced by Continental, that Dailey never wore a union button.

[11] In fact, when Respondent's witness employee Leona Gieraga testified, she once referred to Dailey and stated, "[W]e called him 'Red.'"

Friday before the Monday on which Dailey was discharged. Respondent defends the allegation on the dual bases that it did not know of Dailey's union activities and that Dailey was discharged for several causes. The causes enumerated by Respondent are: (1) tardiness and absences; (2) walking around and talking when he should have been working; (3) being "goofy" as one employee witness described him; (4) hitting a female fellow worker; and (5) unsatisfactory work performance.

Of the 55 workdays between 11 June and 27 August (inclusive) that Dailey was on the payroll he was late for 12 of them, or 22 percent of the time. His timecards reflect that he had only one tardy arrival between 11 June and 5 July; thereafter, he was late for periods of 5 minutes or less on 27 July and 1, 4, 8, 14, 20, 21, and 22 August. Then, as previously noted, he was 7 minutes late on 23 August, 14 minutes late on 24 August, and 20 minutes late on 27 August. Respondent submitted into evidence Dailey's "Daily Attendance Record" that is a calendar for the year 1984 on which tardiness and absences are recorded. The only tardy arrivals recorded on this document are the last three. This record and the timecards further reflect that Dailey was absent for reported illness on 2 and 9 August. Mooney testified that on 2 August Dailey appeared "in bad shape" and alcohol could be smelled on his person. Dailey denied that he had been drinking or that alcohol caused his illness that day; Dailey credited his temporary illness that morning to having inhaled acid fumes at the plant as he was working. Mooney excused Dailey for the day. No other employee was affected by fumes that date, and I find Dailey's story about the fumes absolutely incredible on this point.

In support of its defense that Dailey was discharged, in part, because he chronically walked around the shop, talking to other employees, Respondent called Mooney and employees Herminio Murrias, Laurie Rajnish, and Leona Gieraga. Mooney testified that he regularly had trouble with Dailey's being away from his work station and either talking to other employees or just sitting and loafing. Mooney testified that he had wanted to fire Dailey much earlier, but an "advisor" (apparently a nonlawyer) told him not to do so because it would "look bad" during an election campaign. The consultant advised Mooney to keep notes on Dailey and other employees, which Mooney did. Nine notes on Dailey were received in evidence. The first one is undated but according to Mooney would be for mid-July; it states that he assigned Dailey to help Alfredo Aponte to do a job, but Aponte had to do it while Dailey watched. The second, dated 16 July, states: "not doing anything—at 4:00—was sitting on his ass." The third, dated 24 July, states that "Mino" [Murrias] complained that "all Ken does is walk around." The fourth, dated 2 August, states tha Dailey "said he is sick. Had to go home, worked 1 hour (hungover)." The fifth, dated 8 August, states that Mooney told Dailey "to go cut tubes for CT [large radiators] . . . goofing aroung all the time." The sixth one is undated, but would apparently have been in August; it states: "Had to tell him again about not working. Had him cut tubes again. Told Blackie [Seledon] and Freddie [Aponte] why." The last three notes refer to his last three cases of tardiness, including the one on the day of discharge, 27 August. Mooney testified that employees Murrias and Santos Luciano had, on occasion, complained to him that Dailey was not working while they and other employees were. Mooney further testified that in order to put Dailey in a position where he would have to work, and could be seen by anyone in the shop, he assigned Dailey to the work of cutting brass tubes for the employees who were placing them in the radiators. Mooney did not warn Dailey that anything would happen to him if he did not stop wandering around.[12]

Murrias did testify that he had seen Daley walking around, but he also testified that Dailey walked around, "about the same" as the other employees. Murrias flatly denied that he ever approached Mooney about Dailey's not working, and I credit Murrias on this point. As far as "complaining" to Mooney, the most Murrias testified to was that "Yes, he [Mooney] asked me if he [Dailey] was working or walking around. I would say sometimes he walk[s] around." Santos Luciano did not testify. Contrary to the sixth note in Mooney's file on Dailey, Seledon flatly, and credibly, denied that Mooney once told him "why" Dailey had been assigned to cut tubes.

Employee Laurie Rajnish testified that she worked 15 feet from Dailey's work station and that "he goofed off most of the time . . . most of the day he really didn't work. He went talking with other people." When asked what Dailey's job was, Rajnish testified "he really never hardly did the same thing . . . he was always at a different job." When asked what Dailey's job was, Rajnish testified "he really never hardly did the same thing . . . he was always at a different job." When asked specifically if she had ever seen him soldering with a torch, Rajnish replied, "No." It is undisputed that Dailey's regularly assigned job was soldering with a torch, and only on two occasions was he assigned to something else, tube-cutting.

Gieraga, who worked in assembly with Rajnish, was asked what she saw Dailey doing the most. She replied:

> Well, he was back by the soldering and then—okay, if they didn't have no work down there, Harold [Nichols] sent him over to cut tubes for us or whatever, and like I says, he had the mouth. He would be talking and goofing off all of the time.

Gieraga further testified that although Dailey was usually assigned to soldering:

> [I]f there wasn't no job for him, he was assigned to cut tubes for our department or whatever, and he would be cutting and then he would stop then and talking or whatever, and going to other people talking with them and that stuff.

Seledon, with whom Dailey regularly worked, flatly denied that Dailey walked around the plant and talked to other employees when he should have been working. Seledon testified that when there was not enough soldering work to keep Dailey busy, he would go to Nichols and

[12] Mooney did credibly terstify that once when he ordered Dailey to go cut tubes, he replied, "I know, walking around talking."

ask that supervisor to find something for Dailey to do. Dailey was not asked if he did, in fact, walk around and talk to other employees when he should have been working. Dailey did deny being ever spoken to by any member of management about his work performance or walking around; he specifically denied that he was ever told that he was being assigned to cut tubes because he had been walking around.

In support of its contention that Dailey was "goofy," a term employed by witness Gieraga, Respondent relies on Gieraga's explanation of her use of that term which was: "I stayed away from him. I didn't like to associate too much because he was often in trouble. He was someone you can't get along with."

Rajnish testified that she was twice struck by Dailey. The first time was in the early weeks of Dailey's employment when Dailey struck her on the arm. The second time, according to Rajnish, was when she was standing in line waiting to vote in the 24 August Board election. According to Rajnish, Dailey asked her if she was for the Union or not; when she replied that she was not, Dailey cuffed her on the back of the head. Gieraga testified that she witnessed the latter incident. Dailey denied both incidents; however, I credit Rajnish and Gieraga. There is no evidence that any of Continental's management knew of either incident before Dailey was discharged.

In support of its contention that Dailey was discharged for unsatisfactory work performance, Respondent relies on Mooney's testimony that:

> I don't think he ever learned it. I have been doing this for 18 years. I think you get a pretty good idea if somebody is going to catch on or not. He still could never run a torch. It took him two hands. I mean he would have to set it down and turn it on and hold it instead of using it like a pistol. He never caught on to it.

When asked to compare Dailey with other employees who have trained for 78 days to learn soldering, Mooney replied:

> Terrible. I mean, I have seen guys that altered the torches so they could get it to work with one hand . . . . This guy never caught on.

Seledon, in his direct testimony, stated that Dailey was a "good" worker and by that he meant that Dailey "wasn't slow picking up—picking up doing the work." Seledon testified that by this he meant that Dailey was not slow learning how to do the work. However, while he was on direct examination, Seledon vacillated. For example, Seledon was first asked on direct examination what kind of worker Dailey was, and Seledon replied, "A good worker." When asked to be more specific, Seledon replied:

> He wasn't that good, but he knew what to do. He couldn't control the torch like I do. He couldn't adjust the flame. . . . He would set the flame, but he could do the job.

On cross-examination, Seledon was asked what he meant; he responded:

> Sometimes I had to—I had to go over some of the job because it was lumpy; and to smooth it out or I had—he left a hole in the bottom; we had to fill it in. Or I told him to fill that in. Too much solder or not enough solder on the corners. And when he first started out, it didn't sweat all the way through; and I showed him, now just one or two, three times; I would say maybe a dozen times I showed him how to sweat it in to get into the plate.
>
> It was good and it wasn't—it wasn't 100 percent. I would say it was 75 percent okay. It was good enough to send out to the customer. . . . What I mean by 100 percent, the job being good, all even, no runs or no gobs of solder in between the fins or the tubes.

Seledon denied that he told Mooney or any other supervisor that he was having to correct approximately 25 percent of Dailey's work. Dailey denied that he was ever spoken to by Mooney or any other supervisor about producing poor quality work, and there is no testimony to contradict this statement. In fact, Mooney did not testify that he ever inspected any of Dailey's work.[13]

4. Alleged postdischarge violations of the Act

a. *Background*

(1) Election and petition for new election

At the 24 August 1984 election the vote was 16 for the Union, 15 against, and no votes were challenged. Continental filed objections to conduct affecting the results of the election. A hearing on the objections was conducted on 18 and 19 October. A hearing officer's report issued on 6 December; it recommended that the Board overrule Continental's objections. Continental filed exceptions to the report on 27 December. In an unpublished decision that was issued by the Board 10 December 1985, the Union was certified as the collective-bargaining representative of Continental's production and maintenance employees.

Within the week after the 24 August election 16 employees signed a petition addressed to the National Labor Relations Board asking that the election be set aside because of threats to employees and the inability to read English or Spanish of two employees (and who therefore could not have understood the ballot question). The employees of Continental who signed the petition were Eric Klump, Santos Luciano, Reinaldo Santana, John Castiglione, Herminio Murrias, Juan Santana, Laurie Rajnish, Deborah McLeod, Marie Yerger, Nick Perelekos, Jeffrey Washelewski, Carlos Santana, Bryan Lang, Wilfredo Aponte, Leona Gieraga, and Robert Dziuban. This petition was presented to Geiger, but

[13] Dailey received a 25-cent-per-hour wage increase after his first 30 days of employment with Continental. Mooney testified that he was not responsible for giving this raise, but he would have gone along with it because Dailey had performed satisfactorily for the first few weeks of his employment.

there is no evidence that it was presented to the Board's Regional Office. Employees who did not sign the petition were Seledon, Sheridan, Luis Luciano, Charley Aponte, Kenneth Heidel, William Heidel, Kuzdzal, Anthony Lucaj, Osborne, Larua Polícht, Jeffrey Toomer, and Judy Vargas.

(2) Creation of Great Lake and its relationship to Continental

In November 1984, while Continental's objections to the 24 August election were pending, Geiger incorporated Great Lake, Inc. with himself as the president and sole owner. The business of Great Lake was to assemble complete radiators and distribute them to retail outlets, whereas Continental Radiator Corporation had primarily built radiator cores for other companies to assemble into complete radiators, although Continental had done some distributing. Great Lake employed about six employees between its creation in November 1984 and 31 January 1985.

As previously noted, Continental Radiator Corporation was created in 1976, and Karl Geiger owns 62.625 percent of the stock. Great Lake, Inc. was incorporated on 30 November 1984.[14] The first three to five employees of Great Lake were trained at the 17th Street location that Continental had abandoned in January 1984. All the jobs they learned to do there is unclear, but some employees were trained to do the soldering of radiator cores. Between November and 1 February, some of the Great Lake employees also worked at the Beard Street address. On the day after the 31 January mass layoff of the Continental employees, Great Lake began operating out of the Beard Street facility. The Great Lake employees who had been training at 17th Street were then transferred to the Beard Street. Additionally, by 6 February all employees who had signed the petition to set aside the 24 August union election victory (and four who had not: Seledon, Polícht, Charley Aponte, and Lucaj) were transferred to Great Lake's payroll and continued working at Beard Street. Also Great Lake hired 3 new employees so that by 6 February, Great Lake had a complement of 26 employees, exactly what Continental's employee complement had been at Beard Street before the 31 January layoff.

Great Lake purchases radiator cores from Continental Radiator (who, after May was producing cores at the 17th Street address), and also makes some cores itself. Great Lake also purchases other radiator parts such as upper and lower tanks and channels[15] and assembles them into complete radiators. It also produces radiator kits that are boxes which include the core and other parts necessary to assemble a complete radiator; these are purchased (for less cost than an assembled radiator) by radiator and automobile repair shops for assembly by the purchasers' employees. Sixty-five percent of Continental's 1984 customers were customers of Great Lake, Inc. in 1985. Great Lake also has become a distributor for General Motors radiators. In 1984 Continental distributed a few items that are purchased rather than manufactured, but on a small scale compared with what Great Lake began doing after the layoff of the Continental employees.

Continental had two ovens for the finishing of radiators. One was old and in need of repair; that is the one Karl Geiger sent over to the 17th Street facility when he laid off the Continental employees at Beard Street. After the oven was repaired in May, as described below, Continental began recalling employees (who were not already working at Great Lake) to the 17th Street facility. The core-production business of Continental at 17th Street has steadily atrophied, so that at the time of the original hearing Continental's employee complement was down to six employees.

Geiger testified that the reason for the removal of Continental from the Beard Street location to the 17th Street location was "efficiency." Why it was more efficient to set up a new corporation, Great Lake, for the purposes of handling part of the core production and all the new distribution function, at the same premises, was not explained. The only expense Continental reduced by the move was rent. Continental's lease at Beard Street expired on 1 February. Geiger, who owned the building, chose not to renew Continental's lease (or, at least, chose not to renew it at the same rate). Therefore, Continental Radiator was compelled to return to the 17th Street building that it owned. However, the building, as previously mentioned, had been abandoned in early 1984 because it was dilapidated. What repairs to the 17th Street building were required to make it useable and the cost of those repairs are not disclosed in the record.

In addition to Karl Geiger, president, the officers of Continental Radiator at all times herein have been Harold Nichols, vice president, Martin E. Wall, secretary-treasurer, and Ronald Weigand, assistant secretary-treasurer. When Continental was moved out of the Beard Street location, Nichols and Weigand remained with Great Lake as supervisors. Mooney went ot the 17th Street facility to continue supervising Continental Radiator employees there.

There is no evidence that the employees newly hired by Geiger at Great Lake had any skills not possessed by those who were laid off by Continental; that is, the work at both places was unskilled soldering, assembly, and shipping and receiving work.

b. *Monetary payments at Christmas 1984*

Of the 26 employees who were employed by Continental during the week before Christmas 1984, 22[16] received monetary payments from $40 to $200. The four employees who did not receive any payments were John Kuzdzal, Luis Luciano, Adolph Seledon, and Sharon Os-

[14] Heinz Geiger, brother of Karl, operated a proprietorship called Great Lakes Industries from 27 August 1983 until 21 March 1984 when he filed with the State of Michigan a "Certificate of Discontinuance of Business Under An Assumed Name." When Karl Geiger desired to incorporate another business, he attempted to use the name that Heinz had abandoned; however, because there was then another Michigan corporation with a similar name, he could not. Therefore, he chose the name "Great Lake [singular], Inc.," instead.

[15] These are conduits on the sides of a radiator.

[16] See G.C. Exh. 17, and note that listed employees Calles and Ortiz were not employed by Continental at Christmas 1984.

borne, none of whom signed the petition for a new election, and all of whom were the remaining[17] members of the organizational committee. The General Counsel contends that the four employees who did not receive any cash payment[18] at Christmas 1984 were discriminated against in violation of Section 8(a)(1) and (3) because they were members of the organizing committee and because they did not sign the petition to overturn the 24 August election. Continental contends that the monetary awards were personal gifts from Karl Geiger and not benefits of the employment relationship.[19]

In 1983 Continental employed 20 employees at Christmastime; each of these 20 received monetary awards from $25 to $175.[20] Geiger testified that he took $2030 of his own money and gave it to the company treasurer to cover checks that were issued by Continental for the 1984 Christmas payments. Geiger testified that he did this because the employees would have had a easier time cashing a check from Continental than they would have had cashing his personal checks. Geiger testified that no tax deduction was made on Continental's 1984 taxes for these payments. When Geiger was asked if any deductions were made for the 1983 Christmas payments, he stated that he could not remember. When asked why not all of Continental's employees received the gifts Geiger replied:

> I usually give a gift to people who reciprocate, who I expect another gift [from] or who I expect at least a Christmas card from.

When asked specifically why Kuzdzal did not receive a cash Christmas gift, Geiger replied that he did not expect to receive a Christmas card or gift from Kuzdzal; Geiger acknowledged that Kuzdzal did receive a cash gift ($85) in 1983. When asked why Osborne did not receive a Christmas cash gift, Geiger replied, "I can't tell you the reason, no." When asked why Luis Luciano did not get a 1984 Christmas cash payment, Geiger replied he did not know Luciano; Luciano received $20 at Christmas 1983.

Osborne testified that she got a $25 cash payment in 1983. At the time Nichols told her that she would have received more money if she had been employed longer but she then had only been employed for 3 months. In 1984, when she had not received any cash payment for the year, she approached the office secretary to ask the reason. Apparently the secretary relayed this question to Nichols, because later in the day Nichols approached Osborne at her machine. According to Osborne:

> Mr. Nichols told me that, "this piece of paper would explain everything on what you people are going to be getting. From now on, you will have to associate with the Union people, your Union representatives." And that, "We are not going to be dishing out any more money."

Osborne testified that she did not read the paper which Nichols gave her at that time. Kuzdzal testified that when he did not receive a Christmas payment he asked Nichols the reason. According to Kuzdzal, Nichols replied "company discretion." Nichols did not testify and this testimony by Osborne and Kuzdzal was credible.

c. Layoff of 31 January

On 31 January the following notice to all Continental employees was posted:

CONTINENTAL RADIATOR CORPORATION

To: All Employees

Due to circumstances beyond our control, we are forced to move our operation to 17th Str., Detroit We are sorry to announce that during this transaction the following employees, effective January 31, 1985, will be laid off:

Name	Hire Date
Marie Yerger	4–23–79
Nicholas Perelekos	7–19–82
Jeffrey Toomer	6–18–79
Luis Luciano	9–1–82
Deborah McLeod	9–3–79
Charley Aponte	10–1–82
Reinaldo Santana	1–8–80
Juan Santana	6–20–83
John Castiglione	2–5–80
Laurie Rajnish	6–21–83
Carlos Santana	5–27–80
Sharon Osborne	8–3–83
John Kuzdzal	9–2–80
Kenneth Heidel	1–19–84
Hermino Murrias	6–30–81
Judy Vargas	2–1–84
Jeffrey Washelewski	7–13–81
Laura Policht	2–1–84
Santos Luciano	11–9–81
Wilfredo Aponte	1–25–84
Adolph Seledon	5–11–82
William Heidel	6–19–84
Anthony Lucaj	6–22–84

Hopefully we can conclude this project within a few weeks. Management will do their best to make your layoff as short as possible. Recall will be by seniority and Qualification. If you have any questions during your layoff feel free to call 963–0855. Don Mooney will gladly answer your questions.

Rather than "a few weeks," there was no recall by Continental until May. Three employees of Continental were not laid off on 31 January. They are Leona Gieraga,

[17] By Christmas 1984, Dailey had been discharged, and Sheridan had quit.

[18] They and all other employees of Continental received $25 gift certificates redeemable at a local department store. Continental also gave out these certificates to all employees at Christmas 1983.

[19] Although this issue is encompassed in the 1 April 1986 settlement quoted above, it is necessary to consider this allegation as it bears on the issues of animus that may have affected the decision to discharge Dailey and the remedy for that discharge; that is would Dailey have received a cash award at Christmastime 1984, but for his unlawful discharge, as found herein?

[20] Compare G.C. Exh. 7, which lists seniority dates with G.C. Exh. 17, which lists the payments made in 1983 and 1984; note that Wilfredo Aponte, Calles, Kenneth, and William Heidel, Lucaj, and Policht were not employed by Continental at Christmas 1983.

Robert Dziuban, and Eric Klump, each of whom was senior to the employees listed above. Within the week following the layoff the following Continental employees were transferred to the payroll of Great Lake: Gieraga, Dziuban, Klump, Yerger, McLeod, Reinaldo Santana, Castiglione, Carlos Santana, Murrias, Santos Luciano, Perelekos, Charley Aponte, Juan Santana, Rajnish, Lucaj, Policht, and Seledon. Additionally, Washelewski was first transferred to Kar Tool, another company owned by Karl Geiger, then later to Great Lake. All of these employees, except Seledon, Charley Aponte, Policht, and Lucaj had signed the petition for a new election that was given to Geiger, as mentioned previously. The remaining employees were not employed by either Respondent for 5 months when Continental reopened, on 17th Street, in May; these were: Osborne, Vargas, Kenneth and William Heidel, Luis Luciano, and Kuzdzal, none of whom signed the petition and all of whom are alleged to have been laid off in violation of Section 8(a)(3) and (1).

Policht, who did not sign a union card and did not engage in any other union activity, testified about her transfer. Policht testified that about quitting time on 31 January, the day the above-quoted layoff notice was posted, Geiger approached her at the fin machine that was her regular workplace. According to Policht, Geiger stated: "I am always looking for good workers. Don't go to the unemployment office. Maybe I have a job for you at Kar Tool." Geiger told her to come to work on Monday morning, 4 February, and talk to Nichols. Charley Aponte was standing near Policht and Geiger at the time. Aponte asked Geiger if he could come to work on Monday also; Geiger told him to report the next day. On 4 February Policht reported to the Beard Street facility (which still had an outdoor sign stating "Continental Radiator"), and walked through the employee entrance. As she walked through the employee entrance toward the office she noticed that all employees were working at their same jobs except "a few." When she reached the office she spoke to Nichols. Policht testified that Nichols told her:

> He said that Continental had not rented the building or owned the building, and that they were diversified, I think was the word he used. And that it was Great Lake now. And I had a choice of either staying on the layoff or working for Great Lake. And I asked him if I would be doing the same job. And he said yes. . . .
>
> And I asked him if I went to the other building later, because on the notice it said "a few weeks layoff," I said, "Would I be running doing—doing the same thing?" And he said, "Yes." and I said, "Would you have a fin machine there too"? And he said, "Yes." And he said, "Yes." And I said, "And one here"? He said, "Yes." And I said, "Well, we would be doing the same thing there as here"? And he said, "Yes." And he asked me if I wanted to start working. I told him, "Yeah, I would work for Great Lakes." and he said, "Well, what about later"? And I said, well it depended what the rest of the—I seen that almost all the employees were at the same place. And I couldn't decide what to do—to go to—I [start] work here and then I will see where most of the friends and employees go and I will go with them.
>
> . . . .
>
> I asked him if the amount of pay was the same. He said, "Yes." And if the benefits were the same; he said, "Yes." And the seniority; he said, "Yes." And I said, "if I work for Great Lakes, I would still have my seniority from Continental"? And he said, "Yes."

Nichols asked Policht when she could go to work, and Policht replied that she could go to work right then. Nichols asked if she was a friend of Osborne and Policht replied, "No. We had talked together so much at the machine, we really never talk [to] each other after work." Nichols replied: "Good." Policht then went to work at the same fin machine job that she had worked for Continental. The only difference in the operation was that she was required to operate all four fin machines, in series apparently, whereas before she and Osborne had operated them together. At some point during the week Nichols approached her and stated that another employee would be hired to assist her. Within the week employee Diane Hernandez was hired to work on the fin machines also. Policht continued in this job until 29 May when she received a telegram to report to work for Continental at the 17th Street facility. She was given a job as radiator assembler with the same benefits, rate of pay, and seniority. She reported to Mooney who had been her supervisor at Continental. Nichols did not testify; Geiger testified, but contradicted none of this testimony of Policht.

Employee organizing committee member Luis Luciano testified that on the afternoon of the layoff, 31 January, he asked Nichols if he could come back the following day to pick up a few of his personal things; Nichols replied that Luciano should get the items now so that "I wouldn't have to be coming back again."

Geiger testified that Washelewski begin working for Kar Tool shortly after the layoff of the Continental Radiator employees, but "he applied for a job." Whether Washelewski was asked to apply for a job, as was Policht, is not disclosed in the record. There is no evidence that any other employee was invited to apply for jobs with either Kar Tool or Great Lake.

When Policht was transferred from Great Lake to Continental in May, Continental also recalled Kenneth and Bill Heidel, Kuzdzal, Luis Luciano, Osborne, Toomer, and Bargas. Gieger testified that the delay was caused by the fact that the oven that was transferred to 17th Street was not working; it was owned by another party with whom Continental was in litigation; it would cost $6000 to repair; Continental was not willing to spend that much money on the oven until the litigation was resolved; it was not until March that the owner of the oven stated, in state court, that he did not wish the oven returned to him; on hearing this the repairs were authorized; and the employees were recalled to 17th Street when the repairs were completed in May.

d. *Geiger's interrogation of Policht about her testimony*

In February, while Policht was working for Great Lake at the Beard Street facility, she met with a Board agent to give testimony regarding charges that had been filed by that point. Jeffrey Washelewski, who had been employed by Continental Radiator until the layoff and was given a job with Kar Tool, then Great Lake, by Geiger when the layoff came on 31 January, was also present. On the day following her giving an affidavit, Nichols approached Policht as she was working and told her to go to the office to fill out a job application for Great Lake. When Policht and Nichols got to the office Geiger was there. As Policht was filling out an application, Geiger stated to Nichols that Policht had been a good worker and asked Nichols when she had last received a wage increase. Policht interjected that the last time she had gotten a wage increase was during the summer of 1984. Geiger instructed Nichols to give Policht a raise and told Nichols to leave the room so that he could visit with Policht. When Nichols left the room, Geiger walked over to Policht, sat down beside her, and stated, "I talked to everyone here at Continental [sic] and everyone that knows you and works with you and they all say the same thing. You are a snitch." Policht replied that she did not believe Geiger. Geiger then stated that the Board agent "shouldn't push his way into your house." Policht replied that she invited the Board agent to her house. Geiger asked what she and the Board agent had discussed, and Policht replied that the Board agent had questioned her about why she was working while other Continental employees were not. Policht told Geiger (falsely, because she feared for her job) that she had told the Board agent that she knew nothing about the matter. Geiger did not deny this testimony by Policht.[21]

e. *Geiger's solicitations and threats to employees about their charges*

(1) Kenneth Heidel

On 20 June, while Kenneth Heidel was working at Continental, he approached Geiger and began a conversation that included a range of topics. The conversation at some point turned to the topic of the pending charges. According to Heidel, Geiger handed him a piece of paper with Heidel's name and address on it; below that was:

> Dear Mr. Gottfried, [Regional Director]
>
> I am a charging party on the above identified complaint. I am requesting that my name be withdrawn as a charging party and that I not be included in any settlement or hearing as a charging party.
>
> Please send a notice to me as at the above address indicating that my name has been withdrawn from the charge.

According to Heidel:

> He said that he wanted us to sign a piece of paper saying we wanted to drop our charges and that if we did he would keep the plant open and we could keep working and we would get a raise. . . . [He] wanted me to sign a piece of paper and he wanted me to talk to my brother and the other employees about signing this piece of paper too.

Heidel told Geiger he would talk to the other employees about Geiger's proposal.

In early June the employees of Continental Radiator who had been laid off from 1 February to May were told that they would only receive 60 percent of their vacation pay in 1985. According to Kenneth Heidel, at some point during the above conversation with Geiger, Geiger said that he would pay Bill Heidel, Kenneth's brother, and Jeffrey Toomer their full vacation pay instead of the 60 percent. Kenneth Heidel told Geiger that he would think about what Geiger had told him.

This meeting between Kenneth Heidel and Geiger concluded when Mooney walked into the office and told Geiger that it was time to go to a "lunch date." According to Heidel, Geiger told Mooney to make sure that he, Jeff Toomer, and Bill Heidel all got raises on their next checks.

The testimony by Heidel concerning the withdrawal of charges, the pay of vacation pay to Bill Heidel and Toomer, and the raises to himself, Bill Heidel and Toomer was not denied by Geiger, and I find it credible. Heidel further testified that on his next paycheck he received a 25-cent-per-hour wage increase.

(2) Jeffrey Toomer

Jeffrey Toomer was laid off with the other Continental Radiator employees. As noted above he was recalled in May, and in early June he approached Geiger in the Continental office to ask for a raise. According to Toomer:

> Well, I asked him for a raise and he told me that he didn't have to give me one and he told me that, you know, that if I am going to be fighting him on the charges and if I didn't want to sign off on the charges and go, you know, go with the company that I wasn't going to get a raise and I wasn't going to get my full vacation pay. Because I was laid off, so he said he was going to deduct that from my vacation pay . . . whatever percentage was of months that I was laid off. Like if I was laid off three months I was only going to get 75 percent of it. . . . And he wanted to know if I wanted, you know, to drop my charges, and I told him that I would have to think about it.

Toomer further testified that 2 weeks later he was told to go to the office by Mooney. There he met with Geiger who asked him if he had decided to drop charges

[21] Policht further testified that later in the month she approached Reed and asked about the raise that Geiger had ordered. Reed told her that the Union had put a "freeze" on raises and promotions so that she would not get the raise. While Policht was credible in this testimony, it has been previously noted that the General Counsel failed to prove that Reed was a supervisor or agent of Continental within the meaning of the Act.

and showed him a paper identical to the one previously shown to Kenneth Heidel with Toomer's name and address on it. Toomer replied by stating that he was afraid of losing his protection from discharge if he dropped the charges. Geiger replied that "he could take care of it, but he couldn't make no promises," according to Toomer. None of this testimony by Toomer is denied by Geiger.

B. *Analysis and Conclusions*

1. Violations preceding Dailey's discharge

Because the General Counsel has failed to prove that Franklyn Reed was a supervisor or agent of either Continental or Great Lake within Section 2(11) or (13) of the Act, I shall recommend dismissal of the allegations based on his conduct.

The mid-August statements by Nichols to Osborne that if the UAW "got in," Geiger could move the plant to the South for cheaper labor, was clearly a threat within Section 8(a)(1) of the Act. *Sertafilm, Inc.*, 267 NLRB 682 (1983); *National Micronetics*, 277 NLRB 993 (1985). Nichols' mid-August calling of Kuzdzal to the office, and questioning him about why he was advocating the Union's selection and why he had not come to Nichols first, likewise violated Section 8(a)(1). Although Kuzdzal had been openly displaying his union allegiance by wearing union buttons, the inquiry necessarily assumed a coercive character by Nichols' using the office, the locus of managerial authority, to extract information and express his displeasure at Kuzdzal's activities. See, for example, *Dektronics, Inc.*, 179 NLRB 87, 94 (1969), and *National Can Corp.*, 159 NLRB 647 (1966).

Respondent further violated Section 8(a)(1) of the Act when in August Nichols told Aponte, who was standing within 3 feet of Seledon, that if the employees selected the Union, there would be a wage cut for employees who were making $5.50 an hour as was Seledon. The threat to cut wages if a union was selected clearly would have had a coercive impact on any employee who heard it, or any employee to whom such a threat was subsequently disseminated, even if they were making less than $5.50 per hour.

Nichols' statement that Geiger would never reach an agreement with "you people" (as was credibly testified to by Seledon) is further a violation of Section 8(a)(1) of the Act in that it was a clear threat that Respondent would not bargain with the Union even if it were selected by the employees as their statutory representative.

On the day before the 24 August election, Geiger gave a speech to all Continental employees in which he told them that they did not need a union and that if they did have problems they should bring to them to him. Precisely such statements were held to be a solicitation of grievances with an implied promise of remedy in violation of Section 8(a)(1) of the Act in *K & K Gourmet Meats*, 245 NLRB 1331 (1979), and I reach the same conclusion here.

2. Violations following Dailey's discharge

a. *Withholding the 1984 Christmas bonuses*

Of the four organizing committee members left after Dailey was discharged in August and Sheridan quit in October none received a monetary payment at Christmastime 1984. All the employees who were not on the organizing committee received a bonus at Christmas 1984. All employees who were working in 1983 received a bonus in 1983, and they received a larger bonus in 1984, except Toomer who received $85 in 1983 and $50 in 1984. These statistical coincidences, alone, constitute compelling evidence that the distribution of Christmas payments was motivated by animus against the organizing committee membership of those who were denied a payment at Christmastime 1984. Further evidence is contained in Nichols' statement to Osborne when she inquired as to why she got no bonus in 1984. In 1983 Nichols promised Osborne a larger 1984 bonus for longer service. However, when bonuses were handed out to other employees in 1984, Nichols told Osborne: "You will have to associate with the Union people, your representatives . . . we are not going to be dishing out any more money." Thus, the denial of a bonus to Osborne was bluntly attributed to the successful efforts of the organizing committee of which Osborne had previously told Nichols she was a part (when they were discussing the organizational campaign and Dailey's possibly becoming her "representative").

Geiger testified that the distributions in 1984 were personal "gifts" to those whom he expected something in return, at least a Christmas card, and Respondent makes much of the fact that Continental did not deduct the 1984 payments from its 1984 income tax. Of course, Geiger's argument that the payments were made to those from whom he expected something in return immediately takes the payments out of the realm of "gifts" and places them in the realm of quid pro quo or compensation. Geiger himself abandoned this patently implausible[22] defense as he testified that he could give no reasons for giving nothing to Osborne in 1984 and he could even remember Luciano (although he had liked Luciano, or his work, well enough to have given him a "gift"/bonus in 1983). Nor may Respondent take refuge in Continental's passing up the 1984 tax deduction involved in the distribution. By the time the 1984 corporate income tax return had been filed, the charges had been filed with the Board. Deducting the payments in such circumstances would have been a obvious admission against interest, as Geiger had assuredly realized.[23] Therefore, the failure of

[22] According to this record, the employees were neither personal friends nor relatives of Geiger; they would not have gotten the gifts but for the employment relationship. Moreover, if Geiger's expectation of Christmas cards was the sole criterion for the distributions, there could be no explanation for wide variations in the amounts of the "gifts" that were from $40 to $200.

[23] Geiger took great pains to point out that the 1984 payments were not deducted form the 1984 corporate returns, but he claimed inability to remember whether the 1983 bonuses had been deducted. Having thoroughly considered the "tax angle" of his largess, Geiger's claimed loss of memory was necessarily false.

Continental to deduct the payments on its 1984 income tax returns (which can still be amended) is meaningless.

Finally, the "personal gifts" theory is believed by Respondent's communications to the employees. The first communication was in the form of the checks distributed, themselves. They were company, not personal, checks. Geiger testified that he gave the money to the company treasurer who, in turn, wrote company checks because the employees would have an easier time cashing company checks. Aside from the fact that there is no basis for concluding that the employees' banks would have refused to accept Geiger's personal checks as collection items, no employees (according to this record) were told that even though they were being paid with Continental checks, the payments were personal gifts from Geiger. That is, by the checks themselves, the employees were left with the impression that the "gifts"/bonuses were from the company, not Geiger personally. Also, Kuzdzal asked Nichols why he had received no bonus, and asked specifically if it was because of his union activity; Nichols told Kuzdzal, twice, that the matter was determined by "company discretion." Nichols did not say that Geiger had not expected a Christmas card from Kuzdzal (or Osborne or Seledon or Luciano) and he did not say it was because Geiger considered the Christmastime distributions to be personal gifts. Finally, Nichols did not tell Osborne that she was receiving nothing in 1984 because Geiger thought less of her then than he did in 1983; Nichols told her she should look to the Union, and nothing was said about the payments being "personal."

In summary, I find and conclude that Continental issued Christmas bonuses to all employees except the four remaining employee-members of the organizing committee because of the activities of that committee and the results that committee produced, the 24 August election victory for the Union, and that by such conduct by Respondent violated Section 8(a)(3) and (1) of the Act. *Pinter Bros., Inc.*, 233 NLRB 575 (1977).

b. *Layoff of 31 January 1985*

The General Counsel contends that the employees transferred to Great Lake, rather than being laid off for 3 months, and received their favored treatment because they had signed the petition to overturn the 24 August union election victory. It is a fact that none of the employees who signed that petition were required to endure 3 months of unemployment; those who did not (except for Seledon, Lucaj, Charley Aponte, and Polichi)[24] were. Since only those who exercised their right to refrain from signing the antiunion petition were laid off,[25] a prima facie case of discrimination is presented by the statistical evidence alone.[26]

Independent evidence of unlawful motivation for the layoff is also contained in the record. That Geiger had a predisposition to manipulate the work force to defeat organizational efforts was forecast by Nichols who, it is undenied, told Osborne that Geiger would move his operations to the South to get cheaper labor if the employees selected the Union as their collective-bargaining representative. Additionally, the solicitation of grievances by Geiger and the threats and interrogations of Seledon and Kuzdzal by Nichols, and the unlawful withholding of the 1984 Christmas bonuses from organizing committee members, as found infra, further demonstrate Respondent's animus and fortify the conclusion that the General Counsel has presented a prima facie case of unlawful discrimination in the selection of employees for actual layoff on 31 January.

Therefore, Respondent has the burden of demonstrating that the layoff of the nonpetition signers would have occurred in absence of their protected activity of refusing to sign the petition to set aside the 24 August election.[27]

No reason was given for creating the new corporation, Great Lake, rather than assigning the new work of expanded distribution to the existing business entity, Continental. Nor was any reason given for hiring three new employees, and transferring to Great Lake's payroll all the petition-signers (plus Seledon, Lucaj, Charley Aponte, and Osborne) to do essentially the same work for Great Lake as has been done for Continental. All the jobs were unskilled; indeed, except for one "driver," each of Great Lake's employees employed during the first week of February was classified as a "laborer," according to General Counsel's Exhibit 11, which was produced by Respondents. That is, no plausible reason has been advanced for laying off only these who failed to sign the petition to set aside the Union's victory in the 24 August election.

Therefore, Respondents have not overcome the General Counsel's prima facie case and it must be concluded that its layoff of employees William and Kenneth Heidel, Osborne, Toomer, Vargas, Kuzdzal, and Luis Luciano violated Section 8(a)(3) and (1) of the Act.[28]

c. *Other postdischarge violations*

Finally, Geiger's undenied interrogation of Polichi about her cooperation with the Board agent investigating the charges herein, his calling her a "snitch," and his undenied threats and inducements to Kenneth Heidel and Toomer in an attempt to get them to withdraw their Board charges are further violations of Section 8(a)(1) and further evidence of the animus assuredly possessed by Respondent Continental when Dailey was discharged some months before.

---

[24] The fact that four nonpetition signers were transferred to Great Lake's payroll, rather than really being laid off, does not dilute the significance of the fact that all petition-signers were protected from actual layoff; the General Counsel is not required to prove the negative—why those four were not discriminated against.

[25] Wilfredo Aponte had signed the petition to set aside the 24 August election, and was listed on the 31 January notice as being laid off. However, Aponte had been suspended, pending discharge on 28 January and he was not, in fact laid off; he was discharged after an investigation of misconduct.

[26] *San Angelo Packing Co.*, 163 NLRB 842, 845, 846 (1967).

[27] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–403 (1983).

[28] *Lear Siegler, Inc.*, 277 NLRB 782 (1985).

3. The discharge of Dailey

I have credited Dailey's testimony that, at least once, he told Mooney that he favored the Union and that in the several days before the 24 August election he wore the "UAW" and "UAW Organizing Committee" buttons to work. The uncontradicted testimony of Osborne further makes it clear that Respondent not only knew of Dailey's union sympathies, but it also shows that Respondent knew that Dailey was at the forefront of the organizing effort. It is quite common for leading in-plant organizers to become union stewards or to take other local union offices if an organizational attempt is successful. Mooney assuredly knew this; therefore, the uncontradicted testimony of Osborne that Mooney referred to "loud mouth Ken" as a potential "representative for the UAW" is compelling evidence that Respondent not only knew of Dailey's sympathies but also that he was one of the most active employee organizers and a potential agent of the Union that Continental so intensely opposed.

Evidence of animus, or unlawful motivation, is contained in the discharge itself and how it was handled. On the first working day after the Union won the 24 August election by a one-vote margin, the least senior[29] member of the organizing committee members, and therefore the most colorably vulnerable,[30] was discharged. Discharges following immediately upon heels of union activity, specifically the activity of an election won by a union, has been held to be evidence of unlawful motivation.[31]

Of course, such threats as Nichols' threat to Osborne that Geiger could move to the South for cheaper labor if the Union won is evidence of a particularly virulent variety of animus. This threat, the other threats and the interrogation by Nichols, and solicitation of grievances and offer to remedy them by Geiger himself constitute further evidence of Respondent's animus toward the organizational activities of its employees in general. In addition, Mooney cautioned Osborne that "loud mouth Ken" could become her representative if the Union was selected; the invocation of the pejorative by Mooney clearly demonstrates specific animus toward Dailey's activities on behalf of the Union. Finally, Respondent's postdischarge conduct further demonstrates an overall antiunion motivation with which the decision to discharge Dailey was assuredly approached. This conduct includes: (1) the withholding of the 1984 Christmas bonuses from the organizing committee members; (2) the layoff of seven of the employees who failed to sign the antiunion petition that would have set aside the 24 August union victory at the Board election; (3) Geiger's undenied interrogation of Policht about her cooperation with the Board agent investigating the charges herein; and (4) Geiger's undenied threats and inducements to Kenneth Heidel and Toomer employed in an attempt to get them to withdraw their Board charges.

As the General Counsel has established a prima facie case of unlawful motivation, the burden shifts to the Respondent to demonstrate that it would have discharged Dailey even in the absence of his protected conduct.

Continental produced a veritable litany of reasons for Dailey's discharge: he walked around and talked; he was absent and tardy; he was "goofy"; he twice struck another employee; and he could not do the work.

Although Dailey had been tardy several times in the 2 months preceding his discharge, Respondent's permanent "Dailey Attendance Record" makes note only of his last three tardy arrivals at work. Presumably, if the other tardies had been of significance to Respondent, they would have been recorded in more convenient form than the timecards themselves. It appears that Respondent paid little attention to tardiness until Dailey was late 3 days in a row.[32] Indeed, Respondent stipulated that no employee received a written warning for tardiness or attendance between 1 January 1982 and Dailey's discharge after 2-1/2 years later. As for the last three times Dailey was late, it is noteworthy that Mooney said no more to Dailey then that he should "consider this a warning." Then Dailey was allowed to work a full day, placing the discharge inside the next pay period for no apparent reason.[33] Presumably, if a decision to discharge Dailey had already been made, or if the three tardy arrivals had been a legitimate cause for the discharge, Mooney would not have bothered to give Dailey a "warning" about anything and he would not have let him start, and finish, the day at work.[34]

Seledon denied that Dailey walked around the shop just to talk to other employees. Against this testimony Respondent produced employee witness Rajnish and Gieraga who testified that Dailey "goofed off" for "most of the day" or "all of the time." It is inconceivable that even the most patronistic of employers would allow any employee to waste "all" or "most" of his working time, and it is clear to me that Rajnish and Gieraga were en-

[29] Compare Dailey's hire date of 21 June 1984 with those listed on the layoff notice quoted above.

[30] Indeed, at the hearing Respondent raised the contention that Dailey was subject to a 90-day probationary period. The effect of the probationary period in a shop that had no grievance procedure was not explained, but Respondent raised the contention to make an argument that somehow Dailey was subject to more scrutiny, or had fewer rights or protections, than other employees. However, Dailey and William Heidel (who was also hired in June 1984) testified without contradiction that they were not told on being hired that they were subject to any sort of probation.

By making only the most oblique of references to the "probationary period" argument in the brief, Respondent appears to have abandoned the contention that Dailey was subject to some sort of review that other employees were not. Therefore, plenary discussion of the issue of the existence of a probationary period is not required. However, I feel constrained to state that I found credible the testimony of Policht and Dailey (and found incredible the contrary testimony of Mooney) that Continental first posted a notice that there was a probationary period during the campaign preceding the 24 August Board election. There is no credible evidence that any probationary period existed before the organizational drive herein.

[31] See, for example, *Rogers Furniture Sales*, 207 NLRB 68 (1973), and *Paoli Chair Co.*, 213 NLRB 909 (1974).

[32] Apparently tardiness of 3 minutes or less was excused; when Mooney finally warned Dailey on 27 August, he mentioned only the last "three in a row," even though Dailey had been late 3, 1, and 3 minutes on the 3 days before 23 August.

[33] Discharging an employee during a pay period for accumulated transgressions has been held to be evidence of pretext. See, for example, *McGraw-Edison Co.*, 172 NLRB 1604 (1968), enfd. 419 F.2d 67 (8th Cir. 1969); *James Ray Co.*, 176 NLRB 31 (1969); and *Brake Parts Co.*, 178 NLRB 247 (1969).

[34] For this reason I discredit Mooney's testimony to the extent he sought to convey the impression that a decision to discharge Dailey had been made before the 24 August election.

gaging in extreme exaggeration in an effort to please their employer who had spared them from the effects of the layoff of 1 February, as discussed above.

Mooney testified that he frequently saw Dailey walking around or loafing and that he recorded such instances on the advice of a labor relations consultant. Mooney further testified that employees Murrias and Santos Luciano had complained to him about Dailey's not working. Murrias, when called by Respondent, flatly, and credibly, denied that he had ever complained to Mooney about Dailey; in fact, Murrias testified that Dailey walked around the ship "about the same" as other employees. Luciano was not called by Respondent and no explanation for not doing so was advanced. As for the records that Mooney kept on the advice of the consultant, the most that can be said is that Mooney started the case building on Dailey as early as July when the union movement started. It should be further noted that although Mooney took the time and trouble to build a record on Dailey, he did not bother to warn the employee that he was doing anything wrong, or that he could be punished for what he was doing (or not doing). If Continental had wanted production as bad as it wanted a case against Dailey, Mooney assuredly would have at least told Dailey to stop wandering around. This Mooney did only once, according to his own testimony.[35]

As far as Dailey's not doing his soldering work efficiently, it should be noted that Seledon testified that although Dailey was not perfect, there were worse employees who trained under him; he complained to management about them, but the employees were retained and nothing was done except, apparently, to give them more time to improve, something that Dailey was not given. It is further noted that Mooney did not testify that he ever inspected any of Dailey's work product; certainly, he never warned Dailey about inefficiency or that he should learn how to handle the soldering torch better.

Although I have credited the testimony that Dailey struck Rajnish, there is no evidence that any management representative learned of the incidents at any time before the 27 August discharge.

Finally, in support of contention that Dailey was "goofy,"[36] Respondents rely solely on a conclusionary interjection in her testimony by Gieraga. This was not evidence, and the contention need not be addressed further.

In summary, I find that Respondent has not met its burden of showing that Dailey would not have been discharged even absent his known protected union activities, aand I reach this conclusion because of: (1) the timing of the discharge, coming as it did immediately after the election that the Union won by one vote;[37] (2) the total lack of warnings to Dailey that his job was in jeopardy because of anything he had been doing wrong;[38] (3) the discharge was effected during the middle of a pay period for no apparent reason; (4) no reason was given at the time of the discharge;[39] and (5) the insubstantial nature of the tardiness/absence, wandering around, and poor work performance defenses, and the totally frivolous nature of the fighting and "goofy" defenses. Finally, (6) Mooney acknowledged that he told Dailey: "If you need to use us for a reference, feel free." A positive recommendation was clearly implied, and its offer belies any contention that Dailey was discharged for cause.

Accordingly, because the General Counsel has established a prima facie case of unlawful motivation that Respondents have failed to rebut, I conclude that Respondent discharged Kenneth Dailey in violation of Section 8(a)(3) and (1) of the Act.[40]

4. Single-employer and alter ego allegations and liability of Great Lake

The complaint alleges that Continental and Great Lake are alter egos or constitute a single employer. The General Counsel advances these allegations only because she seeks to have Great Lake remedy the unfair labor practices of Continental, not because she seeks a bargaining order against Great Lake. Because the General Counsel is not attempting to secure an order requiring Great Lake to assume a bargaining obligation originally incurred by Continental, it is not necessary to decide if the two business entities are in the status of alter egos; the obligation of Great Lake may be decided under the joint, or single, employer theory of liability. *O. Voorhees Painting Co.*, 275 NLRB 779 (1985). As stated by the Board in that case:

> The standard applied by the Board in determining joint employers status is "whether two or more employers share or co-determine those matters governing the essential terms and conditions of employment." [Quoting *Pacemaker Driver Service*, 269 NLRB 971 fn. 2 (1984).]

---

[35] "Prolonged observation" rather than telling an employee to "get to work" was held to be evidence of pretext in *Champion Parts Rebuilders, Inc.*, 260 NLRB 731 fn. 1 (1982), enfd. 717 F.2d 845 (3d Cir. 1983).

[36] R. Br. 2 and 5.

[37] Had Continental's objections to the 24 August election been sustained by the Board, the removal of any of the union supporters such as Dailey would have had the obvious effect of causing a tie at the rerun, a fact assuredly not lost on Continental's management.

[38] Specifically, until the 27 August discharge, Dailey was not warned about tardiness even though on 23 and 24 August, Mooney made two tardiness memoranda to the file he was keeping on Dailey, and even though Mooney conceded that he had "on occasions" warned other employees about being late.

[39] Mooney's statement that Dailey just was not the man Continental (or he) was looking for is tantamount to refusing to give any reason at all; this is a factor frequently recognized by the Board as an indication that there was no legitimate reason for an employer's action.

[40] As I have also found herein that Respondent unlawfully withheld bonus payments to the prounion employees at Christmas 1984, and because Dailey would have continued to be employed absent the discriminatory action taken against him, it is appropriate to order, as part of the remedy herein, that Dailey receive a bonus for Christmas 1984. The smallest bonus Respondent gave any employee in 1984 was $40. That amount was given to four of the five employees who were employed at Christmas 1984, but not Christmas 1983. The fifth such employee received $50. (See G.C. Exh. 17.) It would be speculation that, absent the discriminatory motive of Respondent, Dailey would have received the larger amount. Therefore, it is appropriate to order that Dailey receive $40, plus interest, as the amount he would have received at Christmas 1984, absent the discrimination against him.

Here, Geiger did no more than add a few product lines for distribution; he continued to manufacture some radiator cores and import others. Rather than assign the additional work to the employees who had selected the Union (which he had opposed so vehemently), he assigned the new work to newly hired employees and those who had signed a petition to overturn the 24 August election. In a crude attempt to disguise his obvious unlawful objective of avoiding his bargaining obligation, Geiger created the new corporation, Great Lake, assigned the favored (and antiunion or nonunion) employees to it, and banished to the dilapidated 17th Street location those (except Seledon) who had participated in the organizational attempt.

The managerial manipulations in which Geiger engaged are similar to those performed by one Kneisley in *K & S Circuits, Inc.*, 255 NLRB 1270 (1981). There, Kneisley held all the stock of one company, the employees of which selected a union. In an attempt to dilute the effectiveness of an organizational drive, Kneisley created two other corporations of which he was president as well as owner. Although there was scant evidence of Kneisley's actual control of the newly created corporations, the Board held that "it strains credulity too much" to believe that Kneisley exercised only "potential" control of the newly created corporations. There, as here, there was at least some degree of functional operation and, until the organizational attempt, all such operations were conducted "under one roof." 255 NLRB at 1272.

As the testimony of Policht discloses, employees who were transferred to the Great Lake payroll were credited with their seniority earned at Continental; they were paid the same rate, and they continued to do the same work, using much of the same equipment. The identical nature of the employment benefits demonstrates a single source of determination of "those matters governing the essential terms and conditions of employment." See *O. Voorhees Painting Co.*, supra. That is, the terms and conditions of employment at the two corporations were necessarily determined by the same source, Karl Geiger, who was the majority shareholder of Continental, and the sole owner of Great Lake, and who also was the source of the corporate schemes employed to evade his bargaining responsibility.

Accordingly, I find and conclude that Great Lake, Inc. is a joint, or single, employer with Continental, and Great Lake, Inc. is liable for the remedy of Continental's unfair labor practices that were not included in the 1 April 1986 settlement agreement, the discharge of Dailey and the violations that preceded that discharge.

CONCLUSIONS OF LAW

1. Continental Radiator Corporation and Great Lake, Inc. constitute a single employer within the meaning of Section 2(2) of the Act, and they are engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct Respondents violated Section 8(a)(1) of the Act:

(a) In mid-August Nichols threatened employee Osborne that Respondent could move the plant to get cheaper labor if the employees selected the Union as their collective-bargaining representative.

(b) In mid-August, Nichols interrogated employee Kuzdzal regarding his union membership, activities, and desires.

(c) In August, Nichols threatened employees Aponte and Seledon that certain employees would have their wages reduced if the Union were selected as the collective-bargaining representative.

(d) In August, Nichols threatened employee Seledon that Geiger would never bargain with the Union if it were selected as the collective-bargaining representative by the employees.

(e) On 23 August, Geiger informed the employees that they did not need a union and solicited their grievances in an effort to dissuade them from voting for the Union.

4. By the discharge of employee Kenneth Dailey on 27 August, Respondents violated Section 8(a)(3) and (1) of the Act.

IV. EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondents Continental Radiator Corporation and Great Lake, Inc. set forth above, occurring in connection with their operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent Continental Radiator Corporation has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist from engaging in these unfair labor practices. Having further found that Respondent Great Lake, Inc. is a joint employer of Continental Radiator Corporation, I shall recommend that each of them be ordered to take certain affirmative action to remedy these violations, *NLRB v. Gibraltar Industries*, 307 F.2d 428, 431 (4th Cir. 1962). I shall further recommend that Respondents be ordered to offer reinstatement to Kenneth Dailey and pay to him backpay, with interest. Backpay is to be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereupon as established in by the Board in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Because of the proven proclivity of the sole owner of Great Lake, Karl Geiger, to utilize corporate formalisms as a method for defeating the purposes and policies of the Act, it is altogether appropriate that I grant the General Counsel's request for a visitatorial clause that will permit free examination and inspection of all corporate

records necessary to assure that compliance with the Order herein is achieved.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

The Respondents, Continental Radiator Corporation and Great Lake, Inc., Detroit, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant removal if they select International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) as a collective-bargaining representative.

(b) Interrogating employees about their union membership, activities, and desires.

(c) Threatening employees with wage reductions if they select the Union as their collective-bargaining representative.

(d) Threatening that Respondents would not bargain with the Union if it is selected as their collective-bargaining representative.

(e) Soliciting grievances and promising remedy thereof in an effort to dissuade employees from voting for the Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Kenneth Dailey full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent job without prejudice to his seniority or other rights and privileges, and make Dailey whole, with interest, for any loss of earnings and other benefits, including his 1984 Christmas bonus, suffered by reason of his unlawful termination.

(b) Remove from its files of both Respondents any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at their Detroit facilities copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES -
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with plant removal because of their known or suspected activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) or any other labor organization.

WE WILL NOT interrogate employees about their activities on behalf of the Union.

WE WILL NOT threaten employees with wage reduction if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten employees with statements that we will not bargain with the Union even if it is selected as their collective-bargaining representative.

WE WILL NOT solicit grievances of employees and promise to remedy such grievances in order to dissuade employees from voting for the Union.

WE WILL NOT discourage activities in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) by discharging employees or by otherwise discriminating against employees in any manner with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the National Labor Relations Act.

WE WILL offer to Kenneth Dailey full reinstatement to the job he held before he was unlawfully discharged or, if that job no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights and privileges.

---

[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[42] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Kenneth Dailey whole, with interest, for any loss of pay he may have suffered as a result of our discrimination against him.

WE WILL expunge from our files any reference to the discharge of Kenneth Dailey and notify him, in writing, that this has been done and that evidence of his unlawful discharge will not be used as a basis for future personnel action against him.

CONTINENTAL RADIATOR CORPORATION

GREAT LAKE, INC.

Bethlehem Steel Corporation *and* Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO. Case 5–CA–16582

16 March 1987

DECISION AND ORDER

BY MEMBERS BABSON, STEPHENS, AND CRACRAFT

Upon a charge filed by Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO on 31 July 1984 and amended on 9 May 1986, the General Counsel of the National Labor Relations Board issued a complaint on 12 May 1986 against Bethlehem Steel Corporation (the Respondent) alleging that it has violated Section 8(a)(5) and (1) and Section 8(d) of the National Labor Relations Act by negotiating and implementing agreements with the National Union's affiliated Local 33, thereby changing terms and conditions of existing collective-bargaining agreements without bargaining with the National Union. On 23 May 1986 the Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and raising certain affirmative defenses.

On 12 August 1986 the General Counsel filed a Motion for Summary Judgment. On 14 August 1986 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The General Counsel submits that the Board's prior Decision and Order in *Shipbuilders (Bethlehem Steel)*, 277 NLRB 1548 (1986), involving the same parties, contains specific factual findings which collaterally estop the Respondent from asserting any contrary facts here and provides a complete basis for the Board to resolve the 8(a)(5) and (1) and 8(d) issues presented, so that there are no genuine issues of material fact requiring an evidentiary hearing before an administrative law judge.

The Respondent's answer and response deny any unlawful conduct. The Respondent's denial is premised on the contention that the National Union had notice of and consented to negotiation of the bargaining agreements at issue. The Respondent also asserts the affirmative defenses that: the General Counsel is estopped from issuing the instant complaint because the Respondent reasonably relied on the General Counsel's actions against the National Union in the prior litigation; the prayer for prospective remedial relief is moot by virtue of negotiation of a new collective-bargaining agreement which became effective 17 March 1986; equitable considerations require the tolling of backpay; and implementation of changes from the extant agreements with the National Union concerning traditionally local issues were privileged. We find no merit in the Respondent's arguments for the reasons set forth below.

The prior case involved alleged 8(b)(1)(A) and (3) violations by the National Union in interfering with implementation of "Settlement Agreements" negotiated between the Respondent and Local 33. The Board adopted the administrative law judge's dismissal of the complaint as well as the following determinative findings: In 1981 the Respondent, the National Union, and Local 33 entered collective-bargaining agreements expiring 19 August 1984, which covered, inter alia, separate production and maintenance and salaried plant clerical units of employees at the Respondent's Sparrows Point, Maryland shipyard facility; Bethlehem obtained agreement from Local 33 for early negotiations to open and modify the 1981 agreements and attempted to negotiate a complete agreement with Local 33 despite a past practice of negotiating wage and benefit issues with a bargaining committee dominated by the National Union; Bethlehem and Local 33 concealed from the National Union the fact that plenary negotiations involving substantive terms were being conducted; in March 1984 the Respondent and Local 33 signed two "Settlement Agreements" which purported to set aside the existing contracts between the Respondent, the National Union, and the Local; the Respondent implemented the settlement agreements on 1 April 1984, thereby freezing the wages of current employees, reducing the cost-of-living adjustment, reducing the wages and benefits of new hires, and instituting a profit-sharing program; the National Union did not clearly and unmistakably waive its rights under Section 8(d) of the Act to object to implementation of midterm changes in its agreements with the Respondent;[1] the settlement agreements were not ne-

[1] The Respondent mistakenly relies on the administrative law judge's finding in an EAJA suit involving the same parties that the National Union did not stop the members' ratification vote after learning of negotiations between the local union and the Respondent, as support for its contention that the administrative law judge's factual analysis in the underlying 8(b)(3) case was flawed. Initially we note that this finding is not a departure from the judge's findings in the underlying case which the Board affirmed, in which the judge concluded from the overall circumstances of the case that the National Union had made it clear to the local and the Company that it "did not intend to meekly step aside and allow its contractual existence with Bethlehem to be negotiated away." *Shipbuilders (Bethlehem Steel)*, supra, 277 NLRB at 1565. Secondly, the administrative law judge's review of these facts in light of an EAJA suit in which the determination is whether the General Counsel had sufficient grounds upon which to issue complaint requires a different analysis which is simply not relevant to the case at hand.

gotiated or approved by the National Union or by any of its actual or apparent agents; the settlement agreements purporting to modify or terminate the National Union's agreements with the Respondent were null and void; and the actions of the National Union challenged in the consolidated complaint were lawful.

With respect to the instant Motion for Summary Judgment, a review of the complaint's allegations, the Respondent's answer, and the Board's prior decision reveals that the Board's prior decision contains specific factual findings which are directly contrary to each of the points the Respondent's answer places in issue. Specifically, contrary to the Respondent's position that it negotiated the settlement agreements with the knowledge and consent of the National Union, the Board has found that the National Union was not aware of and did not consent to the negotiations of the settlement agreements, nor did the National Union or any authorized agent approve the agreements. Also contrary to the Respondent's position, Respondent's implementation of the settlement agreements was found by the Board to be an abrogation and midterm modification of the existing 1981–1984 collective-bargaining agreements, in violation of the representative status of the National Union and its rights under Section 8(d) of the Act. Finally, contrary to the Respondent's contention here, determinative findings in the earlier case establish that the Respondent failed to give the requisite notice and opportunity to bargain to the National Union prior to the Respondent's implementation of the settlement agreements.

These factual findings unequivocally establish the Respondent's violation of Section 8(a)(5) and (1) and Section 8(d) in the instant case. Because these findings of fact were fully and fairly litigated and necessarily decided in the Board's prior decision, the Respondent is collaterally estopped from relitigating the facts supporting the allegations of the complaint in the instant proceeding.[2]

The Respondent's affirmative defenses likewise raise no genuine issue of material fact warranting an evidentiary hearing. With respect to the Respondent's equitable estoppel contention, we note that the Respondent actually engaged in the alleged unlawful conduct prior to any action by the General Counsel. Thus, it cannot now allege detrimental reliance on the General Counsel's decision to hold the instant charge in abeyance pending resolution of the prior case when the Respondent's violative conduct clearly preceded the General Counsel's decision in this regard. The Respondent's remaining contention that the complaint should be dismissed because a remedial order is inappropriate does not raise any material factual issue on the question of whether the Respondent violated the Act. The Respondent's representation that a new contract with the National Union and Local 33 was negotiated effective 17 March 1986 raises no issue of fact regarding the Respondent's premature termination of the 1981–1984 collective-bargaining agreements and concomitant obligation to make employees whole for its failure to bargain with the National Union. The date to which negotiations of any successor agreements has satisfied the Respondent's affirmative remedial obligation to bargain with the National Union and to make whole unit employees is an issue properly left to compliance proceedings. Furthermore, we perceive no special factors or equitable considerations in this case sufficient to toll backpay. We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Bethlehem Steel, is a Delaware corporation with an office and place of business in Sparrows Point, Maryland, where it is engaged in the business of shipbuilding. The Respondent annually purchases and receives at its facility goods and materials valued in excess of $50,000 directly from points outside the State of Maryland. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that both Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO and its affiliate, Local 33, are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since at least 1972, the Respondent, the National Union, and Local 33 have executed a series of national collective-bargaining agreements covering, inter alia, the Respondent's Sparrows Point, Maryland shipyard facility. The most recent agreements were effective from 14 August 1981 through 19 August 1984 and covered, inter alia, separate units appropriate for the purpose of collective bargaining

[2] Generally, a factual finding which was necessary to support the judgment in a prior proceeding will bar relitigation on that issue in a subsequent proceeding involving the same parties. See *Montana v. U.S.*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 and fn. 5 (1979); *Sabine Towing & Transportation Co.*, 263 NLRB 114, 120–122 (1982).

within the meaning of Section 9(b) of the Act, consisting of certain salaried and hourly paid employees employed at the Respondent's Sparrows Point, Maryland shipyard facility. At all times material herein, the National Union and Local 33 have been the designated exclusive collective-bargaining representative of the employees in such units and have been recognized as such by the Respondent. During the months of February and March 1984, the Respondent and Local 33 negotiated concessionary "Settlement Agreements" covering the employees in the foregoing units at the Respondent's Sparrows Point, Maryland shipyard facility. About 2 April 1984, the Respondent abrogated and failed to continue in full force and effect all the terms and conditions of the existing collective-bargaining agreements by placing into effect "Settlement Agreements" negotiated with Local 33, without affording prior notice to the National Union or an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees.

We find that by negotiating agreements with Local 33 covering the employees in the appropriate bargaining units at the Respondent's Sparrow's Point, Maryland shipyard facility, and by implementing those agreements about 2 April 1984 without affording prior notice to or an opportunity to bargain with the National Union, the Respondent abrogated and failed to continue in full force and effect all of the terms and conditions of the extant 1981–1984 collective-bargaining agreements, thereby violating Section 8(a)(5) and (1) and Section 8(d) of the Act.

CONCLUSIONS OF LAW

By engaging in the conduct described in section II, above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of the Act, we shall order it to cease and desist and, if it has not already done so, to bargain on request with the National Union and embody any understanding reached in a signed agreement, and to take affirmative action designed to effectuate the policies of the Act.

The Respondent shall make unit employees whole for losses suffered as a result of its unlawful midterm modification of contractual wages and benefits from about 2 April 1984 until such time as a new agreement is negotiated with the National Union or until the parties have bargained in good faith to impasse. Such sums shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Bethlehem Steel Corporation, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully bypassing Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO (the National Union) as an exclusive collective-bargaining representative of its unit employees.

(b) Unilaterally, and without the consent of the National Union, modifying the wages and benefits of employees covered by the collective-bargaining agreements between the Respondent and the National Union; provided that nothing in the Order shall be construed to require the Respondent to rescind any increase in wages or benefits of unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the National Union as an exclusive representative of separate production and maintenance and salaried plant clerical units of employees at the Respondent's Sparrow's Point, Maryland shipyard facility with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if it has not already done so, embody any understanding reached in a signed agreement.

(b) Make whole all employees in the foregoing appropriate units for any loss of earnings and other benefits suffered as a result of the unlawful midterm modification of the existing 1981–1984 collective-bargaining agreements, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in checking compliance with this Order.

(d) Post at its Sparrows Point, Maryland shipyard facility copies of the attached notice marked

"Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.[4]

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[4] The General Counsel has requested that the Order include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT bypass Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO as an exclusive collective-bargaining representative of our unit employees by directly dealing with Local 33.

WE WILL NOT unilaterally, and without the consent of the National Union, modify the terms of our collective-bargaining agreements with the National Union, provided, however, that nothing herein shall be construed as authorizing or requiring the Employer to withdraw or eliminate any compensatory benefits presently enjoyed by the Employer's employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the National Union as an exclusive representative of unit employees with respect to rates of pay, wages, hours, and other terms and conditions of employment and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining units.

WE WILL restore the unit employees' terms and conditions of employment to those existing prior to our unilateral modification of our collective-bargaining agreements with the National Union.

WE WILL make whole all unit employees for losses suffered as a result of our unilateral modification of our collective-bargaining agreements with the National Union, with interest.

BETHLEHEM STEEL CORPORATION

Martin of Mississippi, Inc. *and* United Furniture Workers of America, Local 282, AFL–CIO. Case 26–CA–10324

17 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 30 March 1984 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Martin of Mississippi, Inc., Coldwater, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Chairman Dotson notes that there are no exceptions to the successorship finding.

William D. Levy, Esq., for the General Counsel.
Phillip Martin, Respondent's president, for the Respondent.
Ida Leachman, Charging Party's vice president, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charge was filed on July 28, 1983, and an amended charge on August 16, 1983, by United Furniture Workers of America, Local 282, AFL–CIO (the Charging Party or the Union).[1] A complaint, amended complaints, and orders consolidating them issued at various dates in 1983, alleging that Martin of Mississippi, Inc. (Respondent or the Company) and other individuals had committed unfair labor practices within the meaning of the National Labor Relations Act (Act). By order dated December 6, 1983, the Regional Director for Region 26 severed the cases of the other individuals from the one involving Respondent and, on December 13, 1983, issued a fourth amended complaint, alleging that Respondent has refused to recognize or bargain with the Union as the collective-bargaining representative of Respondent's employees in an appropriate unit, and has refused to supply information to the Union which is relevant to its function as such representative, in violation of Section 8(a)(1) and (5) of the Act.

A hearing was conducted before me on this matter on February 1, 1984, in Memphis, Tennessee. On the entire record, including a memorandum brief filed by the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Mississippi corporation with an office and facility at Coldwater, Mississippi where it is engaged in the manufacture of cabinets. Respondent annually sells and ships, from locations within the State of Mississippi, goods valued in excess of $50,000 directly to points outside the State of Mississippi, and annually purchases and receives, within the State of Mississippi, goods valued in excess of the same amount directly from points outside the State of Mississippi. The pleadings as amended at the hearing establish, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings as amended at the hearing establish, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Factual Summary*

1. Hill & Son Manufacturing Co.

There is no dispute about the relevant facts in this case. In May 1979, the Union was certified as the exclusive collective-bargaining representative of the production and maintenance employees of C & R Cabinet Corporation, then manufacturing cabinets in Memphis, Tennessee. In December 1980, C & R entered into a 2-year collective-bargaining agreement with the Union as the representative of its production and maintenance employees. The principals in C & R were Calvin and Ruby Hill. The Hills were thereafter divorced, and the Memphis operation was closed down in December 1981, during the term of the collective-bargaining agreement.

The business reopened in February 1982 in Coldwater, Mississippi, by Calvin Hill, under the name of Hill & Son Manufacturing Co. For legal and financial reasons not material, Ruby Hill joined her former husband in the business, and operated it in Coldwater under the name of Calvin Hill and Ruby Hill d/b/a Hill & Son Manufacturing Co. Except for a brief hiatus, there was no change in the principles of the business. In essence, the business moved to a different location and changed its name.

The Union received and processed grievances from employees of Hill & Son under the contract which it held with C & R, and otherwise applied the terms of that contract to Hill & Son. The contract expired in December 1982.

[1] The Charging Party's name appears as indicated by it in the charges which it filed, G.C. Exhs. 1(a) and (c).

On August 23, 1983, the Regional Director for Region 26 issued a third amended complaint in Cases 26–CA–10124, 26–CA–10258, 26–CA–10207, and in the instant case, in which he alleged that Hill & Son had committed a variety of unfair labor practices beginning in late 1982, including violations of Section 8(a)(1), (3), and (5) of the Act. The complaint alleges, inter alia, that Hill & Son engaged in unlawful refusals to bargain in 1982, and that Respondent Martin did so in July 1983. Thereafter, Hill & Son entered into a formal settlement agreement. The stipulation provides that the Union remained the collective-bargaining representative of Hill & Son employees until July 1, 1983, when Hill & Son ceased operation (G.C. Exh. 2, p. 4). As indicated above, the Regional Director severed the Hill & Son cases, and issued a fourth amended complaint, involving only Respondent.

Hill & Son continued operating in Coldwater until June 24, 1983, the beginning of the normal vacation period. Ruby Bryant, formerly Ruby Hill, testified that she and Calvin Hill could not work together and, accordingly, decided to go out of business.

2. Respondent's purchase of Hill's assets

Philip Martin was a partner in a Florida firm which was one of the largest customers of Hill & Son. He visited Hill & Son in the first half of 1983, and Respondent was incorporated in June of that year. On July 1, 1983, Respondent purchased the machinery and other equipment of Hill & Son. Martin knew that the employees of Hill & Son were represented by a union prior to the purchass.

3. Respondent's operation of the business

A few days after the transaction, Martin placed an ad in a local newspaper stating that Respondent had purchased the assets of Hill & Son, and would be taking applications for employment. He received about 200 applications. Martin hired Thurman Morgan,[2] Hill & Son's former plant manager, and utilized his advice in the hiring of employees. Morgan's recommendations in some instances were based on his knowledge of the applicant's work for Hill & Son. Martin also hired two other former supervisors of Hill & Son[3] and gave them similar status in his company.

Respondent began operations on July 12, 1983. On that date it had 19 employees, all but one of whom had been employees of Hill & Son. Most of them were hired on July 8.[4] A tabulation of employees from July 1983 until the date of the hearing, including employee turnover, shows a total of 38 employees, 25 of whom had previously been employees of Hill & Son.[5]

Respondent began and continues to do business exclusively at the same location in the same two buildings as those used by Hill & Son. Martin is a lessee of Ruby Bryant, formerly Ruby Hill. The Company uses the Hill & Son post office box and telephone numbers. It utilizes most of the machinery purchased from Hill & Son, and has not purchased any significant new equipment. The bill of sale with Hill & Son gave Respondent the right to utilize the trade name "Hill and Son Manufacturing" for 180 days, and Respondent retained this lettering on its trucks and trailers for several months after the purchase, in deliveries to customers.

Martin testified about the process of manufacturing cabinets, and stated that there has been no essential difference between the process utilized by Hill & Son and that utilized by Respondent. There is some similarity between the Hill & Son job classifications and those of Respondent.[6] Martin asserted that similarities exist throughout the cabinet manufacturing industry. Variations in "styles" of cabinets were described by Martin, such as differences in wood, finish, appearance, etc. Respondent has introduced a few new styles, but continues to produce many styles previously manufactured by Hill & Son.

When Respondent started production on July 12, it sold to all or almost all of Hill & Son's customers. Although there is evidence of new "prospects," the record is unclear about the number, if any, of Respondent's new customers.

4. The Union's demands and the Company's responses

The pleadings as amended at the hearing establish that, on July 11, 1983, the Union requested that Respondent bargain with it as the representative of the Company's production and maintenance employees. The pleadings further establish that Respondent denied these requests and refused to bargain with the Union.

The pleadings as amended also establish that, on July 15, 1983, the Union by letter requested 20 items of information[7] from Respondent, and that the Company refused to comply.

B. *Legal Analysis and Conclusions*

In final argument Martin questioned whether the Union represented a majority of his employees. However, under current applicable law, there is a presumption of majority status flowing from the expired collective-bargaining agreement in this case, and the General Counsel is not required to prove actual majority support, *Towne Plaza Hotel*, 258 NLRB 69, 77 (1981), and author-

[2] The parties stipulated that Morgan was Respondent's plant superintendent from July 1 to September 30, 1983, and was a supervisor within the meaning of the Act.

[3] Tommy Street and William Jackson.

[4] G.C. Exh. 3 and stipulation of the parties.

[5] Ibid.

[6] G.C. Exhs. 3, 7, and 14.

[7] (a) Biographical data on employees; (b) names, job operations, and pay rates; (c) incentive rates and formulas; (d) average earnings of employees performing on an incentive basis; (e) timestudies of incentive operations; (f) job classifications; (g) pay rates and bonus pay for hourly rated employees; (h) production quotas; (i) description of pension plan and group insurance benefits; (j) description of other benefits plans; (k) list of paid holidays and pay rates; (l) copy of rules and regulations; (m) names of products with harmful ingredients and manufacturers; (n) reports on monitoring of work areas; (o) information on safety and health policies; (p) copies of material safety data sheets provided by manufacturers; (q) copy of fire and evacuation procedures; (r) copies of programs concerning health and safety; (s) any documents pertaining to OSHA violations; and (t) vacation schedules and rules of eligibility.

ity cited therein. In language relevant to the facts in this case, the Board has stated as follows:

> The presumption applies not only to a situation where the employer charged with a refusal to bargain is itself a party to the preexisting contract, but also to a successorship situation such as we have here. The burden of rebutting this presumption rests, of course, on the party who would do so. It is true that a labor organization's continuing majority may not be questioned during the term of a contract. On the other hand, upon expiration thereof, the presumption of majority arising from a history of collective bargaining may be overcome by "clear and convincing proof" that the union did not in fact enjoy majority support at the time of the refusal to bargain. At such time, it is also a valid defense for the employer to "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status."

Barrington Plaza, 185 NLRB 962, 963 (1970), enf. denied in part on other grounds 470 F.2d 669 (9th Cir. 1972).[8]

The presumption is particularly applicable to the facts in this case. Although the Hill & Son contract expired in December 1982, this was not due to any fault of the Union. Indeed, it attempted to bargain with Hill & Son for a new contract, but this attempt led to the filling of charges, several complaints, and a formal settlement agreement. As noted above, the agreement provides that the Union remained the collective-bargaining representative of Hill & Son employees until July 1, 1983, i.e., for a period of about 6 months after expiration of the contract.

Respondent in this case has not submitted any evidence, much less "clear and convincing proof," that the Union did not enjoy majority status. Nor did Martin submit any "objective considerations" to support his asserted belief that the Union in fact did not have the majority support of his employees. Accordingly, I find that the Union did have the support of a majority of the Hill & Son employees at the time Respondent purchased Hill & Son's assets, and that this support continued thereafter.

It is also clear that Respondent is a successor to Hill & Son under current Board law. The Board has recently restated the law on this subject, as follows:

> In determining whether a purchaser is obligated to bargain with the exclusive representative of its predecessor's employees, the traditional test is whether there is substantial continuity in the employing enterprise. Where there is such a continuity, the presumption of majority status by the Union under the predecessor, such as established by a collective-bargaining agreement as here, is not affected by a change in ownership. The traditional criteria for this test include whether there has been substantial continuity in the following: (1) business operations; (2) plant; (3) work force; (4) jobs and working conditions; (5) supervisors; (6) machinery, equipment, and methods of production; and (7) product or service.

Aircraft Magnesium, 265 NLRB 1344, 1345 (1982).

The facts in this case show that all of these test were met. Respondent's plant, machinery, and all of its significant equipment were identical with those of Hill & Son. The business operations remained the same, as did the product being manufactured, and most of the customers. Although Respondent did create a few new "styles" of cabinets, this did not change the product, which continued to be cabinets. See *Jeffries Lithograph Co.*, 265 NLRB 1499 (1983). Nor was there any essential change from Hill & Son's former method of production. Finally, when Respondent commenced operations with 19 employees, all but one were former employees of Hill & Son, in addition to which Respondent hired three of the Hill & Son supervisors.

Martin's only answer to these facts was the general argument that such factors are much the same in the entire cabinet manufacturing industry. No evidence was advanced to support this factual assertion. However, if true, it would not follow that the Board's criteria for successorship *have not* been met in this proceeding. Rather, the only logical conclusion would be that, in any case involving the cabinet manufacturing industry, it is likely that such criteria *will* be satisfied.

Respondent argues that the hiatus between the time Hill & Son ceased operations, June 24, and the time that Respondent began operations, on July 12, should negate a finding of successorship. This was the normal vacation period, and it is questionable whether the description "hiatus" may appropriately be applied to it. In any event, there were no changes in operations, and Respondent conducted the hiring of its complement of employees, all but one of them former Hill & Son employees, within 1 week of the time that it purchased the latter's assets. Under almost identical circumstances, the Board concluded that the hiatus did not overcome the otherwise established substantial continuity of the employing industry. *Aircraft Magnesium*, supra at 1346.

The fact that the bill of sale between Respondent and Hill & Son recited only the former's purchase of assets does not negate a finding of successorship. In similar circumstances, the Board has concluded that a successorship relationship was created, despite the fact that the successor only purchased the equipment of the predecessor. *C.J.B. Industries*, 250 NLRB 1433, 1435 (1980). It is settled law that "the controlling factor in successorship cases is not the form of the transfer but whether the employing enterprise remains essentially the same." *East Belden Corp.*, 239 NLRB 776, 791 (1978), enfd. 634 F.2d 635 (9th Cir. 1980).[9]

I therefore conclude that Respondent is a successor of Hill & Son Manufacturing Co. It, therefore, had an obligation to recognize and bargain with the Union on and since July 11, 1983, the date of the Union's demand. Because Respondent admittedly refused to do so, it thereby violated Section 8(a)(5) and (1) of the Act.

[8] In its conclusion that the Trial Examiner's findings rebut the Board's reliance on a presumption of majority status, the court noted factors in that case which are not present herein.

[9] See also *Band-Age, Inc.*, 217 NLRB 449 (1975), enfd. 534 F.2d 1 (1st Cir. 1976).

Under applicable Board law, Respondent also had an obligation, beginning July 15, 1983, to supply the Union with information required by the latter to fulfill its function as the collective-bargaining representative of Respondent's employees. The information requested by the Union related to the rates of pay, wages, hours of work, and other terms and conditions of employment of Respondent's employees, and was therefore required by the Union to fulfill this function. Inasmuch as the Company admittedly refused to supply this information, it again violated the same sections of the Act.

In accordance with my findings above and the entire record, I make the following

CONCLUSIONS OF LAW

1. Martin of Mississippi, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Furniture Workers of America, Local 282, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Respondent, including city truck drivers, excluding all office clerical employees, over-the-road truck drivers, guards and supervisors as defined in the Act, constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

4. United Furniture Workers of America, Local 282, AFL–CIO has been and is the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing, on or about July 11, 1983, and at all times thereafter, to recognize and bargain collectively with the above-named labor organization as the exclusive representative of all its employees in the appropriate unit, and by refusing, on or about July 15, 1983, and at all times thereafter, to supply the aforesaid labor organization with information necessary for it to fulfill its function as the aforesaid exclusive representative, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and, on request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and supply the Union with information necessary for it to fulfill its function as such representative.[10]

In final argument for the General Counsel stated that, in another case not consolidated with the instant proceeding, the issue had been raised as to whether Respondent had any obligation to bargain with the Union over the hiring of its initial work force. Conceding that there is no complaint allegation concerning this issue, the General Counsel requests that the remedy include such an obligation.

The General Counsel's request raises issues which were not litigated in this proceeding, including the question of whether it was "perfectly clear" that Respondent intended to retain all of Hill & Son's employees.[11] The evidence in this proceeding is insufficient to establish that this was Respondent's intention. Accordingly, I shall reject the General Counsel's request.

On the foregoing findings of fact, conclusions of law, and the entire record, I issue the following recommended[12]

ORDER

The Respondent, Martin of Mississippi, Inc., Coldwater, Missisippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Furniture Workers of America, Local 282, AFL–CIO as the exclusive collective-bargaining representative of employees in the following unit:

> All production and maintenance employees employed by it, including city truck drivers, excluding all office clerical employees, over-the-road truck drivers, guards and supervisors as defined in the Act.

(b) Refusing to supply to the aforesaid Union all information necessary for it to fulfill its function as the aforesaid bargaining representative, as described in the remedy section of this decision.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the above-named Union as the exclusive representative of employees in the above-described unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) On request, supply the above-named Union with all information necessary for it to fulfill its function as the aforesaid bargaining representative, as described in the remedy section of this decision.

---

[10] Supra, fn. 7.

[11] See, e.g., *Boeing Co.*, 214 NLRB 541 (1974), affd. sub nom. *Machinists v. NLRB*, 595 F.2d 664 (D.C. Cir. 1978); *Spruce Up Corp.*, 209 NLRB 194 (1974).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Post at its Coldwater, Mississippi plant copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with United Furniture Workers of America, Local 282, AFL-CIO as the exclusive representative of our employees in the following unit:

> All production and maintenance employees employed by us, including city truck drivers, excluding all office clerical employees, over-the-road drivers, guards and supervisors as defined in the Act.

WE WILL NOT refuse to supply the above-named Union with information which it needs to fulfill its function as the representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL bargain with the Union in the unit described above, and WE WILL supply them with the needed information.

MARTIN OF MISSISSIPPI, INC.

Systems Engineering Associates Corp. *and* Local 387, International Union of Operating Engineers, AFL–CIO. Case 5–CA–18206

18 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

Upon a charge filed by the Union 10 July 1986, the General Counsel of the National Labor Relations Board issued a complaint 13 August 1986 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 5 June 1986, following a Board election in Case 5–RC–12568, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since on or about 23 June 1986 the Company has refused to bargain with the Union. On 20 August 1986 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 24 November 1986 the General Counsel filed a Motion for Summary Judgment. On 4 December 1986 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Company's answer admits its refusal to bargain with the Union, but denies the validity of the certification based on its objections to the election in the representation proceeding. The General Counsel argues that all material issues have been previously decided. We agree with the General Counsel.

The record, including the record in Case 5–RC–12568, reveals that an election was held 28 March 1986, pursuant to the Regional Director's Decision and Direction of Election issued on 29 January 1986.[1] The tally of ballots reflects that of approximately 196 eligible voters, 89 cast valid ballots for and 77 against the Union; 3 ballots were challenged, but constituted an insufficient number to affect election results. After considering the Company's objections, the Regional Director issued a Supplemental Decision and Certification of Representative, overruling all objections raised.

By letter dated 10 June 1986, the Union requested that the Company bargain with it regarding all matters relating to rates of pay, wages, hours, and other terms and conditions of employment for the employees in the appropriate bargaining unit.

On 18 June 1986 the Company filed a request for review of the Regional Director's Supplemental Decision and Certification of Representative. By letter dated 23 June 1986, counsel for the Company acknowledged receipt of the Union's bargaining demand and indicated that the Company did not intend to bargain during the pendency of its request for review.[2]

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company has failed to establish the existence of newly discovered and previously unavailable evidence or special circumstances sufficient to require the Board's reexamination of its decision in the representation proceeding.[3] We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

[1] On 26 February 1986 the Board denied the Company's request for review of the Regional Director's Decision and Direction of Election.

[2] On 14 October 1986 the Board denied the Company's request for review of the Regional Director's Supplemental Decision and Certification of Representative. Thereafter, on 2 December 1986, the Board denied the Company's motion for reconsideration of the 14 October denial of its request for review. It is undisputed that the Company continues to refuse to bargain with the Union.

[3] In the underlying representation proceeding, the Company alleged, inter alia, that its predecessor was in collusion with the Union. The Company raised various issues pertaining to that allegation which, in essence, it now raises again in its memorandum in opposition to the Motion for Summary Judgment. In this regard, the Company asserts that it has newly discovered and previously unavailable evidence to the effect that other Federal agencies have initiated investigations concerning the alleged collusion, and that therefore circumstances exist here which warrant reexamination of the representation proceeding. In our view, however, the Company's assertions do not constitute sufficient evidence to warrant a hearing in this proceeding.

FINDINGS OF FACT

I. JURISDICTION

The Company, a New Jersey corporation, provides technical and warehousing services to the United States Department of the Navy under the contractual Intra-Fleet Supply Support Operations Program at naval facilities in Portsmouth, Norfolk, and Newport News, Virginia, where it annually purchases products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Virginia. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held 28 March 1986, the Union was certified as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees employed by the Employer at all of the locations at which it performs work for the United States Department of the Navy in the vicinity of Portsmouth, Norfolk and Newport News, Virginia, including employees sent from this area on temporary assignment to other areas, material handlers or coordinators, forklift operators, validators, researchers, work leaders, and plant clerical employees, but excluding office clerical employees, CRT operators, guards and supervisors within the meaning of the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since 10 June 1986 the Union has requested the Company to bargain, and since 23 June 1986 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after 23 June 1986 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Systems Engineering Associates Corp., Portsmouth, Norfolk, and Newport News, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 387, International Union of Operating Engineers, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees employed by the Employer at all of the locations at which it performs work for the United States Department of the Navy in the vicinity of Portsmouth, Norfolk and Newport News, Virginia, including employees sent from this area on temporary assignment to other areas, material handlers or coordinators, forklift operators, validators, researchers, work leaders, and plant clerical employees, but excluding office clerical employees, CRT operators, guards and supervisors within the meaning of the Act.

(b) Post at its facilities in Portsmouth, Norfolk, and Newport News, Virginia, copies of the at-

tached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN DOTSON, dissenting.

I would deny the General Counsel's Motion for Summary Judgment and have a hearing on the Employer's Objections 5 and 7.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 387, International Union of Operating Engineers, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time employees employed by the Employer at all of the locations at which it performs work for the United States Department of the Navy in the vicinity of Portsmouth, Norfolk and Newport News, Virginia, including employees sent from this area on temporary assignment to other areas, material handlers or coordinators, forklift operators, validators, researchers, work leaders, and plant clerical employees, but excluding office clerical employees, CRT operators, guards and supervisors within the meaning of the Act.

SYSTEMS ENGINEERING ASSOCIATES CORP.

State Bank of India *and* Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO. Case 2-CA-19329

18 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 31 January 1985 Administrative Law Judge Howard Edelman issued the attached decision. The Charging Party filed limited exceptions and the Respondent filed exceptions and a supporting brief. The General Counsel filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found, inter alia, that the Respondent, by suspending employee Scaria and also by suspending and subsequently terminating him and employee Viswam, violated Section 8(a)(1), (3), and (4) of the Act. The Respondent excepts, contending, inter alia, that even if the General Counsel had established a prima facie case, it was rebutted because the Respondent proved that its disciplinary actions would have occurred even in the absence of Viswam's and Scaria's protected activity. We find merit in this contention and dismiss the complaint in its entirety.

The Respondent hired Scaria in March 1975 as a mail clerk and Viswam in April 1977 as a bank messenger. As fully set forth in the attached decision, the judge found, and the Respondent admits, that both Scaria and Viswam were active union adherents of long standing.

The initial incident in issue occurred on 27 September 1982 when Scaria was suspended for 3 days by the Respondent's personnel director, Griffin, for cursing and frightening his supervisor, Ghate, on 24 September. Griffin investigated the incident by interviewing Ghate, directing Ghate to describe the incident in writing, and attending separate meetings with Viswam and Scaria. In Ghate's oral statement to Griffin she asserted that on 23 September she had warned Viswam about "referring out" incoming calls. At 5:40 p.m. on Friday, the next day, Ghate left work and saw Viswam and Scaria at the corner of Park Avenue and 54th Street. As Ghate approached, Scaria spoke loudly and cursed Ghate in Hindi after asking her, "You want telephone calls, is it your father's phone?" Ghate explained to Griffin that the translation of Scaria's Hindi obscenities was "bastard" and "one who fucks his mother."[2] Ghate also asserted that Scaria repeated his words, approached in a threatening manner, and left with Viswam after Ghate threatened to call the police. Ghate's written statement of these events did not vary from that of her interview with Griffin, except that Ghate did not translate the "bad words."

On 27 September Ghate confronted Scaria during a meeting which also included Scaria's immediate supervisor, Gururajan, and Griffin. Ghate accused Scaria of confronting and cursing her, but did not specify the nature of Scaria's curses. When Gururajan asked Ghate to translate the curses from Scaria's Hindi, Ghate replied, "I am a lady" several times and offered to repeat the language if Gururajan specifically asked, which he did not. Scaria was questioned primarily by Gururajan. Scaria repeatedly denied any knowledge of the incident. Scaria also asserted that he, Viswam, and other employees had left the bank at 5 p.m., walked to the subway entrance at Lexington Avenue and East 59th Street, and went home.

In a subsequent interview on the same day, attended by Griffin and Viswam's supervisor, Rao, Viswam corroborated Scaria's statement. Viswam also mentioned another bank employee, Simon, who had accompanied them to the subway. Griffin then interviewed Simon. Simon asserted that he saw Viswam and Scaria at the subway entrance after leaving the bank with them at 5 p.m. Simon, however, did not see them board the train or pass through the turnstile.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also excepted to our assertion of jurisdiction. This exception is without merit. *State Bank of India*, 273 NLRB 264 (1984), enfd. 808 F.2d 526 (7th Cir. 1986).

We also find totally without merit the allegations of bias and prejudice on the part of the judge made by William Perry, president of Local 6. On our full consideration of the record we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against Perry, or Local 6, in his analysis or discussion of the evidence. Additionally, we find that Perry's conduct, set forth in the remedy section in the attached judge's decision, is disgraceful and inexcusable. Any similar conduct will result in a more severe penalty than censure.

[2] The judge did not mention this testimony or discredit Ghate as a witness.

[3] Contrary to the judge's findings, Griffin did not testify "that after speaking to Simon she had no doubt that Scaria and Viswam were at the subway with Simon and boarded their train." Instead, Griffin testified

Continued

After conducting the investigation, Gururajan and Griffin suspended Scaria for 3 days. Viswam, who allegedly was present but remained silent during the incident, was not disciplined. Gururajan testified that, compared to Scaria's muteness and unresponsiveness during the interview, he was persuaded by Ghate's responsiveness to questioning and obvious agitation. Griffin testified that during the investigation she found no reason to doubt Ghate. Although Simon placed Scaria on Lexington Avenue and East 59th Street after 5 p.m., the incident occurred approximately 30 minutes later at Park Avenue and East 54th Street. Griffin asserted that even if Scaria's alibi was true, it was reasonable to assume that Viswam and Scaria could have walked six city blocks in approximately 30 minutes.

Two months later, on 17 and 18 November, the Respondent notified Viswam and Scaria by letter that they had been terminated for hiring Johnson, a former union organizer, to assault Ghate. On 29 October Johnson entered the bank and passed a note to Ghate. The note contained his name, telephone number, and an allegation that Viswam "has tried to hire me to beat you up." Ghate brought Johnson to Griffin. Johnson told Griffin that after he beat up Ghate, he was to contact Scaria for a cash bonus. Johnson handed Griffin a slip of paper with Scaria's name and telephone number on it. Griffin took the paper to Bhattacharjee, the Respondent's deputy chief manager, and conveyed Johnson's story. Bhattacharjee, after identifying the handwriting in the note as Viswam's, called the Respondent's labor attorneys. Griffin accompanied Johnson to their law offices where Attorney Conneely took Johnson's affidavit.

According to the affidavit, Johnson knew Viswam from their organizing activities for the Union. In early October, Viswam asked Johnson to arrange having "someone beat up." Thereafter, Viswam gave Johnson $100 to assault a person whom he would identify later. On 29 October Johnson telephoned Viswam, and they agreed to meet that day at the bank. Johnson arrived at the bank and met Viswam in the reception area. Viswam then accompanied Johnson to his desk. Viswam identified Ghate, who was working nearby, described Ghate's customary subway line and departure time, and gave Johnson Scaria's name and telephone number on a slip of paper. Viswam, who was leaving the country later that day, directed Johnson to assault Ghate early the following week. He also told Johnson to contact Scaria for a bonus once Ghate had been assaulted. Viswam and Johnson left the bank together and separated. Johnson then returned to the bank and told his story to Ghate.

After Johnson described these events to Conneely, Johnson and Griffin left the law offices. Griffin returned to the bank and asked the receptionist, DiFulvio, if anyone had visited Viswam that day. DiFulvio confirmed that a man who resembled Johnson entered the reception area twice and on the first occasion to visit and speak with Viswam. DiFulvio's account was confirmed by her affidavit and that of Kotak, the bank's deputy manager. Conneely subsequently contacted the Board's Regional Office and confirmed that Johnson had worked as an organizer for the Union. On the basis of Johnson's previous affiliation with the Union, DiFulvio's statement and affidavit, Kotak's affidavit, and Johnson's statement, affidavit, and detailed knowledge of Viswam's overseas trip and departure time, Scaria's name and phone number, and Ghate's customary departure time from work and subway line, the Respondent terminated Viswam and Scaria on 17 and 18 November.

Assuming that the General Counsel presented a prima facie showing, we agree with the Respondent that its disciplinary actions would have occurred even in the absence of Viswam's and Scaria's union activities. Regarding Scaria's 3-day suspension for allegedly cursing Ghate, the judge found that "Ghate did not, during the course of Respondent's investigation, disclose what the 'bad words' were." The record contradicts this finding. Ghate testified that, during her first meeting with Griffin on 27 September, she translated Scaria's Hindi words as meaning "'bastard' and the other word . . . 'one who fucks his mother.'"

Based on the foregoing, we find that the case cited by the judge, *Art Steel of California*, 256 NLRB 816 (1981), is inapplicable. In *Art Steel*, the Board found that an employer acted pretextually when, without confronting an employee with either his accuser or an accusation, it disciplined that employee by relying exclusively on a conclusory allegation that he had used "bad words." In the instant case, however, Ghate translated Scaria's Hindi curses during her first meeting with Griffin. During the 27 September meeting which Scaria, Ghate, Griffin, and Gururajan attended, the Respondent also confronted Scaria with both his accuser and the accusation.

The judge also found that because a witness left work with Viswam and Scaria at 5 p.m. and walked three blocks with them to a subway station approximately six blocks away from their alleged encounter with Ghate at 5:40 p.m., it would have

---

that she did not doubt that Scaria "was at the train station at 5 o'clock" and that Scaria "had forty minutes to get back to the place" where Scaria reportedly cursed at Ghate. Griffin did not state her belief whether Scaria had passed through the turnstile or boarded the train.

been unlikely "for them to have taken the train to the next stop and to double back and intercept Ghate at a corner of 54th Street and Lexington Avenue." We note, however, that no witness saw Viswam or Scaria board the train or pass through the turnstile and that Griffin testified that even if Scaria's witness spoke truthfully, it was reasonable to assume that Viswam and Scaria could have walked six city blocks in approximately 30 minutes.

The judge also found that neither Viswam nor Scaria was sufficiently motivated to have cursed Ghate because "there is no evidence that Viswam was particularly angry about [Ghate's] memo or displayed such conduct which would trigger such an elaborate and planned response." Regarding his telephone message practices, however, Viswam testified that Ghate had previously warned him orally and in writing and that Ghate's warnings were common knowledge at the bank. Viswam also testified that Ghate continually complained about his work and that she "was always trying to harass me." Accordingly, we do not agree with the judge's conclusion that the Respondent's suspension of Scaria was unreasonable and we find that the Respondent has demonstrated that it would have disciplined Scaria even absent his union and protected concerted activities.

Regarding the Respondent's termination of Viswam and Scaria for having hired Johnson to assault Ghate, the judge found that the Respondent's investigation was "perfunctory and one sided." The judge found that, given the "bizarre" nature of Johnson's confession and demeanor, the Respondent should have contacted not only Viswam and Scaria for an explanation, but also other witnesses "who could have shed light on Johnson's credibility or explained troubling aspects of the affidavit." Applying *Lancer Corp.*, 271 NLRB 1426 (1984), the judge concluded that the Respondent's termination of Viswam and Scaria was unreasonable because their discharge was not predicated on a "full and fair investigation."

In concluding that the Respondent's investigation was deficient, the judge noted that had it contacted Viswam or Scaria, "they might have been able to explain Johnson's motivation, or to shed light on his credibility or to explain how Johnson became aware of some of the details set forth in his affidavit." The judge also posited that had the Respondent contacted the Union's president, Perry, he might have explained Johnson's knowledge of Ghate's name and subway route because "Perry . . . had filed a charge alleging the discriminatory suspension of Scaria, which investigation was pending at the time Johnson gave his affidavit and these details might well have been within the knowledge of Local 6 representatives and available to Johnson." The judge's speculation may or may not be correct. However, the issue is not whether the Respondent's investigation would have been more thorough had it elicited possible explanations from Viswam, Scaria, and Perry, but whether the Respondent's disciplinary investigation would have been the same had Viswam and Scaria not been associated with the Union.[4]

The judge cited several cases, including *Lancer Corp.*, supra, to infer that the Respondent's investigation was perfunctory because it did not contact Viswam, Scaria, or Perry. None of these cases, however, necessarily requires an employer to establish conclusively either the veracity or related motivation of a witness against an alleged discriminatee. They also do not require an employer, in all circumstances before an employee's termination, to allow the employee to have his say. Although the judge found that the Respondent, by not allowing Viswam and Scaria to explain Johnson's accusation, did not follow its customary practices, the only evidence of its disciplinary procedures is Griffin's assertion that the Respondent "usually, it depends on the situation," gave employees a chance to explain reported misconduct. But the allegation of a man, known to have been a union employee, that employees, who also were associated with the Union and who had only 2 months earlier been implicated in and/or disciplined for related conduct in cursing at a supervisor, had hired him to assault the same supervisor obviously constitutes unusual, not ordinary, circumstances. There is no evidence that the Respondent had been previously confronted with a situation similar to that here. That, however, does not warrant a finding that it departed from its "customary" disciplinary practices. Thus, as noted above, it is not clear that the Respondent had a uniform practice with respect to disciplinary procedures. In any event, given the nature of the misconduct of Viswam and Scaria reported by Johnson, the situation which confronted the Respondent obviously was unusual and serious and not one for which "customary" disciplinary procedures would apply.

We also find that even assuming Viswam and Scaria had explained their second reported offense against Ghate, the clear weight of the evidence suggests that, even absent their protected activities, the Respondent's disciplinary actions would not have varied. The judge speculated that if Viswam, Scaria, and Perry had been consulted by the Respondent, they might have explained that Johnson could have obtained his detailed knowledge about

[4] See *Wright Line*, 251 NLRB 1083 (1980).

Ghate from the Union's previously filed unfair labor practice charge against the Respondent. But the judge's retrospective version of the incident is only speculation and ignores the Respondent's obligation to Ghate, its supervisor and agent, to hold her safe from harm in the face of a plausible, work-related physical danger. Because it was reasonable for the Respondent to have believed Johnson rather than any possible denials by Viswam or Scaria, who had been implicated previously in similar misconduct and had an obvious reason to bear a grudge against Ghate, the judge's analysis of the incident is neither reasonable nor probable. Because we find that the Respondent acted reasonably under the unusual circumstances of this case, we shall dismiss the entire complaint.[5]

ORDER

The complaint is dismissed.

[5] In dismissing the complaint, we note that the judge's analysis of the Respondent's alleged violation of Sec. 8(a)(4) of the Act is the same as that of the Respondent's alleged 8(a)(3) and (1) violations. The record does not establish a specific causal relationship between Viswam and Scaria's use of Board processes and the Respondent's disciplinary actions.

Judy M. Sandler Esq., for the General Counsel.
John F. Gibbons, Esq., and *Israel Kornstein, Esq. (Kelly, Drye & Warren)*, for the Respondent.
Saul Jakubowitz, Esq., for the discriminatees K.M. Viswambharan and Johannes Scaria.
William Perry, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on May 21, 22, 23, and 25, June 8, and August 2, 1984.

On December 29, 1982, Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO (Local 6), filed a charge against the State Bank of India (Respondent), alleging that Respondent had discharged its employees K. M. Viswambharan and Johannes Scaria (Viswam and Scaria), in violation of Section 8(a)(1), (3), and (4) of the Act. On January 31, 1983, Local 6 filed an amended charge alleging, inter alia, that Respondent had suspended Scaria, prior to his discharge, in violation of Section 8(a)(1), (3), and (4) of the Act. On March 22, 1984, a complaint issued alleging that Respondent had suspended Scaria and thereafter discharged Scaria and Viswam in violation of Section 8(a)(1), (3), and (4) of the Act.

Briefs were filed by the General Counsel and Respondent. On my consideration of the entire record,[1] the briefs, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Respondent is a banking or financial institution organized under the laws of India. It is licensed to do business in the State of New York where it has a facility located at 460 Park Avenue, New York, New York. During the normal course of its business operations, Respondent annually derives gross revenues in excess of $1 million and engages in interstate financial transactions in excess of $100,000 from its New York facility.

Respondent denies that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent contends that it is a direct instrumentality of the government of India and, therefore, is not an employer within the meaning of the Act.[2] This same contention was made by Respondent concerning its Chicago, Illinois facility and rejected by the Board. *State Bank of India*, 229 NLRB 838 (1977). The Board concluded that Respondent was not excluded within the meaning of Section 2(2) of the Act which provides that the term "employer" shall not include "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof" and that "there is no public policy or policy of the Act which, on the ground that the employer is disclosed to be an 'agency' or 'instrumentality' of a foreign state, justifies us to continue to decline jurisdiction in cases affecting employees in our own country whose employer meets the Board's jurisdictional standards for such enterprises." The Board therefore concluded it would effectuate the purposes of the Act to assert jurisdiction. This contention was raised again by Respondent in connection with its New York facility in *State Bank of India*, 273 NLRB 264 (1984), and again rejected by the Board. Accordingly, I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (262 NLRB 1108 (1982).)

I conclude Local 6 is a labor organization within the meaning of Section 2(5) of the Act. *Port Chester Nursing Home*, 269 NLRB 150 (1984); *State Bank of India*, 262 NLRB 1108.

II. THE UNION ACTIVITIES OF SCARIA AND VISWAM—RESPONDENT UNION ANIMUS

Scaria was hired by Respondent in March 1975 as a mailclerk. He worked continually for Respondent until his discharge on November 1982. During this period Scaria was a satisfactory employee and was offered a supervisory position by Respondent in January 1981 and March 1982, which he turned down.

[1] Following the close of the hearing counsel for Respondent filed a motion to correct the official transcript. The General Counsel, counsel for Local 6, and counsel for the discriminatees did not oppose this motion. On due consideration, I issue an Order correcting the transcript to reflect the changes set forth in Respondent's motion. The above motion shall become part of the record herein and is designated as J. Exh. 1.

[2] The facts on which this contention is based are contained in R. Exhs. 19 through 26 and are summarized concisely in the administrative law judge's decision in *State Bank of India*, 262 NLRB 1108 (1982), involving Respondent's New York facility.

Viswam was hired in April 1977 as a bank messenger and worked for Respondent continually thereafter until his discharge on November 1982. During this period Viswam was a satisfactory employee. At the time of his discharge he had been promoted to the position of letter of credit negotiator. Viswam was offered a supervisory position in November 1980 but turned it down.

In 1977 Viswam and Scaria were among a small group of employees who began organizing Respondent's employees. They formed an independent labor organization called Local 777. On January 12, 1978, following a petition filed with Region 2, Local 777 was certified by the Board. Shortly thereafter Respondent and Local 777 entered in a collective-bargaining agreement. Viswam thereafter served the local as the shop steward.

By 1980, Viswam and Scaria were dissatisfied with the lack of success achieved by Local 777 in obtaining benefits and improved working conditions for the unit employees. Viswam wanted to affiliate with a stronger union. Local 777's attorney advised him to call William Perry, president of Local 6. Viswam contacted Perry and he and Scaria met with Perry. It was decided that Local 777 would attempt to merge with Local 6. In furtherance of this merger, Viswam and Scaria circulated and posted Local 6 literature and arranged a meeting of employees where they obtained about 65 employee signatures in support of the merger. Thereafter, Local 6, through its president, Perry, requested Respondent to bargain with it. Respondent refused. On December 8, 1980, Local 6 filed unfair labor practice charges against Respondent alleging violations of Section 8(a)(1) and (5) of the Act.[3] On January 22, 1981, a complaint issued alleging an unlawful refusal to recognize and bargain with Local 6. The case was tried in September 1981. During the trial, Viswam and Scaria were the principal witnesses in support of the charge.[4]

Sometime in January 1981 after the complaint in the above case (2–CA–17711) issued, P. K. Bhattacharjee, Respondent's deputy chief manager and the second ranking officer in the New York office, called Scaria to his office. He offered Scaria a promotion to a supervisory position. During this meeting he discussed the pending unfair labor practice case and told Scaria that Respondent did not want Local 6 and that if he took this promotion it would "bust the Union." Scaria refused to accept this offer of promotion and later confirmed such refusal in writing, setting forth his reason as fear on his part that Respondent was trying to promote him out of the unit to fire him. Bhattacharjee, who was called as a witness by Respondent, did not deny this conversation. I fully credit Scaria's testimony regarding this conversation.[5]

About July 1981, shortly before the trial of the above-described unfair labor practice complaint was scheduled to take place, Viswam was attending a send-off party for Chandurka, Respondent's deputy chief of contract and admittedly an agent and supervisor of Respondent. Chandurka was going to work at the bank's main office in India. During this party, Viswam testified he spoke to Chandurka and Chandurka expressed his feeling that he had not discriminated against him for his union activities. However, Chandurka told him he had better "watch out" for Respondent. Viswam responded that he was aware Respondent could fire him. Chandurka was not called as a witness by Respondent. Viswam's testimony is therefore undenied. I fully credit Viswam's testimony concerning this conversation.[6] As a result of Chandurka's threat, an unfair labor practice charge was filed by Local 6 against Respondent.[7] The charge was withdrawn by Local 6 only after the Regional Director assured Local 6 that Respondent had given Viswam "written assurances to the effect that it will not discriminate against him because of his union activities."

Sometime in September 1981, during the hearing in connection with the refusal-to-bargain charge described above, Viswam met Bhatacharjee in the lobby of the Federal Building, Federal Plaza, New York. Viswam testified that Bhatacharjee came over to him during a recess in the trial and told him that he needed Viswam's support and that Respondent did not need a union. Bhattacharjee told Viswam he needed his help to see that there was no union in the bank. He then told Viswam that Respondent would accede to the employees' demands if there was no union. Although Bhattacharjee was called as a witness, he did not deny this conversation. As set forth above, I found Viswam to be a credible witness. Accordingly, I fully credit his testimony concerning this conversation.

In October 1981, shortly after the trial of the unfair labor practice complaint described above. Viswam and Scaria planned to picket Respondent at the Waldorf Astoria Hotel which was the site of a scheduled reception to celebrate the arrival from India of Padmanabhan, the chairman of the bank. In furtherance of this planned picketing, which was to protest working conditions, Viswam and Scaria posted picketing notices throughout the bank and distributed such notices to employees. The picketing was to take place on October 5, 1981, at 5:30 p.m.

On October 4, Bhattacharjee called Scaria and Viswam into his office. Both Scaria and Viswam testified that Bhattacharjee pleaded with them to cancel the picketing planned for October 5 at the Waldorf. He told them if the picketing took place, his name and career would be spoiled. Viswam and Scaria listened, but gave no commitment. On October 5, Bhattacharjee called Viswam into his office. Viswam testified that he again pleaded with him to cancel the planned picketing, explaining if the picketing took place as scheduled, his career would be spoiled. As an inducement, Bhattacharjee told Viswam he would arrange a meeting with Bank Chairman Padmanabhan so that Viswam could presum-

[3] Case 2–CA–17711.

[4] On February 12, 1982, the administrative law judge issued his decision in the above case in which he dismissed the complaint in its entirety. On July 21, 1982, the Board affirmed the judge. (262 NLRB 1108.)

[5] I was favorably impressed with Scaria's demeanor throughout the course of his testimony. His answers were very candid and forthright during both direct and cross-examination. I was also very impressed with Scaria's recollection of the facts.

[6] Viswam impressed me as a credible witness. I was impressed by his demeanor. He was very forthright during both direct and cross-examination and like Scaria displayed an excellent recollection of the facts.

[7] Case 2–CA–18302.

ably present the employees' demands. Viswam agreed and the scheduled picketing was canceled. Bhattacharjee, although called as a witness by Respondent, did not deny these conversations. As set forth above, I have found Scaria and Viswam to be credible witnesses. Accordingly, I fully credit their testimony concerning the above meetings.

On July 21, 1982, the Board, as set forth in footnote 3, affirmed the judge's decision dismissing the complaint which had alleged that Respondent had refused to recognize and bargain with Local 6. Shortly thereafter, Local 6 filed with Region 2 a petition for election. Viswam and Scaria solicited and obtained from Respondent's employees a sufficient number of signed authorization cards which were used to support this petition for an election. Pursuant to the petition, an election was scheduled for September 2, 1982.

On September 2, the election was held. Viswam was the observer for Local 6. Following the vote, the ballots were counted and Local 6 won by a count of 44 for Local 6 to 33 for no union. Present for Respondent during the count, which took place in the conference room at Respondent's facility, was Bhattacharjee and Respondent's attorney, John Gibbons. Present for Local 6 was William Perry, Local 6 president, and Scaria and Viswam. Perry testified that following the count he attempted to shake hands with Gibbons but he refused and walked away from him. Perry, Viswam, and Scaria were left and began laughing. Gibbons then walked by, heard them laughing, and stated to the group, "I'm going to fuck you." Viswam and Scaria corroborate Perry's testimony. Gibbons testified that he signed the tally of ballots and left the room without saying a word. He concedes he saw a big smile on Viswam's face. He denies that Perry tried to shake his hand or that he told Perry, Viswam, or Scaria, either individually or collectively, that he would "fuck" them or words to that effect. Bhattacharjee could not remember that Gibbons made the statement attributed to him by Scaria, Viswam, and Perry. I credit the testimony of Perry, Scaria, and Viswam. As set forth above, I have concluded that Scaria and Viswam are credible witnesses. I was not impressed with Bhattacharjee's demeanor. His responses during cross-examination were often vague. His memory of the above incident was particularly vague. Moreover, his testimony on cross-examination concerning Respondent's decision to terminate Scaria and Viswam was often evasive. Additionally, during the trial of this case, as set forth in the record, Perry and Gibbons demonstrated an intense hostility toward each other. During the short period of time Perry appeared,[8] his manner toward Gibbons was to goad and antagonize him, and Gibbons' response was to become angry and lose his temper. Perry's testimony is consistent with their conduct at this trial. Counsel for Respondent, in an attempt to discredit the testimony of Perry, Viswam, and Scaria, established that in several prior investigatory affidavits taken by Board agents after the election, neither Scaria nor Viswam included Gibbons' statement in their affidavit, nor did Perry in sworn testimony in an unemployment insurance proceeding involving the subsequent discharges of Scaria and Viswam. I have considered this evidence and, notwithstanding, conclude for the reasons described above that the mutually corroborative testimony of Perry, Scaria, and Viswam is credible.

In September 1982, Scaria and Viswam again organized and scheduled picketing to take place at the Waldorf Astoria Hotel at a time when Respondent's chairman, Padmanabhan, was coming over from India for a reception. The picketing was again to protest the employees working conditions. Scaria and Viswam testified that Bhattacharjee again called them into his office and pleaded with them not to picket. During this conversation, Scaria testified that Bhattacharjee told them their "union activities were interfering with the bank." At the conclusion of this meeting Scaria and Viswam did not agree to cancel the scheduled picketing. The following day Bhattacherjee called Scaria into his office. He pleaded with him to cancel the picketing and told him "it [the picketing] was bad for the bank." Pursuant to Bhattacharjee's promise that he would arrange a meeting with Padmanabhan, Scaria and Viswam agreed to cancel the scheduled picketing. Bhattacharjee, although called as a witness by Respondent, did not deny these conversations. Accordingly, I fully credit the testimony of Scaria and Viswam.

On September 27, 1982, Scaria was suspended for 3 days for allegedly verbally assaulting Respondent's supervisor, Sheela Ghate. Scaria denied that he had spoken to Ghate that day. On November 17 and 18, 1982, Respondent discharged Scaria and Viswam for allegedly conspiring with an individual named Joseph Johnson Jr. to physically assault Ghate.[9]

The General Counsel has the burden of proving union animus was a substantial or motivating factor in the suspension of Scaria and in the discharges of Scaria and Viswam. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Respondent admits, and indeed the evidence established, Respondent's knowledge of Scaria's and Viswam's activities on behalf of Local 6. Such activities included testifying in the September 1981 trial and the filing of unfair labor practice charges alleging unlawful threats. Respondent further admits, and the evidence fully established, that Scaria and Viswam were the most active employees on behalf of Local 6. In fact, the evidence established that Scaria and Viswam were the heart and soul of Local 6 as far as its existence in Respondent's facility was concerned and Respondent acknowledged this by its conduct. For example, it was Scaria and Viswam who planned and scheduled the above-described picketing in 1981 and 1982; it was Scaria and Viswam with whom Bhattacharjee pleaded to cancel such scheduled picketing, and it was Scaria and Viswam who ultimately agreed to cancel the scheduled picketing.

[8] Perry was ejected from the hearing because of improper conduct directed to me during the course of this hearing discussed in detail below.

[9] The facts surrounding the above suspension and discharges will be set forth in the section of this decision relating to Respondent's defense.

The evidence also conclusively established Respondent's intense union animus directed to Local 6 generally and to Scaria's and Viswam's activities on behalf of Local 6 in particular. The following facts conclusively establish Respondent's animus.

(a) Bhattacharjee's January 1981 conversation with Scaria in which he stated that Respondent did not want Local 6 and it would "bust the union."

(b) Chandurka's threat to Viswam that he had better "watch out" for Respondent, in connection with his activities on behalf of Local 6, and the subsequent unfair labor practice charge filed which resulted in written assurances by Respondent that it would not discriminate against Viswam.

(c) Bhattacharjee's September 1981 statements to Viswam to the effect that Respondent did not want Local 6 as the bargaining representative of its employees and would accede to the employees' demands if Viswam dissuaded the employees from supporting Local 6. Such conduct could arguably constitute a violation of Section 8(a)(1). *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844 (D.C. Cir. 1984).

(d) Bhattacharjee's pleas to Scaria and Viswam to cancel scheduled picketing, a protected activity, in October 1981 and in September 1982, shortly before the suspension of Scaria and discharge of Scaria and Viswam, because such picketing would embarrass Respondent and ruin Bhattacharjee's career. These picketing incidents standing alone would, in my opinion, supply sufficient motivation for Respondent to want to rid itself of Scaria and Viswam. It is clear that by threatening to picket, these employees had Respondent by the throat, and Respondent did not like it.

(e) Gibbons' statement following Local 6's election victory that he would "fuck" the Union.

Even a casual examination of Respondent's conduct directed at Scaria and Viswam, as described above, establishes conclusively, in my opinion, intense union animus directed at Scaria and Viswam and a substantial motivating factor in the suspension and discharges. It is obvious that if Respondent were able to rid itself of Scaria and Viswam it would effectively rid itself of Local 6.

Additionally, the timing of the suspension and discharges, within a month of the Local 6 election victory and a second threat to picket Respondent, further support a discriminatory motivation for the suspension and discharge. In short, the General Counsel has established not only a motivating factor, but a solid prima facie case. Once such motivating factor is established, the burden of proof shifts to Respondent to establish that the same action would have taken place even in the absence of the employees' protected activities. *NLRB v. Transportation Management*, supra; *Wright Line*, supra.

III. RESPONDENT'S DEFENSE

On September 27, 1982, Respondent's supervisor, Sheela Ghate, went to Respondent's personnel director, Selena Griffin, a supervisor and agent of Respondent, and reported the following incident to Respondent in writing:

> On September 24, 1982 I left the office at 5:40 PM and was walking to the 5th Avenue subway station. Mr. Scaria and Mr. Viswambharan were standing at the corner of 54th Street and Park Avenue. As I approached that corner Mr. Scaria spoke to me loudly in Hindi. The meaning was 'You want telephone calls, is it you father's phone?; and then he said bad words. He repeated the same thing again and came towards me in a threatening gesture. . . . I said to Mr. Scaria, "If you do not stop, I will call police." Then both of them walked away.

Ghate did not, during the course of Respondent's investigation, disclose what the "bad words" were or describe the "threatening gesture." On September 23, Ghate had given Viswam a warning memo for referring out calls he allegedly should have taken. Ghate told Griffin she assumed the reference to "telephone calls" by Scaria was in connection with this memo.

Griffin then reported the incident to Respondent's supervisor, Gururajan, who was Scaria's direct supervisor. Gururajan, Griffin, and Ghate then met with Scaria in Gururajan's office. Gururajan then said to Scaria, "I believe you confronted Mrs. Ghate on Friday [September 24]." Scaria said he did not know anything. In this connection Scaria testified that he had left the office at 5 p.m. on September 24 with Viswam and other bank employees and taken the Lexington Avenue subway home. Respondent's facility is on 57th Street and Park Avenue and the Lexington Avenue subway is on 59th Street and Lexington Avenue. Park Avenue and Lexington are a city block apart.

After meeting with Scaria, Griffin and Rao, Viswam's supervisor, met with Viswam. Rao told Viswam he understood something had taken place between Scaria and Ghate after work on September 24. Viswam, as did Scaria, denied knowing or seeing anything. He did, however, tell Griffin and Rao that he, Scaria, Simon, a bank employee, and other employees had left the office at 5 p.m. and walked to the Lexington Avenue subway to go home.

Griffin then spoke with Simon who confirmed that both Viswam and Scaria left work at 5 p.m. and went with him to the Lexington Avenue subway station. According to Griffin, Simon told her that he did not exactly see them board the train because he went to buy tokens. However, Griffin testified that after speaking to Simon she had no doubt that Scaria and Viswam were at the subway with Simon and boarded their train, but concluded that it was possible for Scaria and Viswam to have gotten off the train at the next stop and doubled back in time to intercept Ghate. Ghate usually left work at 5:30 p.m.

On the basis of the above investigation, Griffin testified she made the decision to suspend Scaria for 3 days. No disciplinary action was imposed on Viswam.

An analysis of the above facts establishes that:

(a) The suspension was predicated on alleged statements by Scaria to Ghate which are in part incoherent and in part subjective and conclusory. Scaria was alleged to have said "You want telephone calls, is it your father's phone." I simply do not understand what this sen-

tence means, even assuming it was allegedly related to Ghate's warning memo to Viswam the previous day. I certainly do not see how it could be insulting or threatening. The reference to Scaria saying "bad words" and making a "threatening gesture" is totally subjective and conclusary. *Art Steel of California*, 256 NLRB 816, 821 (1981). It is undisputed that at the time of the suspension, Respondent had no knowledge of what such "bad words" or the "threatening gesture" were. Ghate testified she did not disclose these bad words or describe the gesture to Respondent supervisors during the investigation. Nor is there any evidence to establish that Griffin or other Respondent supervisors pushed Ghate to reveal what "bad words" were allegedly used or the nature of the "threatening gesture."

(b) The alleged incident took place after working hours and outside of Respondent's facility.

(c) The alleged incident did not involve Scaria's supervisor.

(d) It is simply not probable that the incident could have taken place as described. Griffin admitted that the investigation established that Scaria and Viswam left work at 5 p.m. and went to the Lexington Avenue subway at Lexington and 59th Street. This is 2 blocks north and 1 long city block east of Respondent's facility. She then testified she concluded it was possible for them to have taken the train to the next stop and to double back and intercept Ghate at a corner of the 54th Street and Lexington Avenue. Ghate generally left about 5:30 p.m. It would be virtually impossible for Scaria and Viswam to double back from the subway given the unpredictability of New York subways and pick the one corner, out of four, that Ghate would traverse, wait there for her, and then pick her out of the thousands of people crowding this area during the height of New York's rush hour by 5:40 p.m., the alleged time of the incident. Indeed, there is no evidence that they were aware of what subway Ghate took, or the route she customarily took to reach the Fifth Avenue subway. She could have taken any number of routes to her subway that would have bypassed 54th Street and Park Avenue entirely.

(e) It is unlikely that Scaria and Viswam would have undertaken such a complex and devious action with such little likelihood of success merely to say a few "bad words" concerning a memo to Viswam. In this connection there is no evidence that Viswam was particularly angry about the memo or displayed such conduct which would trigger such an elaborate and planned response.

(f) There is no evidence that Respondent suspended other employees or in any way disciplined other employees based on similar incidents.

In view of this analysis, I conclude that Respondent has failed to meet its burden and establish the suspension would have occurred in any event. *Transportation Management*, supra. Accordingly, I conclude that Respondent suspended Scaria because he engaged in activities in support of Local 6. Since such activities involved testifying during Board proceedings, filing of unfair labor practice charges, and participating in a Board-conducted election, I conclude that by engaging in such conduct, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

On October 29, 1982, shortly after noontime, Joseph Johnson Jr., a recent organizer for Local 6, but then unemployed, and a stranger to Respondent, walked into Respondent's facility and handed Sheela Ghate a note which said:

> Mr. Viswam has tried to hire me to beat you up. My name is Joseph Johnson, Jr. I can be reached at 452-3812.
>
> It [presumably a reference to the alleged assault] is supposed to take place after he leaves the country. Let him stay out!
>
> Keep this confidential between you, I, and the authorities.

Ghate read the note and asked Johnson to come with her. He went with Ghate who took him to Griffin's office. Ghate showed Griffin the note and Johnson then related an alleged plot whereby he was hired by Viswam to beat up Ghate. He told Griffin after he beat up Ghate he was to call Scaria and he would receive a cash bonus. He gave a slip of paper to Griffin with Scaria's telephone number on it. Griffin took the note and slip of paper to Bhattacharjee, showed them to him, and related Johnson's story. Bhattacharjee recognized Viswam's handwriting. Bhattacharjee called his attorneys and on their advice it was decided to turn the investigation of this matter over to them. It was then recommended by Respondent's attorneys that Johnson be brought to their office so an affidavit could be taken. Johnson agreed to this and went with Griffin by cab to the attorney's office.

Griffin testified that Johnson was dressed in an "ostentatious" manner and observed that he "stood out in a crowd." Bhattacharjee testified that Griffin later told him, in connection with reporting her impressions of Johnson, that during the ride to the attorney's office he recited poetry, evidently written by him, to her and that she thought Johnson "was not that bad" (a reference to his character and credibility rather than his poetry).

When they reached Respondent attorney's office, Johnson was interviewed by Brian Conneely, an associate in the firm's labor department. Conneely took an affidavit from Johnson which set forth the details of the alleged conspiracy.[10]

Johnson stated that in early October he was at the offices of Local 6 when he happened to meet Viswam. He knew Viswam in connection with his Local 6 activities on behalf of Respondent's employees. Viswam came to him and said, "I need to have someone beat up." He said he would give Johnson the name of the intended victim and the day of the assault later. Johnson agreed to perform this alleged act for Viswam.

The following day Johnson stated he called the NLRB (Region 2) and spoke to one of the Board investigators. (The Board investigator's name was not set forth in the affidavit, however, Johnson testified he told Conneely

[10] In recounting this alleged conspiracy, I am using the affidavit of Johnson taken by Conneely rather than Johnson's testimony at trial because it was the contents of the affidavit that was used by Respondent in reaching its decision to discharge Scaria and Viswam. (See R. Exh. 15.)

that he knew David Leach, at the time a field attorney employed by the NLRB and working out of Region 2.) He related to this Board investigator his conversation with Viswam the day before and was advised to come to Region 2 to give an affidavit. He never did this. The following day he called Viswam at his office telephone number and the made an appointment for lunch. During this lunch appointment Viswam asked how much the job would cost and they agreed to a $100 price. According to Johnson, Viswam gave him the $100 during lunch and said he would call him later to let him know who he wanted beat up and when.

On October 29, Johnson stated he called Local 6's office and the secretary told him Viswam was trying to contact him. Johnson states he called Viswam at his office and he told him to meet him at Respondent's facility that same day about noontime. Johnson met Viswam in Respondent's reception area. He accompanied Viswam to his desk where Viswam pointed out Ghate. At this time he told him what time she left for work and the subway station she entered. Viswam then told Johnson to do the job early the following week when he had left the country. Viswam then gave Johnson a slip of paper with Scaria's name and phone number on it (described above), and told him to contact Scaria when the job was done. According to Johnson, he and Viswam then left Respondent's facility and headed in opposite directions. When Viswam was out of sight Johnson doubled back to Respondent's facility and gave the note described above to Ghate.

After Johnson left the attorney's office, Griffin returned to Respondent's facility. She asked their receptionist whether anyone had come to see Viswam that day and the receptionist described a man answering Johnson's description who she said later returned to the bank.

Respondent Attorney Conneely thereafter called Carol Sobin, a field attorney working out of Region 2 and assigned to investigate the unfair labor practice charge filed by Local 6 concerning Scaria's suspension. Sobin confirmed that Johnson was an organizer for Local 6. The following week, John Gibbons, Respondent's primary attorney, returned to his office and took over the investigation. Gibbons had been out of town on October 29. On his return Conneely briefed him about the events of October 29 and Gibbons reviewed Johnson's affidavit, the note to Ghate, and slip of paper with Scaria's name and phone number on it. Conneely told Gibbons that Johnson had said he knew Leach, a field attorney working out of Region 2. Later that day Gibbons called Leach who confirmed that he knew Johnson to be an organizer for Local 6 and that he had been involved in an 8(a)(3) proceeding which Region 2 had prosecuted.

The following week, Conneely contacted Region 29 and spoke with a Board agent and asked if he knew Johnson. The agent referred him to *Seaport Manor, Inc.*, 248 NLRB 886 (1980), in which the Board had found Johnson to have been discriminatorily discharged.

Johnson was frequently used by Local 6 as a "Plant." He would obtain a job at a plant Local 6 intended to organize and organize it from within. On occasion he would be discriminatorily discharged in connection with these activities.

On November 4, Gibbons spoke with Board Agent Sobin who was investigating Scaria's unfair labor practice charge described above. He had asked her several days before to ask Viswam whether Johnson had been in to see him at the bank on October 29. During this conversation Sobin told him she had asked Viswam this question and he replied that he had not.

On the basis of this investigation, which was conducted under Gibbons' supervision, Gibbons contacted Respondent by a letter dated November 15, 1982, recommending that Respondent discharge both Scaria and Viswam. Respondent, by letters dated November 17 and 18, notified Scaria and Viswam respectively that they had been terminated.

At no time during this investigation did Respondent's personnel or its attorneys contact Johnson's employer, William Perry, president of Local 6, or Scaria or Viswam. When Griffin was asked during her testimony why Respondent had not spoken to Scaria or Viswam, she replied that Respondent just assumed they would deny the accusation. No reason was offered by Respondent for not contacting Perry. Respondent did report this alleged conspiracy to the police. However, according to the testimony of Johnson, Scaria, and Viswam, the police did not contact them and there have been no criminal proceedings.

Griffin admitted during her testimony that when Respondent contemplated disciplinary action against its employees, they were invariably interviewed so that they could present their position, offer an explanation, or rebut accusations before any disciplinary action was taken.

The central issue concerning Respondent's defense is whether it acted reasonably and conducted a full and fair investigation as a basis for the discharge of Scaria and Viswam, or whether the investigation was prefunctory and the results of such investigation used as an excuse for Respondent to rid itself of union adherents. *Lancer Corp.*, 271 NLRB 1426 (1984); *Tama Meat Packing Corp.*, 230 NLRB 116 (1977); *J. W. Mortell Co.*, 168 NLRB 435 (1967); *Norfolk Tallow Co.*, 154 NLRB 1052 (1965).

The first thing that seems obvious to me is that Johnson's story is rather bizarre. It is certainly bizarre that two white collar employees with relatively long terms of employment with Respondent, who are reliable workers, with good work records, and family men, would engage in a criminal conspiracy which could not only end their careers with Respondent, but send them to jail and destroy their families. And what would be their motivation? Merely to retaliate against Ghate because she issued the memo to Viswam described above. Johnson's allegation is a very serious allegation and, under these circumstances, a full and fair investigation was required.

Not only is the allegation bizarre, but the person making the allegation is a total stranger to Respondent. Moreover, Respondent had serious doubts concerning his credibility. In this connection, Griffin described Johnson as dressed in a very "ostentatious" manner and observed that "he stood out in a crowd." She later reported to

Bhattacharjee that during their cab ride to the attorney's office Johnson had recited poetry he had written to her and "was not that bad." During the trial, Johnson was questioned about his literary talents as follows:

> Q. Well, do you write books?
> JOHNSON: Yes, I do.
> Q. And do you write autobiographies?
> JOHNSON: I write fiction and nonfiction, plays, short stories. I'm a professional writer. I'm an accomplished writer, on a scale that I'm sure that you're not even aware of.
> JUDGE EDELMAN: What kind of stories do you write?
> JOHNSON: I write fiction, nonfiction. I got a book on—I got a manuscript of the 70's; I got a baseball story about a federal agent.
> JUDGE EDELMAN: You've got a baseball story about a federal agent?
> JOHNSON: Well, yes.
> JUDGE EDELMAN: What was the story about?
> JOHNSON: It's a fellow that goes into military, get's programmed by the military to be in a special program that the president is initiating. Then he goes through life and he becomes a part of organized crime and he joins sides in this managing control of America. He grows up to be a leader of a family and he goes to jail and he comes out to be a G-man.
> JUDGE EDELMAN: When does he become a ball player?
> JOHNSON: He's a ball player from a child. He joins the nastalgia league when he's 12 years old and he goes throughout life playing baseball, playing ball.
> JUDGE EDELMAN: He goes through his life playing baseball except when he's in the army or—
> JOHNSON: In the army or conducting business with this organized crime people that are trying to get him to work for him for ten years so they could control the economy of America for ten years.

I feel certain that Johnson's poetry was consistent with his prose and that Griffin had serious doubts about Johnson's credibility as her observations to Bhattacharjee indicate. Moreover, during the trial of this case I was unimpressed with the demeanor of both Griffin and Bhattacharjee. Both impressed me as being vague and evasive especially in connection with their testimony as to the character of Johnson. I feel certain that Griffin had serious doubts about Johnson's credibility and conveyed this to Bhattacharjee.

I am also convinced beyond any doubt that when Respondent and its attorneys reviewed Johnson's affidavit they saw it as a vehicle by which they could rid themselves effectively of Local 6. As set forth above, Viswam and Scaria were effectively Local 6 as far as the employees were concerned. I am further convinced that Respondent's attorneys who have an extensive practice before the NLRB and are well versed as to Board law, carefully orchestrated an investigation which would give the appearance of a full investigation, but intentionally failed to contact available witnesses who might show that Johnson was not a credible witness, or who might explain incriminating details set forth in his affidavit. Respondent's attorneys were aware that Johnson was a stranger as far as Respondent was concerned and Conneely, the attorney who took the affidavit, could observe as well as Griffin that Johnson was "ostentatious" and "stood out in a crowd." On hearing Johnson's story, it must have struck Conneely and Gibbons, who later reviewed the affidavit, as bizarre. Moreover, as Johnson's testimony clearly indicates, even casual questioning establishes that he has some problems distinguishing between fact and fiction. Even if Griffin did not recount her observations and impressions about Johnson to Conneely and Gibbons, which she probably did as a skilled attorney, Conneely should have been able to observe it himself during his questioning. However, it is obvious that neither Conneely nor Gibbons wanted to become aware of anything negative about Johnson's credibility, or to have any incriminating aspects set forth in Johnson's affidavit explained. This is evidenced by the questions they did not ask, the curious facts contained in Johnson's affidavit that did not trouble them, and the witness who they failed to contact, including Viswam and Scaria, that could have shed light on Johnson's credibility, his motivation for telling this strange tale, or explained certain statements set forth in Johnson's affidavit that tended to implicate Scaria and Viswam.

For example, Johnson was never asked if he was convicted of a crime, or if he had undergone psychiatric treatment, if he would be willing to take a lie detector test, or whether he had any animosity toward Scaria or Viswam.

Additionally, Gibbons was not at all troubled by the fact that some 3 weeks prior to October 29, Viswam allegedly paid Johnson $100 in advance to beat up a bank employee, and Johnson kept the money and never reported this felony to the police. When he was asked about this, his response was that he was not at all upset by Johnson keeping the money or his failure to report a conspiracy to commit a felony to the police. Evidently, this did not trigger any suspicions about Johnson's credibility either.

However, the most revealing aspect about the investigation was the people that were not contacted who could have shed light on Johnson's credibility or explained troubling aspects of the affidavit. David Leach, then a field attorney with Region 2, was called by Gibbons, but was not asked if Johnson had called him or anyone in Region 2 to report the proposed assault as set forth in Johnson's affidavit. Perry, president of Local 6 and Johnson's employer, was not called and questioned about Johnson's character, credibility, or motivation. Perry testified that during Johnson's employment he had told Perry he heard voices from outerspace and that he bought a Rolls Royce automobile. Perry on one occasion observed Johnson sitting on the curb on Madison Avenue wearing nothing but his undershorts and a motorcycle helmet. Perry further testified that Johnson was reported to him by a motel owner as having stripped a motel room while on an organizing assignment for Local 6. On another occasion Johnson was ordered out of one

of the nursing homes represented by Local 6, on which occasion the nursing home administrator referred to him as a "crazy man." Had Gibbons taken the trouble to call Perry, Perry would have undoubtedly related these incidents. Perry might also have been able to explain how Johnson was aware of Ghate's name and the subway route she took home. After all, Perry, on behalf of Local 6, had filed a charge alleging the discriminatory suspension of Scaria, which investigation was pending at the time Johnson gave his affidavit and these details might well have been within the knowledge of Local 6 representatives and available to Johnson. Perry might also have been able to explain possible motivation for Johnson's affidavit. Perry should have been called, but was not.

However, the most striking example of Respondent's attorneys' failure to conduct a complete investigation of Johnson's allegations is their failure to contact Scaria and Viswam. Griffin testified they were not contacted because it was assumed they would not admit the allegations and Respondent would not believe their denial. In view of the seriousness of the allegation and the effect it could have on their careers and their lives, elemental fair play cries out that they be contacted and confronted with the allegations so that they might have the opportunity to explain them. Had they been contacted they might have been able to explain Johnson's motivation, or to shed light on his credibility or to explain how Johnson became aware of some of the details set forth in his affidavit. For example, Viswam testified that the slip of paper with Scaria's name and telephone number on it, which Respondent regarded as highly incriminating, was written by Viswam and given to Perry, so Perry could contact Scaria if necessary while Viswam was out of the country. Johnson, who had access to Local 6's office, could have obtained the slip from Local 6's office. That Gibbons was aware that Viswam and Scaria should have been contacted is evidenced by his request to Board Agent Sobin that she ask Viswam if Johnson visited Viswam at the bank on October 29. This was a question, among others, that Gibbons should have asked Viswam directly if he were truly interested in conducting a full investigation. He did not do this because he then would have had to confront Viswam with Johnson's allegations and Viswam might have been able to explain them, and tell Gibbons that Johnson was not a reliable witness and apparently neither Respondent nor its attorney wanted to be confronted with such explanation. Although Board Agent Sobin allegedly told Gibbons that Viswam denied Johnson was at the bank on October 29, there is no evidence regarding the actual questions Sobin asked Viswam or the circumstances of such inquiry. Such questions were certainly not relevant to the investigation she was at the time conducting. Gibbons should have confronted Viswam and Scaria and asked the questions himself.

Respondent's principal reasons for crediting Johnson's affidavit were the handwritten note in Viswam's handwriting with Scaria's telephone number on it and the fact that Johnson knew where Ghate lived and the subway route she took home. As set forth above, both of these factors could have been explained had Respondent contacted Perry, Viswam, or Scaria as should have been done for a full, open, and fair investigation. Even if it turned out that the above-named individuals were unable to explain such factors, this is no excuse for failing to make such contacts because Gibbons could not have known one way or the other what, if any, explanation he would have received without first contacting such individuals and asking the appropriate questions. The Board has repeatedly held in appropriate circumstances that an impartial inquiry requires that an employee accused of conduct requiring some disciplinary measure be provided an adequate chance to defend himself. *Lancer Corp*; *Tama Meat Packing Corp.*, supra; *J. W. Mortell Co.*; *Norfolk Tallow Co.*, supra.

An analysis of Gibbons' investigation establishes that it consisted entirely of Johnson's affidavit, which was fully credited, by Respondent, the statement of Respondent's receptionist who stated that she observed Johnson meet with Viswam in his office on October 29, and a few telephone calls to Board agents at Regions 2 and 29, who were asked whether Johnson was a Local 6 organizer. The investigation conducted by Gibbons is analogous to the Board conducting an unfair labor practice investigation on a charge filed against an employer by interviewing only the charging parties' witnesses and thereafter issuing a complaint without giving the employer a chance to rebut or explain the allegations charged. I am convinced, had similar accusations been made by Johnson concerning other employees rather than Scaria and Viswam, the Local 6 adherents, Respondent would have conducted an extensive investigation which would have included calling in the employees and giving them the opportunity to defend themselves and to explain and rebut the allegations against them. In this connection, Respondent admitted that in cases where it contemplates disciplinary action against its employees, the employee in question is invariably given the opportunity to explain or rebut the accusations against him before any disciplinary action is taken.

Therefore, in view of Respondent's prefunctory and one-sided investigation of Johnson's allegations, and in view of Respondent's departure from it usual practice of giving employees subject to potential discipline an opportunity to explain or rebut accusations against them, coupled with the activity by Viswam and Scaria on behalf of Local 6, and Respondent's intense animosity, I conclude that Respondent has failed to meet its burden to establish that the discharges would have taken place in any event. Rather, it is apparent to me that the discharges were purely discriminatorily motivated because of Scaria's and Viswam's activities on behalf of Local 6, which activities included their participation in the Board proceedings described above. Accordingly, I conclude that by discharging Viswam and Scaria, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 6 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by suspending its employee, Scaria, violated Section 8(a)(3) and (4) of the Act.

4. Respondent by discharging and thereafter refusing to reinstate its employees Scaria and Viswambharan violated Section 8(a)(1), (3), and (4) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that it cease and desist from engaging in such unfair labor practices and take certain affirmative action set forth below. Respondent shall offer K. M. Viswambharan and Johannes Scaria immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges. In addition, Respondent shall make Viswambharan and Scaria whole for any loss of earnings or other benefits they may have suffered by reason of the discrimination practiced against them. All backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *Florida Steel Co.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). Additionally, I shall require that Respondent remove from its records any reference to the unlawful discharges of Viswambharan and Scaria. Respondent shall also be required to provide written notice of such expunctions and to inform them that Respondent's unlawful conduct will not be used as a basis for future personnel actions concerning them. *Sterling Sugars*, 261 NLRB 472 (1982).

On May 22, 1984, during the second day of this hearing, William Perry, who appeared on behalf of Local 6, was ordered to leave the hearing because he engaged in gross disrespectful conduct demeaning to the court and the judicial process. During the cross-examination of Scaria, Respondent Attorney Gibbons, in connection with the issue of the so-called bad words allegedly used by Scaria, asked Scaria, "Is it offensive in Hindu to refer to somebody as a person who fucks his mother?" Both the General Counsel and counsel for the discriminatees objected. Gibbons replied: "That is the comment that Ms. Gajte [sic] will testify was made to her by Mr. Scaria on September 24th, 1982." I then replied that it was my clear recollection based on the testimony of Gururahan that the nature of the "bad words" was never disclosed by Ghate prior to Respondent's suspension of Scaria and was about to sustain the objection when Perry interrupted and the following exchange ensued:

> MR. PERRY: That's\kind of confusing. I don't know. I don't understand. Ms. Gajte [sic] was supposed to say that she's going to fuck her mother. I thought she's a female—
>
> MR. GIBBONS: I object to this.
>
> MR. PERRY: He's objecting to it? He raised the damn thing.
>
> JUDGE EDELMAN: Mr. Perry—
>
> MR. PERRY: I mean where—
>
> JUDGE EDELMAN: One second, please. Allegedly this is what Mr. Scaria said. There is an objection and I am attempting to sustain the objection because—
>
> MR. PERRY: The question was not posed, your Honor, "Did you say this?" Is it offensive? It's offensive in any language.
>
> JUDGE EDELMAN: Well, the issue is—
>
> MR. GIBBONS: I'll take that as a stipulation.
>
> MR. PERRY: Well, I will take that as a stipulation—
>
> JUDGE EDELMAN: Excuse me.
>
> MR. PERRY: If that's what Mr. Gibbons always does, screws his mother, I will take that as a stipulation.
>
> MR. GIBBONS: I am not going to put [up] with this.
>
> JUDGE EDELMAN: I'm not going to put up with it either, Mr. Perry and if we have it again you're going to be leaving.[11]

A few minutes later Perry objected to the turning over to Gibbons of an affidavit submitted by Scaria in a prior related case. Gibbons was cross-examining Scaria at the time. After considerable discussion during which time Perry was permitted to state his position, I ruled Gibbons was entitled to the affidavit for purposes of cross-examination. The following exchange ensued:

> JUDGE EDELMAN: My ruling is that he's entitled to any statement given in whatever case relating to his direct testimony. I overrule your objection.
>
> MR. PERRY: Your Honor, you didn't even hear his direct testimony. Your Honor said yesterday that he can get any statements. That's what your Honor said! You didn't even hear his testimony yet. And you already made a ruling!
>
> JUDGE EDELMAN: Mr. Perry, I've made my ruling. Please sit down.
>
> MR. PERRY: Don't order me! I'm not finished yet!
>
> JUDGE EDELMAN: I said please. You are finished.[12]

A few minutes later Gibbons asked Scaria a question and Perry objected. I overruled the objection and the following exchange ensued:

> JUDGE EDELMAN: Overruled. Go ahead.
>
> MR. PERRY: (To the witness) If you don't remember, you don't have to answer.
>
> MR. GIBBONS: I object to Mr. Perry coaching the witness while he's testifying.
>
> JUDGE EDELMAN: Mr. Perry, it's not your province to do that. If you want to request that I instruct him, you may do so.
>
> MR. PERRY: When I request of your Honor, I am falling on deaf ears, with all due respect.

[11] Tr. 331–332A.

[12] Tr. 348.

best copy available

JUDGE EDELMAN: Mr. Perry, one more remark like that and you will not be falling on deaf ears—you will be out of this room.

MR. PERRY: You personally going to throw me out?

JUDGE EDELMAN: No. I'm going to order you out. As a matter of fact, Mr. Perry, leave this room.

MR. PERRY: Good. Good day. And let the record reflect that I am being asked to leave and I am being denied due process of the law.

JUDGE EDELMAN: You are not being asked. You are being ordered.

MR. PERRY: Fuck you!

JUDGE EDELMAN: Let the record indicate that.

MR. PERRY: I think you must be taking money too.

JUDGE EDELMAN: The record has indicated that. Good day.[13]

[13] Tr. 360 and 361.

While Perry is not an attorney, he invariably represents Local 6 which has been involved in extensive Board litigation over the years. *Seaport Manor*, supra; *State Bank of India*, 229 NLRB 838; *American Geri-Care*, 258 NLRB 1116 (1981); *Port Chester Nursing Home*, 269 NLRB 150 (1984). An examination of the record herein, and of other records in cases involving Local 6, indicates that Perry is very knowledgeable about the Board's Rules and the Federal Rules of Evidence. He certainly knows how a representative appearing before the Board is supposed to conduct oneself. I consider his conduct, described above, to be outrageous and demeaning to the Board's process. Accordingly, I recommend that the Board in its decision strongly censure Perry and/or take other appropriate action.

[Recommended Order omitted from publication.]

K & M Electronics, Inc. *and* General Teamsters, Chauffeurs, Warehousemen & Helpers, Building Materials, Heavy and Highway Construction Employees, Local Union #404, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 1–CA–23014 and 1–CA–23030

19 March 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 18 March 1986 Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, and to adopt the recommended Order[2] as modified.

We agree with the judge that the Respondent violated the Act by prohibiting employees Lemoine and Csekovsky from soliciting employee signatures on a union-prepared petition dealing with toxic substances during their breaktime. The General Counsel excepts to the judge's failure to find that the Respondent also violated the Act by discriminatorily enforcing its no-solicitation rule. We find merit in this exception.

The record shows that the Respondent tolerated a wide variety of solicitation activities without imposing discipline on any employee involved in those activities. Gerald Fouche, the Respondent's production manager, testified that the employees operate a weekly numbers pool, with employees buying a $1 ticket entitling them to a chance to win the money collected if their number is drawn. No discipline has been imposed on employees participating in the pool and Fouche himself has purchased tickets.

Linda Csekovsky testified without contradiction that it seemed to her as if there was always some type of solicitation going on. She specifically mentioned, in addition to the weekly numbers pool, that employees solicited signatures for birthday and condolence cards, and circulated mail-order catalogues for various items. Contributions to charitable causes were also solicited and the employees held a raffle at Christmas. Csekovsky testified that many of these activities were conducted during the employees' working time and that at least one supervisor, Nicole Twiss, not only knew of the solicitation activities but also participated in them. We conclude, by allowing the above-described types of solicitation to take place while prohibiting employees Lemoine and Csekovsky from soliciting signatures on a union-prepared petition, the Respondent has discriminatorily applied its no-solicitation rule in violation of Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, K & M Electronics, Inc., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraphs accordingly.

"(c) Discriminatorily enforcing its no-solicitation rule."

2. Substitute the following for paragraph 2(a).

"(a) Offer Linda Csekovsky and Dorothy Lemoine immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision."

---

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find that on the particular facts of this case, the conduct for which Dorothy Lemoine was disciplined, using threatening and profane language to her supervisors, was not protected even assuming *arguendo* that she was engaged in concerted activity.

The General Counsel excepted to the judge's failure to find that Twiss' statement that "you girls would have to pay the consequences for trying to get the Union in here" violated Sec. 8(a)(1) of the Act. We find this statement to be violative of Sec. 8(a)(1) as a threat of unspecified reprisals. No additional remedy is necessary.

The General Counsel moves to correct two inadvertent errors of the judge. The motion is granted. Thus, at fn. 28 of his decision, the judge referred to G.C. Exh. "71." The correct exhibit number is "7." Also, in the sixth paragraph of sec. 4,b,3 of his decision the judge referred to "Cousineau's" recent warnings. The correct reference is to "Lemoine's."

[2] The General Counsel seeks a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of the case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

We shall modify par. 2(a) of the judge's recommended Order to conform his reinstatement language to that customarily used by the Board.

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, coerce, or restrain you in the exercise of your right to form, join, or assist General Teamsters, Chauffeurs, Warehousemen & Helpers, Building Materials, Heavy and Highway Construction Employees, Local Union #404, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by threatening reprisals, including plant closure, in retaliation for union activities.

WE WILL NOT preclude you from engaging in solicitation protected by Section 7 of the Act on nonworking time.

WE WILL NOT apply our no-solicitation rule in a discriminatory manner.

WE WILL NOT discourage you from joining or assisting the above-named, or any other, labor organization by discharging you or otherwise discriminating against you with respect to your wages, hours, or terms, conditions, or tenure of employment.

WE WILL NOT discourage you from engaging in concerted protected activity under Section 7 of the Act by issuing formal warnings, or in any other manner discriminating with respect to your wages, hours, or any other terms or conditions or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Linda Csekovsky and Dorothy Lemoine immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits they may have suffered by reason of our discrimination against them, less any net interim earnings, plus interest.

WE WILL notify Linda Csekovsky and Dorothy Lemoine that we have removed from our files all reference to both an oral warning issued to them concerning their circulation of a hazardous materials petition and their discharges, notifying them specifically that this has been done and that these unlawful disciplinary actions will in no way be used against them in the future.

K & M ELECTRONICS, INC.

Avrom Herbster, Esq., for the General Counsel.
Dennis P. Powers, Consultant (Sheridan & Associates, Inc.), of Holyoke, Massachusetts, and *Albert R. Mason*, of West Springfield, Massachusetts, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This proceeding was heard in Springfield, Massachusetts, on 18, 19, and 20 November 1985, on an original unfair labor practice charge filed 28 February 1985, and a consolidated complaint issued 4 September 1985, alleging that K & M Electronics, Inc. (Respondent) independently violated Section 8(a)(1) of the Act by imposition of unlawful restrictions on union activity and threats of unspecified reprisals, as well as plant closure. The complaint further alleged that Respondent violated Section 8(a)(3) and (1) of the Act by issuing disciplinary warnings to employees Linda Csekovsky and Dorothy Lemoine, by suspending and then discharging them, and by imposing more onerous conditions of work in retaliation for activity on behalf of the Union.[1] In its duly filed answer Respondent denied that any unfair practices were committed. At the close of the hearing, briefs were filed on behalf of the General Counsel and Respondent.

On the entire record in this proceeding, including consideration of the posthearing briefs, and my opportunity directly to observe the witnesses while testifying and their demeanor,[2] it is found as follows

[1] At the hearing allegations of discrimination pertaining to Stephen Miller were deleted from the complaint pursuant to an amicable adjustment.

[2] Credibility rulings are based on demeanor, context, and probability. As shall be seen, from time to time objective rationale is offered in support thereof. This should not be construed, however, as discounting the firsthand impressions gained from my presence in the courtroom and my opportunity to observe the witnesses directly. Moreover, it is not my intention to lather, in this decision, each and every testimonial item and, accordingly, testimony, whether or not contradicted, is to be taken as rejected to the extent that it is irreconcilable with expressly credited findings and ultimate conclusions made herein.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with a place of business in West Springfield, Massachusetts, from which it is engaged in the manufacture of high voltage miniature electronic components and cable interconnect systems. During the calendar year ending April 1985, a representative period, Respondent in the course of its operations sold and shipped from its facility products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Massachusetts, and purchased and received at that facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. The complaint alleges, the answer admits, and it is found that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and it is found that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

The issues in this case are essentially factual. Respondent's production and maintenance employees have no history of collective bargaining. An initial organization campaign was waged among them beginning in late winter 1985. Pursuant to a petition filed in Case 1-RC-18384, an election was held on 28 March 1985.[3] The Union was rejected by a narrow margin; 168 voted for representation, 170 against, and 2 cast nondeterminative challenged ballots. No objections were filed.

The allegations of coercion and discrimination draw their essence from treatment of employees Linda Csekovsky and Dorothy Lemoine, both prior to and after the election, during the period February through June 1985. Both were good workers, having enjoyed an employment record that demonstrated quality output at high levels of productivity. They also were key supporters of the Union. Their discharges, some 3 months after the election, give rise to the issue of greatest remedial concern in this proceeding.

B. *Concluding Findings*

1. The right-to-know petition

Apparently in early 1985 Respondent's employees received training, as required by state law, with respect to toxic or hazardous substances. The quality of this training was subsequently questioned by employees. With support of the Union a petition was prepared through which employees were to express their objections.[4] Signatures were to be obtained by teams of two employees in each department, who would solicit coworkers.

The alleged discriminatees, Csekovsky and Lemoine, worked in the prep department. Their supervisor was Nicole Twiss. Csekovsky and Lemoine were the team responsible for circulation of the petition in Twiss' department. Twiss had been among management representatives who provided the training required by the hazardous substance program. Accordingly, her role therein was subject to attack by the petition.

In late February Lemoine and Csekovsky, during the morning break, showed that document to a coworker. As the coworker read the petition, Twiss intervened stating, "[T]hat cannot be allowed." Lemoine argued that 3 minutes remained on the break, whereupon Twiss admonished, "[T]his cannot be done in the prep department."

Approximately 10 minutes after returning to their work stations, Csekovsky and Lemoine were summond to the office of Twiss, where they were told that the petition in question could not be distributed on company time. Twiss produced a copy of the employee handbook, referring the employees to the following rule that she had highlighted in yellow:

> 2. No employee may distribute, post, or circulate any leaflets, circulars, pamphlets, objects or any other material during his or her working time or during the working time of any other employee to whom the material is directed. Employees may not distribute literature at any time in any working area of the Company.[5]

When the employees again observed that they had not solicited signatures on company time, but did so on break, Twiss told them that such activity was barred on company property, unless pursued in the cafeteria.

The General Counsel does not argue that the rule set forth in Respondent's handbook is presumptively unlawful. Rather, it is the General Counsel's premise that Twiss implemented an overly broad application by subjecting what clearly appears to have been employee "solicitation," to the more restrictive rules governing "distribution."

The factual issues are limited. The account of Twiss does not contradict the testimony of Csekovsky and Lemoine that the solicitation occurred during a break.[6] Moreover, Respondent does not seriously contest the fact that circulation of the petition, challenging safety and health conditions on the job, was protected by Section 7 of the Act. Accordingly, undisputed facts show that Twiss informed the employees that such conduct was prohibited in working areas, an expression that conveyed clearly that the prohibition remained in force even when the conduct was pursued on breaktime. This amounted to an unlawful intrusion on statutory rights. As recently stated by the Board in *National Semiconductor Corp.*, 272 NLRB 973, 974 fn. 6 (1984):

---

[3] Unless otherwise indicated all dates refer to 1985.

[4] See G.C. Exh. 15.

[5] See R. Exh. 3, p. 17.

[6] To the extent that Respondent contends otherwise, its position is not confirmed by my reading of the record.

> [A] rule prohibiting solicitation on employees' own time is presumptively invalid.
>
> [C]irculation of the petition constitutes solicitation, not distribution. We see no difference between seeking signatures on a petition rather than an authorization card, which the Board has long held to constitute solicitation.

Accordingly, by the extension of the no-distribution rule to limit *solicitation* during break periods, without evidence that such a broadened limitation was justified by special circumstances, Respondent violated Section 8(a)(1) of the Act.[7] See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

In consequence of this same transaction, the complaint also alleged that Respondent violated Section 8(a)(3) and (1) of the Act through issuance of disciplinary warnings to Csekovsky and Lemoine. This allegation is subject to a conflict in testimony. Both Lemoine and Csekovsky testified that Twiss closed the aforementioned meeting by informing the employees that she was giving them a verbal warning, and that the next time they would get a written warning. Twiss denied issuing any form of disciplinary warning on the occasion in question. She admits, however, to preparing a written account of the events of 26 February that recited as follows:

> Dottie Lemoine . . . and Linda Chekovsky [sic] . . . were over by Joyce Robins asking her to sign a petition at end of break 9:30 in prep area. I told them both at that time that break was over, to go to work. I called them in my office a few minutes later and told them [Linda & Dottie] that they could not solicit, ask people to sign things pass out anything on Co. time, or in any company work area. That this could only be done on their time, in cafeteria, and a written warning could follow. Told them to read the K&M employee hand-book. Dottie got quite verbal and said she could do that meaning she could have people sign . . . in work-area as long as she was on her time. I then went & made a copy of the page [17] in K&M hand book [sic], highlited [sic] it, and gave them each a copy.
>
> N. Twiss[8]

According to Twiss, she retained this written record of the incident in her desk, considered it a personal memorandum, and not part of the disciplinary record or file of either Lemoine or Csekovsky.[9] In any event, that document on its face confirms the testimony that the employees were told "a written warning would follow." Considering the fact that under Respondent's progressive system of discipline, a written warning would necessarily follow a verbal one, at the very least, Csekovsky and Lemoine could rightfully assume that an oral warning was intended. Beyond that, however, when their testimony is weighed in context of Respondent's progressive disciplinary system, they are entitled to the benefit of any doubt. Based on their credited testimony, it is found that Respondent violated Section 8(a)(3) and (1) by issuing an oral warning because Csekovsky and Lemoine, during a break, had solicited a signature to a safety petition, conduct that is protected by Section 7 of the Act.

2. Threats of reprisal

Supervisor Twiss and Csekovsky often drove to work together. Prior to the advent of the Union, they were on friendly terms, having shared trips to the laundromat and shopped together. According to Csekovsky, after circulation of the hazardous materials petition, Twiss changed her attitude toward Csekovsky. A week or so later, noticing that Twiss had acted coldly toward her, Csekovsky asked Twiss if it would be better if she got a ride with someone else. Twiss expressed that it would be, adding that she never thought that Csekovsky would turn out to be a "back stabber." When Csekovsky asked what Twiss meant, the latter explained, ". . . you passed out that chemical petition knowing damn well that I was in charge of it, and you made me look like a jack-ass and I won't forgive you for that." When Csekovsky attempted to explain that her belief about the lack of adequate training was not something that she held individually, but one commonly shared among employees, Twiss stated, ". . . that is all right . . . I don't forget people that stab me in the back." Twiss' attention next turned to the Union. She told Csekovsky that a union had put her prior employer, TRW, out of business and that if a union came in at Respondent, the employees "would have to pay the consequence just like the employees at TRW," adding that "Mr. Mitchell would shut the plant down before he would allow a union in there."

The above was undenied. Based on Csekovsky's credited account, it is concluded that Respondent, through Twiss, violated Section 8(a)(1) of the Act by the threat implicit in her unwillingness to forget "back stabbers" or, in other words, those who engage in activity protected by the Act, and by her references to undefined retaliation and plant closure in the event of unionization.

---

[7] The General Counsel alternatively contends that even if Twiss had engaged in a legitimate application of the rule, the rule itself would have been discriminatorily enforced in view of Respondent's permissive stance with respect to other forms of solicitation. This view is premised on testimony by Csekovsky that in the presence of Supervisor Twiss, and with her knowledge, employees during working time, with impunity, had from time to time contacted coworkers for the purpose of conducting raffles, sending condolence or sympathy cards, selling candy for charitable causes, circulating mail-order catalogues, and soliciting participation in a gambling pool. The testimony of Csekovsky in this regard fails to convince me that the aberrations described, even if condoned by a low-level supervisor, were sufficiently widespread and pervasive to require a statutory application that would require management to permit union activity during working hours in working areas on pain of violating the Act should it make any attempt to regulate or curtail such conduct. See, e.g., *Famous-Barr Co.*, 174 NLRB 770 (1969); *Emerson Electric Co.*, 187 NLRB 294 fn. 2 (1970); *Serv-Air, Inc.*, 175 NLRB 801 (1969); and *Atkins Pickle Co.*, 181 NLRB 935 (1970).

[8] See G.C. Exh. 13.

[9] Respondent maintains a progressive system of discipline. As described by Gerald Fouche, Respondent's production manager, dual systems for culpable or nonculpable offenses exist, with each triggered by a verbal warning, then a written warning, followed by suspension and discharge.

3. The imposition of more onerous conditions of work

The General Counsel contends that about 4 April Respondent, through Supervisor Twiss, imposed more onerous conditions of work as a reprisal for union activity among employees in her department, and that Respondent thereby violated Section 8(a)(3) and (1) of the Act. This claim of discrimination stands essentially on the testimony of Csekovsky and Lemoine. Of major import to the issue is a segment of Respondent's published handbook, which states as follows:

> 4. No employee may leave his or her assigned work area during working time without the specific approval of the Supervisor.[10]

Twiss admitted that on 4 April she discussed the above rule with employees in her department. This was only a week after the Union had failed, albeit narrowly, to achieve majority designation. Employees at the time were reminded, according to Twiss, that they were to inform her before leaving their work area.

The General Counsel's contention rests on evidence that this was a "turn-about" from preelection conditions. Thus, Csekovsky testified that prior to the election, the above rule was not enforced with respect to trips to the restroom and to the cafeteria to obtain coffee. Most critical, however, to the assessment of discrimination is Csekovsky's further testimony that on 4 April, when Twiss came out of her office to discuss the rules, she called the women in the prep department together, stating, "OK, you girls didn't like the way things were done before . . . now we are going to go by the book."[11] Twiss assertedly added, "nobody was to leave the department without asking permission, and [employees] could not go up for coffee any more . . . ."

Lemoine testified she never had to ask permission to go to the bathroom previously,[12] adding that prior to the election she would take orders for coffee and snacks from other girls in the department and, with another girl, would repair to the cafeteria, taking 10 to 15 minutes, each day. Twiss, herself, according to Lemoine, had participated in this practice. Lemoine summed up the atmosphere created by Twiss on 4 April in the following terms ". . . in other words, you couldn't leave the department without asking permission."

Twiss testified that on 4 April she went to the separate work areas of the employees in her department, and talked to them in groups of three and four. She claims to have reminded them of the abuse of rules governing their failure to notify her when going to the bathroom or using the phones, and their eating at their work stations. She denied telling the employees that they had to ask permission to leave the department and, on the other hand, claims to have simply informed them that they had to let her know where they were going when they left. Twiss admittedly told employees that the practice described by Lemoine, whereby employees would take orders from coworkers and leave their work area to get coffee and snacks from the cafeteria, would no longer be permitted.[13] Instead, employees were told that if they wished to obtain a cup of coffee themselves, on the way back from the ladies' room, or after letting Twiss know where they were going, they could do so.

At the same time, Production Manager Gerald Fouche credibly testified that employee absences from work areas had been a recurrent problem in the plant. He asserted further that difficulties in policing and enforcing the preestablished rule intensified in March 1985 when a layoff eliminated group leaders, leaving supervisors, such as Twiss, to assume full responsibility for monitoring employees who leave their work area for one reason or another. Consistent therewith, Twiss testified that her action on 4 April was provoked by abuses that had come to her attention. Her testimony in this respect was perfectly plausible and is credited.[14]

On balance, the credible evidence merely establishes an attempt by Twiss on 4 April basically to admonish employees of their obligation to inform her when leaving the department. Although Csekovsky and Lemoine suggest that, during the period preceding the election, management was lax in this respect, it is difficult to imagine that a work rule of this type was ignored to the point of falling into abandon. Respondent's written restriction in this respect had been promulgated by the Company in advance of any union activity. Neither that rule, nor the reminders were atypical of demands routinely made on employees in an industrial setting. As a general proposition, restrictions on movement by production employees from their respective work stations are inherently necessary to the maintenance of plant discipline and efficiency. The effort by Twiss to this extent was perfectly legitimate and inoffensive to Section 7 rights. Twiss did, however, go beyond the published rules in curtailing the practice of "order taking," leaving employees to the task of obtaining coffee and snacks individually. Nonetheless,

[10] See R. Exh. 3, p. 17.

[11] Although undenied, the testimony imputing this remark to Twiss was uncorroborated. Lemoine's version of the meetings of 4 April was a little different from that of Csekovsky. The former averred that Twiss came out of her office with Terry Fouche, and called the girls together, stating: "No more going upstairs for coffees. No more going to the bathroom, and definitely no more using the phone." Csekovsky was not an impeccable witness. At times she seemed prone toward argumentation and a desire to present facts beyond her knowledge in a most prejudicial fashion. In this instance I did not believe her uncorroborated testimony. I think it more likely that the absence of contradiction in this respect was attributable to oversight, rather than indicative of any implied attestation to Csekovsky's veracity.

[12] As shall be seen, the next day Lemoine confronted Production Manager Gerald Fouche and Twiss, complaining bitterly about "any" requirement that she ask permission to go to the bathroom. In the process, Lemoine admittedly was corrected by Fouche who stated, "calm down, Dottie . . . you don't have to ask to go to the bathroom . . . just come out, and ask, could you please leave the department, when you need to go." With this clarification, Lemoine acknowledged that she felt that this was "no big deal" and left.

[13] Twiss admitted that this admonition was not supported by anything in Respondent's established rules.

[14] Moreover, I am convinced that employees merely were told that they would have to inform Twiss about their whereabouts when leaving the work area. Insofar as Csekovsky and Lemoine testified that employees were told that they would have to obtain permission before going to the bathroom, and no longer could obtain coffee from the cafeteria, these references were considered unreliable, as based on exaggerated interpretation of what was said, rather than the words actually used by Twiss. In this instance, the testimony of Twiss was preferred.

I am unpersuaded by the General Counsel's claim that this latter innovation, isolated as it was, amounted to a reprisal for union activity. From the fact that Lemoine and Csekovsky were known union sympathizers, it does not follow, logically, that Twiss would incur the wrath of an entire department after defeat of the Union in a close election, by taking a step offending all 26 employees in her department, irrespective of their sentiment on the issue of representation. In the circumstances, it is concluded that Twiss' course of action on 4 April was a legitimate exercise of the supervisory function and not based on considerations other than a desire to maintain discipline in her department as dictated by published rules and her own judgment. The 8(a)(3) and (1) allegations in this respect will be dismissed.

4. The warnings, suspensions, and discharges

a. *The discharge of Csekovsky*

Csekovsky was terminated on 21 June 1985. Prior thereto, she recently had survived deep layoffs, as an employee of more than 2 years in a department that had experienced a high degree of turnover. She was regarded by management as an excellent employee, with a good record in the areas of productivity and quality.[15] She was a known union supporter. Her involvement in the organization campaign was manifested by attendance at union meetings, brandishment of union buttons, and distribution of union authorization cards. It will be recalled that she, together with Lemoine, distributed a petition that originated with the Union and was critical of the Company's approach to educating employees concerning hazardous materials, an activity that provoked Twiss, her supervisor, to refer to her as a "back stabber," an accusation that Twiss proclaimed would not soon be forgotten.

In late May, Csekovsky sustained an on-the-job injury, losing 3 weeks' work. She returned on 17 June. Following her return, she spent most of her time performing prep-work on "shot gun" cables. On the third day, 19 June, Csekovsky spent the entire day in this fashion. Events that day, according to Respondent's proffer, gave rise to the cause of her discharge.

Central to the assigned reason for the discharge is the so-called timesheet prepared by Csekovsky at the end of that day. Routinely, such a document is completed by employees at termination of their shift. Each worker is expected to enter the daily units produced. The final count was often amended by the employee who would strike the original entry and substitute a new figure.[16] Csekovsky, in accounting for her production on 19 June, twice corrected her entries, thus, recording three different counts of her output. These adjustments on her timesheet triggered her suspension and discharge on the ground that they were pursuant to a *deliberate* attempt on the part of Csekovsky to falsify the output finally reflected on the document.

According to Twiss, the events leading to the termination of Csekovsky unfolded early in the morning on 20 June. Twiss claims to have reported for work at approximately 6 a.m. that morning, 1 hour before the scheduled appearance of employees in her department. In the process of an apparently routine review of the 19 June timesheets, she noticed that Csekovsky "scratched off a couple of times on her count," and hence assumed that Csekovsky had a problem. For this reason, according to Twiss, she elected to seek out and physically count the units produced by Csekovsky the previous day.[17]

Accordingly to Twiss, she and Robin Gagne, between 6 and 6:20 a.m., made the count. Twiss claims to have examined the previous day's output that could be located in the prep department and the crimping department, the next step in the production process. She claims to have checked production tickets attached to finished bundles of shotgun cables, finding cards bearing Csekovsky's production number on only 38 pieces. According to Twiss, rework was also checked, with none bearing evidence that it had been worked by Csekovsky.

Twiss, who professed to have had other problems with Csekovsky's performance on 19 June, after the check on 20 June, at approximately 7:15 a.m., met with Csekovsky. According to Csekovsky in the course of this conversation she was lectured by Twiss about her behavior the previous day. When Twiss mentioned that her count was off, Csekovsky claims to have responded with a denial, indicating that she was conscientious in making the count, that she had done so three times and was certain that the figure 45 was accurate. When Twiss indicated that she had come up with 38, Csekovsky denied that that was possible. Csekovsky claims to have requested that she and Twiss go out and again count the cables. Twiss responded, "No, it is not necessary."[18] According

[15] In his brief, counsel for the Respondent asserts that Csekovsky was not an "admirable worker," in that "she had to be disciplined for attendance problems . . . ." It is true that some time back Csekovsky had been called down in this respect. However, this was the only negative mark on an otherwise highly positive employment record. According to Fouche, who allegedly made the decision to discharge Csekovsky, the latter had made "good progress" in correcting the attendance problem prior to her discharge. Indeed, Fouche related that he considered Csekovsky to be "an excellent employee."

[16] There was nothing sinister in the practice of changing output tallys in this fashion. Blank worksheets are available, affording employees the option of discarding a timesheet with any errors, while replacing it with a clean, new sheet. The practice of correcting miscounts on the sheet itself or obtaining a new copy would seem to be a matter of employee preference and convenience.

[17] Twiss testified that in her experience she would find corrections are made by an employee on at least one timesheet per day. She conceded that such revisions would not always trigger an actual count of pieces produced. She explains that Csekovsky's case was unique in that there were two crossouts and three entries indicating that Csekovsky was not sure what she had produced. Significantly, Twiss maintained that Csekovsky's first entry looked like 70, the second 50, compared with the final entry of 45. This reading of the timesheet by Twiss, later shared by Production Manager Fouche, struck as so unfair as to stand among numerous questions concerning the genuine nature of the defense. For, having examined the original document, the figure originally entered by Csekovsky was obliterated beyond recognition; it could have been a seven, a five, or a four. No one could be sure and the suggestion otherwise reflected an argumentative posture, lacking in objectivity.

[18] Respondent's brief states with respect to the above that "Ms. Twiss denies that such a request was made." (See Respondent's posthearing brief, p. 17, item 5.) On my reading of the testimony, no such denial appears. I believed Csekovsky in this respect. The refusal to permit such a recount is another factor affecting the bona fide nature of management's action in her case. Obviously, throughout a given workday, product is in a fluid state and an attempt, the next day, to locate the entirety of an employee's output, particularly when unassisted by the producer, would

Continued

to uncontroverted testimony by Csekovsky, she then reminded Twiss that problems between them had not developed until her involvement with the Union. Twiss next reiterated her prior warning, stating: "You girls would have to pay the consequences for trying to get the Union in here."[19]

Twiss next prepared a reprimand concerning Csekovsky's alleged behavior on 19 June that stated:

> Shotgun cables—wrote 45 pcs. on time sheet—actual 38 according to tickets—talks *too* much, excessive, slows other people down. Made her move to another table.—
>
> Also Shotguns when I checked on . . . 1 [inch] strip was way off—had to re-measure & glue them.
>
> Signature Twiss[s]
> Written warning 6/20/84[20]

Twiss next attempted to clear the reprimand with Fouche, who, in turn, submitted it for review by the personnel department. Both Twiss and Fouche concede that prior to the submission of the proposed warning to personnel,[21] neither had considered the possibility that Csekovsky might have deliberately falsified her timesheet, and hence "discharge" was not considered by them. Indeed, the reason they gave for the request for reprimand was grounded solely on "poor workmanship."

Gail Pike, Respondent's personnel manager, reviewed the request and recommended, inter alia, that a possible falsification of company documents be pursued.[22] After Fouche conferred with personnel, he elected to suspend Csekovsky "pending investigation of falsification of records." Twiss testified that she learned of his intent "sometime before 9 o'clock" when Fouche called her from the personnel office. He at that time made his initial request to see a copy of the timesheet and informed Twiss that "we were going to suspend Linda for falsification, pending further investigaton."

Fouche apparently made the decision to discharge the next day. This discharge was based on an investigation assertedly consisting of examination of Csekovsky's previous records, her timesheet of 19 June, and Fouche's further conferring with Twiss and Robin Gagne.[23] Fouche failed to direct a double check of the count allegedly made by Gagne and Twiss, nor was there any other effort to verify the accuracy of that count. Csekovsky's coworkers were not interviewed and it does not appear that a single item of additional evidence was developed. The conclusion that Csekovsky had deliberately falsified rested on no more than what appeared in Twiss' original memo. Yet, interestingly enough, neither Twiss nor Fouche viewed those facts as suggesting deliberate falsification at the time the request for reprimand was forwarded to personnel.

In the case of Csekovsky, the General Counsel has successfully carried the initial burden under *Wright Line*.[24] Csekovsky was one of the more active proponents of the Union. Her support was openly manifested and known to both Twiss and Fouche. Her discharge came 3 months after a close election in which the Union narrowly missed designation, and followed unlawful warnings issued by Supervisor Twiss in response to Csekovsky's attempt to engage in activity protected by the Act as well as a reminder as late as 20 June that those responsible for union organization would have to face the consequences. In these circumstances, the evidence convincingly establishes that protected conduct was at least "a" motivating factor in the Employer's decision to eliminate this union protagonist.

Under established precedent the inference arising from the General Counsel's prima facie case is subject to rebuttal only by evidence that persuades "by a preponderance . . . that the same action would have taken place even in the absence of union activity." See *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *Centre Property Management*, 274 NLRB 190 (1985). Respondent has failed to meet this burden. Instead, the defense from corner to corner convincingly demonstrates that "the asserted justification is a sham in that the . . . circumstance advance by the employer did not exist." 251 NLRB at 1084; *NLRB v. Charles Batchelder Co.*, 646 F.2d 33, 39 (2d Cir. 1981); *Pearcy Co. v. NLRB*, 648 F.2d 460, 462 (7th Cir. 1981).

Falsification is a serious allegation that not only is a dischargable offense, but one that carries a career-damaging connotation of criminal behavior. Even the above-average employee's future employment opportunities would be narrowed by such a blemish. Fouche himself would decline to hire such an individual. Yet, Csekovsky, who was not reputed to be untrustworthy or dishonest, was terminated on this ground even though evidence of any intent on her part to mislead or to falsify was totally

---

seem a risky chore. On the other hand, a recount with the aid of the individual actually responsible for the production would enable explanation for any missing units, verification by the affected employee, and a far more reliable basis for sorting out any discrepancy. Twiss' posture in this respect was remarkably similar to the disinterest shown by other high level management officials in taking any steps that might lessen the justification for discharge of both Csekovsky and Lemoine.

[19] Despite disbelief of Csekovsky in other areas, in this respect, I believed her and accept her unrefuted testimony.

[20] See G.C. Exh. 9. Twiss' proposed warning itself included an important inaccuracy, which carelessly overstated the facts underlying her accusations against Csekovsky. Thus, contrary to the memo, Twiss conceded that she did not move Csekovsky to another table, but merely threatened to do so. The move was avoided because Csekovsky "kept her mouth shut." The inaccurate reference would naturally inflame, falsely, any problems attributable to Csekovsky, and raises questions about the dependability of Twiss' reports that day.

[21] Under Respondent's practice, to assure consistency requests for discipline are first cleared by the personnel department.

[22] Pike admitted at the time that she had no knowledge regarding whether any falsification within the meaning of Respondent's work rules had occurred. Insofar as appears, her suggestion was founded solely on the content of the proposed reprimand. Listed in the employees' handbook as a prohibited action is the following: "Falsifying any reports or records, including personnel, absence, sickness and production records." (R. Exh. 3, p. 46.)

[23] Insofar as can be ascertained, Fouche spoke with Gagne to confirm Twiss' report that the shotgun cables had been counted three times and that another department had been examined for tickets bearing Csekovsky's clock number. Gagne, herself, did not testify. There is no explanation of her presence at the plant between 6 and 6:20 a.m. on 19 June, well in advance of the start of the shift. On Twiss' own account it does not appear that the attempt to inventory Csekovsky's output of the previous day took an excessive amount of time.

[24] *Wright Line*, 251 NLRB 1083, 1089 (1980). *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

absent. At best, from all that Respondent knew an innocent error in tabulation had occurred. Moreover, Csekovsky's acknowledged record for high productivity, the absence of an incentive system, and the fact that the job she performed on 19 June was unrated were known to Fouche at the time of discharge, obscuring any assumption that she had something to gain.[25] Fouche, whose testimony in this area seemed defensive and of a shifting nature, himself related that there would be no need for a productive employee to conceal faulty production because faulty production occurs throughout the plant, is subject to certain tolerances, and hence only notorious offenders risk discipline on this basis.

The motive underlying the baseless accusation against Csekovsky was complemented by Fouche's so-called investigation. For, it represented too conspicuous an attempt to avoid delving into exculpatory areas that might detract from the serious charge leveled at Csekovsky. Gagne was the *only* employee he claimed to have interviewed. Although Csekovsky, by Respondent's own estimate, was an excellent worker, she was neither questioned nor offerred an opportunity to explain her actions or entries on the timesheet. In this regard Fouche departed from his own formula for conducting investigations. For by admission, he would talk to the employee involved "if there is something I don't understand or is not clear." As he put it:

> If it was not clear to me, based on the facts that were presented, whether an employee had done something or not, I would probably question the employee myself.

The accuracy of the severe cause under consideration in the case of Csekovsky could not have been clear to Fouche. For he admitted that there was no direct evidence of deliberate falsification. His own explication for his deduction that this, nevertheless, was the case, as set forth in the following colloquy with the General Counsel, firmly portrays the dubious foundation for his charges against Csekovsky:

> GENERAL COUNSEL: When you got General Counsel's Exhibit 11 [Csekovsky's 19 June timesheet] did you make a determination that there had been a falsification of records?
>
> MR. FOUCHE: I was of the opinion that there certainly was a strong possibility of it when I saw that. Yes.
>
> Q. And it was something on the sheet that made you believe that there was a falsification of records? right?
>
> A. It was a combination of that timesheet and my knowledge of Linda as a worker.
>
> Q. What was your knowledge of Linda as a worker?
>
> A. I had found Linda to be a very capable person. In fact, on some of her employee evaluations you can see where I praised her very highly. If you understand the cable that we're talking about, its uniqueness and it's totally different method of bundling, as opposed to other cables that we produce. It's very unlikely, in my opinion, that Linda could make a mistake unknowingly like this. There's nothing else it could be than deliberate.

On this specious reasoning, a prounion employee with a good work record was terminated. At the time, Fouche must have known that the discrepancies on the timesheet might have been attributable to a miscount on the part of Csekovsky, or Twiss, a number of factors that could have defeated the accuracy in Twiss' day-late, after-the-fact inventory.[26] Moreover, it is difficult to imagine how Fouche, in good faith, could have reasoned that the crossouts, the nature of the product, or the ability of the employee supported anything other than a *possible* innocent error.

On the basis of the totality of the credible evidence, the conclusion is inescapable that Fouche's assignment of an unfounded, yet gravely serious, cause for discharge might be explained only in terms of a crude, but transparent, attempt to overreach and contrive a passable ground for eliminating a known union supporter, and to give meaning to the Twiss warning of 20 June that union supporters "would have to face the consequences." Accordingly, in terminating Linda Csekovsky on 21 June 1985, Respondent has failed to show that this would have occurred absent Csekovsky's involvement in protected activity, and it is concluded that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

b. *The alleged discrimination against Dorothy Lemoine*

(1) Preliminary statement

Dorothy Lemoine was terminated on 27 June, a week after the discharge of Csekovsky. Like Csekovsky, she

[25] A "nonrated" job, under plant policy, would not have been factored into the efficiency data kept by Respondent and would in no sense influence Csekovsky's record. Production on such a job would not influence earnings. Finally, conjecture that she had something to gain is obscured further by the fact that Csekovsky's overall production record was so good that Twiss herself would have been surprised if Csekovsky had been concerned as to a short fall in output on 1 day.

[26] In furtherance of the defense, Fouche claims to have recalled that he had discharged another employee, Carlena Nicolas, on this very ground. Her case was plainly distinct from that of Csekovsky. Although Fouche insisted that he "equated the two cases," he later conceded that in the case of Csekovsky there was no direct evidence of intent to falsify, while in the case of Nicolas there was an eyewitness. Thus, Nicolas was observed by a coworker falsifying a production ticket by replacing the identifying number of the employee who actually produced the product with her own, thereby enhancing her own productivity profile at the expense of the actual producer. Unlike the timesheet, under no circumstances would an employee have a right to make an entry on someone else's production ticket and, indeed, it is difficult to conceive of circumstances whereby an employee would have any business even possessing a production ticket attached to another worker's output. In contrast with Csekovsky who was reputed to be an excellent employee with a high level of productivity, Nicolas had been under suspicion for some time by her supervisor because of a disparity between her recorded output and her work habits. She clearly had something to gain by overstating her production. On my evaluation, the incident involving Nicolas is more beneficial to the case-in-chief than the defense. For it evidences that Fouche should have been mindful of a form of chicanery by a coworker that could have caused a short fall in the actual count allegedly made by Twiss and Gagne on 20 June, namely, the substitution of a different clock number on the production tickets of Csekovsky.

was an excellent worker, and a key protagonist of the Union, having distributed union literature, passed out authorization cards, and worn T-shirts and other insignia demonstrating her desire for union representation. At the election held on 28 March, she officiated as an election observer on behalf of the Union. Lemoine, who served in the same department as Csekovsky, in late February was confronted by Supervisor Twiss and with Csekovsky, was unlawfully warned in consequence of her role in the employee protestation critical of the Company's hazardous material educational program. Prior to the events in issue here, management, admittedly, was fully mindful of Lemoine's prounion leanings.

Until the election, Lemoine's work record appeared to have been unblemished for a period of 18 months. Furthermore, the difficulties that prompted her discharge had nothing to do with her value as a productive and efficient worker who produced at levels of high quality.[27] Thus, the discipline under interdict of the instant complaint, including warnings and the discharge, all dealt with abusive behavior affecting her relations with others, a contradiction of Twiss' comment in Lemoine's most recent evaluation to the effect that: "she gets along well with everyone."[28]

(2) The warnings

As will be recalled, Supervisor Twiss spoke to employees on 4 April concerning restrictions on their right to leave their work area. Lemoine understood, albeit mistakenly, that these restrictions required the employees to obtain permission before going to the restroom. Lemoine, who impressed me as a rambunctious and energetic sort, was disturbed. That same day, when she observed Fouche in the office of Twiss, she elected to confront them concerning what she perceived as a ridiculous change in policy. According to Fouche, Lemoine angrily entered the office, pointed her finger at Twiss, stating to the effect, "You son-of-a-bitch, now we have to get permission to go to the bathroom."[29]

Twiss was not examined regarding the specifics of what transpired. Though previously having heard Lemoine utter profanities, never before had she heard Lemoine swear at someone. Twiss did testify, however, that the warning issued to Lemoine in consequence of the incident was "because she was directing abusive language, at me, in anger."

In contrast, Lemoine denied directing the profanity toward Twiss. She claims that on entering the office, she stated, "Nicole, you know this is a son-of-a-bitch. I have to ask to go to the bathroom. I am not a child. I am not a kidnergarden [sic] kid. I am not going to ask to go to the god-dam [sic] bathroom."[30]

On 5 April, Lemoine was called to the office of Twiss. She was at that time given a written memorial of an oral reprimand based on her outburst of 4 April, which recited:[31]

> I am giving you this Verbal Reprimand as a result of your improper personal conduct on April 4, 1985 wherein, in the presence of the cable division manager, you directed profane and abusive language toward me, your supervisor, in direct violation of company rules regarding personal conduct.

Lemoine admits that she reacted, getting a little "uptight" and "very upset." First she accused Twiss of issuing the warning in consequence of Lemoine's union activity. Referring to the warning, she proclaimed to Twiss "this is a fucking big deal," and went on to inform Twiss that, "you people are trying to get rid of me one way or the other, and . . . the only way you can do it—[is] through my swearing." Lemoine admitted that as she was leaving the office she slammed the door, stating to Twiss, "you will get yours baby."

Prior to the end of the shift, Twiss told Lemoine that Fouche wanted to see her in his office. A counseling session ensued in which Fouche eventually asked Lemoine whether she knew why she was there. The latter responded as follows:

> It is something to do with . . . swearing in front of . . . Nicole Twiss. . . . I didn't swear at her. I swore at her, but always—when I swear, I always—I just swear. I don't swear directly at a person. It is in my conversation.

According to Lemoine she then indicated to Twiss that if she was upset, she would apologize.

On 9 April Twiss summoned Lemoine to her office, where she handed Lemoine a written warning, which in material part provided as follows:

> On Friday, April 5, 1985, you were issued a Verbal Reprimand for your "abusive language" and improper conduct on Thursday, April 4, 1985.
>
> When I, your Supervisor, Nicole Twiss, presented you with your verbal reprimand you stated to me:
>
> 1. That you didn't direct the abusive language at me.
> 2. That I was "playing fucking games."
> 3. That "you'll get yours baby."
> 4. You then left my office and slammed the door behind you.

After reading the warning, Lemoine reacted by stating "O[h], hey, that is great. . . . Thank you very much Nicky." She then left.[32]

---

[27] See G.C. Exh. 7.

[28] See G.C. Exh. 71.

[29] A segment of the daily calendar maintained by Fouche is in evidence. It shows an entry on the date in question to the effect that Lemoine did use the terms "You son-of-a-bitch." The notation also imputes to Lemoine a statement threatening to bring the Union back in a year if Fouche continued to apply the rules, regulations, and policies contained in K & M's employee handbook. (See G.C. Exh. 5.)

[30] Although basically Lemoine was regarded as the more truthful, in this instance I am willing to give Fouche and Twiss the benefit of the doubt. I believe that Lemoine during the incident was "out of control," and likely would have difficulty recalling her actions accurately.

[31] See G.C. Exh. 6.

[32] See R. Exh. 1. Lemoine claims that on entering the office of Twiss, she was susnicious, because she observed Fouche as well as an antiunion employee, Nellie Paine, standing nearby. Even if they were present and

Continued

The citations issued Lemoine on 5 and 9 April each carried the admonition that failure to correct the conduct in question and to meet all duties and responsibilities in the future would subject Lemoine "to further disciplinary action up to and including discharge."

The General Counsel's claim of discrimination with respect to the warnings centers on the argument that Respondent issued warnings to punish a strong union adherent "for conduct which Respondent had tolerated since Lemoine's employment began." Consistent therewith, the issuance of warnings to a staunchly prounion employee, who had acted as a union observer in a hotly contested election conducted only a few days earlier, desires close scrutiny. In this instance, however, the credible evidence substantiates actionable misconduct on the part of the employee and discipline tailored appropriately to the offense. Contrary to the General Counsel's insinuation, the warnings were not addressed merely to Lemoine's offbeat vocabulary, nor was their thrust to prevent her from cursing or to rid the plant of curse words. It is one thing for employees to curse playfully and in good humor with a coworker and, indeed, even a supervisor. Lemoine, however, a habitual exponent of the use of foul language, went too far when such language was employed in an attack on a management representative. There is no evidence that any supervisor had ever before condoned such an act. Nor does it appear that Lemoine in the past had been guilty of such disrespect. In short, the evidence does not disclose that Lemoine, or any other employee, had ever escaped discipline after a hostile assault on a supervisor, with or without the use of profanity. Respondent has demonstrated persuasively that the oral warning of 4 April and the written warning of 9 April would have been issued even if Lemoine had not engaged in activity protected by the Act. Accordingly, the allegation that Respondent violated Section 8(a)(3) and (1) of the Act in these particulars shall be dismissed.[33]

(3) The discharge

Lemoine, during the period preceding her termination, does not appear to have digressed from a work record that prompted Fouche's exhortation, prior to the advent of the Union, "Good job!! Keep it up."[34] Moreover, the discharge occurred shortly after Supervisor Twiss threatened that union supporters would have to bear "the consequences," and only a week after Lemoine's collaborator in the assertion of organizational rights, Csekovsky, was unlawfully discharged on pretextual grounds. In light of the predilections disclosed through that discharge, a powerful prima facia case of proscribed discrimination has been substantiated. In these circumstances, Respondent's explanation warrants close examination.

Respondent claims that Lemoine was discharged on the basis of alleged misconduct on her day off, while she was away from company premises on an excursion to the Bronx Zoo in New York City. The trip took place on 22 June. It was organized by employee Jeanne Briere, a cochairman of the Employer's social committee. Briere made the arrangements and collected the money for the trip, which was paid for fully by those attending. Company support for the trip was not forthcoming at the outset, and Briere could not even obtain permission to post a notice on plant premises. Hence, all publicity was handled by word of mouth. About 2 weeks before the scheduled trip, the Company informed employees that access to the K&M parking lot would be provided, enabling participants to meet the bus at the location, rather than at a local mall.[35]

Glenda Comeau of the quality control department was the only supervisor on the trip. On Monday, 24 June, Comeau informed Fouche that during the bus trip "Lemoine . . . was very loud and vulgar, and she was swearing in front of a bunch of little children and a couple of parents had voiced their opinion about it." Similar to his reaction in Csekovsky's case, Fouche initially was inert. His account of what transpired and his reaction is evident from the following colloquy with the General Counsel:

> MR. HERBSTER: How did you find out that . . . [Lemoine] . . . was allegedly involved in some conduct on that trip?
>
> MR. FOUCHE: In a routine walk through the plant, which I do very regularly. A QC superintendent stopped me and asked me if I had heard about the show that Dorothy had put on on the bus trip to the Bronx Zoo on Saturday.
>
> . . . .
>
> Q. And who was the QC supervisor you spoke to?
>
> A. Glenda Comeau.
>
> . . . .
>
> Q. What did you say?
>
> A. I said I had not.
>
> Q. What did she say?
>
> A. She said that it was something to the effect of being quite a show, that she was rowdy and obnoxious and really upsetting people.

---

even if Twiss departed from her usual practice of closing the door, the scenario depicted by Lemoine is not viewed as having any relevant bearing on the issue of motivation.

[33] There is no merit in the General Counsel's alternate contention that Lemoine's protestations concerning the change in work practices involved protected concerted activity, and therefore the *Thor Power* doctrine, 148 NLRB 1379 (1969), would insulate her from discipline for this outburst of "animal exuberance." Twiss' 4 April reminder to the employees concerning their responsibility on leaving their work area was supported by Respondent's published rules, and involved a legitimate exercise of supervisory discretion. Lemoine's protestations thereof were not shown to have been pursuant to authority conferred by coworkers, or part and parcel of any attempt to induce group action. She was neither a designated spokesperson, nor representative of any other employee. See *NLRB v. City Disposal System Co.*, 462 U.S. 822 (1984); *Schreiber Materials & Cartage Co.*, 268 NLRB 1457 (1984). Thus, under present Board standards, Lemoine's reaction to the change was individually pursued and lacked the essential element of "concertedness." See *Meyers Industries*, 268 NLRB 493 (1984).

[34] See G.C. Exh. 7.

[35] The Company claims that it "sponsored" the trip, a characterization that is somewhat debatable. Whatever the nature of its involvement, it is clear that access to its premises was provided, a gesture that would seemingly afford liability protection under the Company's insurance policies.

Q. Had you heard about anything like this before, that Dorothy Lemoine had engaged in this behavior?

A. No.

. . . .

Q. And what did you reply to Miss Comeau?

A. Only that I had not heard anything about it. She then asked me if there was anything I could do about it, because they were upset. I said at that time that I didn't think there was anything I could do about it, but if there was activity that went on that was that upsetting to them that I thought it prudent for her to at least report it to the personnel department, register a complaint. And then on second thought: "The social committee is really the party that was involved. And perhaps the complaint would better register with them."

Q. At this time did Comeau tell you what language was used and what behavior?

A. She mentioned—she quoted one statement that was made.

Q. She said it was the language that was used? That's what was objectionable? Correct?

A. She stated that her language and behavior was objectionable.

Q. What about her behavior did Miss Comeau say was objectionable?

A. She gave me one example of Dorothy giving an obscene gesture to another employee.

Q. And you said you didn't think there was anything you could do about it? Correct?

A. At that time that's correct.

Q. This is the incident that ultimately got Dorothy Lemoine discharged? Correct?

A. That's correct.

According to Comeau, on 24 June, she also conversed with two others who were on the trip, Carole Cousineau and Grace Desnoyers, both of whom worked as clerks in the personnel department. In consequence, Comeau and Desnoyers prepared a letter dated 25 June for submission to the social committee. It set forth as follows:[36]

> Employee Dorothy Lemoine #963 fellow passenger on the K & M bus trip to the Bronx Zoo, N.Y. on June 22, 1985 used foul and abusive language to a point where children on the bus were offended. Children on the bus ranged from 2 1/2 to over 16 years of age.
>
> Complaints were made to several of the parents by the older children causing the parents to be very uncomfortable. This complaint is enlarged because we, the undersigned as concerned parents feel our children should not be subjected to this kind of atmosphere.
>
> We feel the social committee is not responsible for any persons action during K & M social activities. But should make people aware that rules should be followed on bus trips and other K & M functions, whether at K & M or any other location. Please note attached copy of page 46 of the Employee's Handbook.
>
> [s] Carolyn Cousineau
> [s] Grace Desnoyers
> [s] Richard Pike (Guest)
> [s] Glenda Comeau

Attached to the above memorandum was an excerpt from Respondent's employee handbook, page 46, which in material part listed as among "prohibited action," the following:

> Unlawful or improper conduct off the premises or during non-working hours which affects the employee's relationship to his job, to his fellow employees, to his Supervisors, or to the Employer's services, property, reputation or goodwill in the community.

Before taking the letter to the social committee, Comeau delivered a copy to Personnel Director Gail Pike. Fouche also was updated by Comeau concerning the action that had been taken.[37] The former claimed that previously he was unaware that the above accusations fell within company rules and regulations.

After his conversation with Lemoine, Fouche on 26 June sought out Briere, the cochairman of the social committee, and the individual Fouche knew to be responsible for organizing the bus trip. He inquired about whether she had seen the above letter. She had not. Under questioning by Fouche, she failed to corroborate the accusations, advising Fouche that she "knew nothing about her [Lemoine] swearing." Fouche acknowledged that after speaking with Briere a "conflict" existed and that the facts "at that point" were not clear.

Fouche then went to see Vice President Darrell Mitchell, who at that juncture had heard nothing of the incident. After providing him the letter of complaint, Fouche reminded Mitchell of Cousineau's recent warnings for similar offenses, as well as her role as a union observer, a factor which, according to Fouche, had to be taken into consideration. Finally, Fouche suggested that Lemoine be suspended pending an investigation. With this information, Mitchell claims to have contacted the Company's counsel, whereupon he was instructed "to perform an investigation and get the employee's side of the story" while suspending Lemoine pending completion of the investigation.

At 9:30 a.m. on 27 June, Lemoine was called to the office of Twiss, where Fouche gave her an opportunity to read the letter of complaint. Lemoine denied using profanity or engaging in any wrongful behavior on the bus trip. In response, Fouche informed that she would be suspended until the Company "could determine the facts." Lemoine then argued that the Company wanted to get rid of her because of union activity. According to

[36] Comeau's testimony varies from that of Fouche, in that according to her, although he suggested that they make a complaint, he did not suggest that it be addressed to the social committee.

[37] There is no primary evidence that this document was ever delivered to the social committee. Briere never saw it. Desnoyers did not testify. Comeau related that Desnoyers told her she was going to give the document to Briere's cochairman, Joann Cadieux. The latter did not testify.

the credited testimony of Lemoine, Fouche reacted by peering at Lemoine and stating, "Why don't you quit?"

Parenthetically, it is noted that Lemoine, having been alerted earlier by Briere that complaints had been registered, attempted to see Mitchell early in the morning on 27 July. She was told by his secretary that he was unavailable but that Lemoine would be contacted in the event of a change.

During the above conversation with Fouche, Lemoine informed her that she had attempted to make an appointment with Mitchell. According to the credited, uncontradicted testimony of Lemoine, Fouche assured that Mitchell would call her at home. On leaving the premises, Lemoine went to the front office where she *again*, without success, attempted to speak with Mitchell. The latter's secretary again told Lemoine that Mitchell was busy with meetings, was leaving town, and that she would call Lemoine if he could meet with her.

Thereafter, Lemoine received in the mail a letter dated 27 June, confirming her indefinite suspension pending investigation of charges that she had engaged in "improper personal conduct during a Company sponsored social committee event . . . ."[38] The indefinite suspension would have a term of but 1 day.

After suspending Lemoine, Fouche did not participate in the investigation. This assertedly was handled by Mitchell, who made the ultimate decision to effect the termination. Mitchell admitted that in his 11 years with the Company, he knew of no one else who had been discharged for conduct during nonduty hours and away from the plant. As in the case of Csekovsky, the investigation in Lemoine's case did not extend beyond the original complaint. Thus, at Mitchell's direction, Personnel Director Pike obtained written, unsworn statements from Comeau, Cousineau, and Desnoyers.[39] Insofar as Mitchell knew, they were the only employees who made the trip that had raised any question about Lemoine's conduct.

Although advised by his counsel to "get the employee's side of the story," Mitchell did not do so. He allegedly left this to Fouche, who in turn, reported Lemoine's denial of wrongdoing. Moreover, of those giving statements, Comeau, a supervisor mindful of Lemoine's role as a union activist, was the only witness directly interviewed by Mitchell who claims to have observed the conduct in question.[40]

Mitchell was told by Fouche that Briere denied having observed any of the conduct in question. Yet, he did not speak to or inquire further of her. He also was aware of Lemoine's denial, and knew that prior to the suspension Lemoine had been attempting to see him. He not only refused to see her,[41] but apparently felt it unnecessary to throw light on the conflicting reports, by interrogating or obtaining a single statement from among the numerous other employees who were on the bus trip.

At the hearing, several witnesses, employees as well as nonemployees, were presented by the General Counsel to support Lemoine's continuing denial of the accusations against her. Comeau, as the sole eyewitness offered by Respondent, stuck by her account. As I see it, this conflict need not be resolved. The issue is one of motive. Management must frequently invoke discipline on the basis of information derived from secondary sources. The fact that that information may be false, and thereby produce an injustice, would not alone prove this element of wrongful discrimination.[42] On the other hand, it would seem that when information is gleaned from secondary sources, the trier of fact must be assured reasonably that the remedial objectives of the Act are not undermined by cursory action, not aimed at developing fact, but in quest of a facially palatable excuse for elimination of a union adherent.

In Lemoine's case, like that of Csekovsky, the defense fails to persuade. The General Counsel's prima facie showing of discrimination is robust. In the face of Twiss' specific threat of retaliation, two known union sympathizers, who were relatively long-term, efficient employees from a department having a high turnover, were terminated on a halfhearted, pro forma investigation within a week of each other.

On Respondent's behalf there can be no debating that Comeau's accusations against Lemoine raised the spectre of serious misconduct.[43] Profanity is probably not uncommon at this plant. Nonetheless, its acceptability, as heretofore indicated, depends on context. Just as profanity, no matter how characteristic of plant discourse, may not be addressed with hostility to a representative of management, there is no excuse for use of such language in the presence of young children.

However, the question confronting management on and after 24 June was not only whether such allegations would support discharge, but also whether the conduct actually took place. Mitchell showed little regard for the latter. He conducted a cursory investigation not designed to develop the facts as they occurred on a balanced basis, but to confirm accusations that could be relied on

[38] See G.C. Exh. 3.

[39] See R. Exhs. 11(a), (b), and (c).

[40] Mitchell did not talk with Desnoyers. He did indicate that Carolyn Cousineau had "come in" to discuss her statement. However, as indicated on the face of her statement Carolyn Cousineau "did not hear the offensive language used by [Lemoine] . . . ." See R. Exh. 11(b). In the course of Mitchell's interview with Comeau, he did not inquire concerning whether Comeau requested Lemoine to stop, or complained to the busdriver, or whether Lemoine approached Briere to stop Lemoine. Comeau admits that, while on the trip, she made no attempt to curtail the alleged improprieties.

[41] The only explanation afforded was that Mitchell was about to leave on a 10-day trip. This raises the question about why the discharge could not be deferred until his return. Because Lemoine's suspension was of "indefinite" duration, the haste with which Mitchell acted is difficult to understand.

[42] Cf. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), dealing with a good-faith, but mistaken, belief that an employee, in the course of Sec. 7 protected activity, engaged in a dischargeable offense.

[43] I reject the General Counsel's argument that Fouche's initial reaction to the complaint by Comeau demonstrates that "a serious breach of Respondent's rules" was not involved. Contrary to the General Counsel, this was not necessarily indicative of condonement. Representatives of management often differ about whether conduct may or may not be suitable for discipline. Fouche, who admittedly was responsible for enforcement of the rules, claims that his position initially was based on his being unaware of the rule pertaining to off-premises behavior. Moreover, he did respond the next day, on receipt of complaint in written form. There is no indication that his change of mind was triggered by intervening events of a protected nature.

as an acceptable ground for termination. All avenues that might complicate that objective were avoided. Thus, having sought guidance from outside counsel, Mitchell, by his own account, was told to get "[Lemoine's] side of the story," and "to investigate, get statements from the employees, get statements . . . from the employee involved." Mitchell was instructed that if the accusations turn out to be "true" a discharge would be in order.[44] Yet, this advice was not heeded. Other than those who supported the initial complaint, Mitchell made no effort to obtain a single statement from "employees" who were on the trip and who might well have either supported Lemoine, or failed to corroborate the accusation, as had Briere. Though aware of Lemoine's denial and her attempts to see him, Mitchell declined to afford her an airing, thus flouting the instruction that he get "the employee's side of the story." His effort did not even include a meeting with all the complainants, and it does not appear that there was any examination concerning the possible exaggeration or bias on the part of the accusers, nor did Mitchell attempt to explore the possibility of extenuating circumstances. In sum, his one-sided approach in the case of this highly productive, valuable employee reinforces, rather than dispels, the inference arising from the General Counsel's impressive case of discrimination.[45]

In the total circumstances, while the accusations themselves were sufficiently serious to warrant an investigation and perhaps even suspension, in light of the nature thereof, acceptable proof of a convincing nature has not been offered to demonstrate that Lemoine would have been victimized by a discharge in such circumstances if she had not engaged in activity protected by the Act. Accordingly, the convincing prima facie case has not been overridden, and Respondent is deemed to have violated Section 8(a)(3) and (1) by discharging Lemoine.

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent independently violated Section 8(a)(1) of the Act by threatening reprisals, including plant closure, because employees engaged in union activity, and by informing employees that they could not engage in protected forms of solicitation on company property.
4. Respondent violated Section 8(a)(3) and (1) of the Act by issuing oral warnings to Linda Csekovsky and Dorothy Lemoine because they engaged in solicitation of a nature protected by Section 7 of the Act, during breaktime and further by terminating Csekovsky on 21 June 1985, and by terminating Lemoine on 28 June 1985, in reprisal for their union and/or protected activity.
5. The above unfair labor practices have an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action deemed necessary to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Linda Csekovsky and Dorothy Lemoine, it shall be recommended that Respondent make them whole for any loss of earnings they may have suffered by reason of the discrimination against them by payment of a sum of money equal to that which they normally would have earned from the date of discharge to the date of a bona fide offer of reinstatement to their former positions or, if not available, to a substantially equivalent position. The backpay shall be reduced by net interim earnings and is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as specified in *Florida Steel Corp.*, 231 NLRB 651 (1977).[46]

The General Counsel requests that the remedial order include a visitatorial clause, "authorizing the Board to engage in discovery under the Federal rules of civil procedures . . . so it will be able to monitor compliance with the Board order." This request, first mentioned in the posthearing brief, does not appear to address any special issue generated by the instant procedure, but is founded on the notion that such provision be adopted as part of the Board's general remedial formula and be incorporated routinely in its orders. Hence, the issue is one of policy, to be resolved at the highest level on the basis of a fair airing by all interested parties, a condition that could not be achieved at this time on the instant record without substantial delay in achieving vindication of a remedy. Considering the advantages of visitatorial provisions against the delay, the issue is best left to ultimate resolution down the line through the administrative process. In passing, it is noted that the only reported case in which the Board has considered the issue resulted in denial. See *O. L. Willis Co.*, 278 NLRB 29 (1986). Although the Board has yet to articulate standards for determining the appropriateness, if any, of such a remedy, the holding in that case makes it clear that the visitatorial clause will not be engrafted as a standard segment of remedial orders. Thus, the Board declined such relief, reasoning that "under the circumstances of this case, it is unnecessary to include such a clause."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

---

[44] Only after receiving these instructions did Mitchell, according to his testimony, convey that a union observer was involved. According to Mitchell he was told by counsel that this would make no difference.

[45] The failure to conduct a meaningful investigation or to give the employee an opportunity to explain has been regarded as an important indicia of discriminatory intent. See *Florida Medical Center*, 227 NLRB 1412, 1412 (1977); *Greensboro News Co.*, 272 NLRB 135 and cases cited at fn. 23 (1984). Cf. *Westinghouse Electric Corp.*, 277 NLRB 136 (1985), when the Board on materially distinct facts reversed my findings and dismissed an 8(a)(3) allegation, concluding that the investigation involved there was neither "biased, negligent or cursory."

[46] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, K & M Electronics, Inc., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with reprisals, including plant closure, to discourage them from engaging in union activity.

(b) Barring employees from engaging in solicitation of protected nature on company property.

(c) Discouraging employees from engaging in activity in behalf of a labor organization by discharging or in any other manner discriminating against them with respect to their wages, hours, or other conditions of employment.

(d) Discouraging employees from engaging in concerted activity protected by Section 7 of the Act, by issuing oral warnings, or in any other manner discriminating against them with respect to their wages, hours, or other conditions of employment.

(e) In any like or related manner interfering with, coercing, or restraining employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Linda Csekovsky and Dorothy Lemoine immediate reinstatement to their former positions or, if not available, to substantially equivalent positions without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings by reason of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Remove from its files, delete and remove, any references to the unlawful discharge of Linda Csekovsky and Dorothy Lemoine as well as the oral warnings issued them on 4 April 1985, notifying them in writing that this has been done, and that neither the warnings, nor the discharges will be used against them in the future.

(c) Post at its place of business in Springfield, Massachusetts, copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

American Steel Warehousing, Inc., a subsidiary of Lexington Oil Corporation[1] *and* United Steelworkers of America, AFL–CIO–CLC. Case 14–CA–18332

19 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 29 September 1986 Administrative Law Judge Burton S. Kolko issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Steel Warehousing, Inc., a subsidiary of Lexington Oil Corporation, Granite City, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Offer in writing immediate employment, without prejudice to any seniority or any other rights and privileges, to each of the former employees of Steel Warehousing of Illinois who had been laid off in November 1985 for whom the Respondent had vacancies after 27 January 1986 and whom it could have employed but declined to employ, if necessary replacing employees who had not been employed by Steel Warehousing of Illinois on 27 January 1986 but who were hired by the Respondent after that date, such employment to be offered for the classifications at the rates and under the conditions pertaining to the replaced employees; and place on a preferential hiring list all remaining former employees of Steel Warehousing of Illinois who would have been hired but for the lack of available jobs."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the United Steelworkers of America, AFL–CIO–CLC as exclusive representative of the following unit:

> All production, maintenance, shipping and receiving employees employed at our Granite City, Illinois facility, excluding office employees, plant clerical employees, guards, watchmen, professional employees, foremen, assistant foremen and all other supervisors as defined in the Act.

WE WILL NOT discourage membership in the Union or in any other labor organization by discriminating against any employee or job applicant regarding hire, tenure of employment, or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody such agreement in a signed contract.

WE WILL offer employment to Steel Warehousing of Illinois employees who were laid off in November 1985 for whom we had vacancies after 27 January 1986 and whom we could have employed but declined to employ, if necessary replacing employees who had not been employed by Steel Warehousing on 27 January 1986, but who were hired by us after that date, such employment to be offered for the classifications at the rates and under the conditions pertaining to the replaced employees; and place on a preferential hiring list all remaining former employees of Steel Warehousing of Illinois who would have been hired but for the lack of available jobs.

[1] The Respondent's name appears as amended at the hearing.

[2] No exceptions have been filed to the judge's finding that American Steel Warehousing is a successor employer.

[3] The General Counsel excepted to the judge's recommended Order to the extent that it limits the remedy to require the Respondent to replace only those employees who had been hired by the Respondent "before 1 June 1986." We agree that the remedy should not be so limited and have modified the recommended Order and notice accordingly. The General Counsel also excepted to the lack of a "make-whole" paragraph in the notice. We agree, and have so modified the notice.

WE WILL make whole the employees of Steel Warehousing of Illinois to whom we will offer employment as set forth above for any losses they may have suffered from our discrimination against them, plus interest.

AMERICAN STEEL WAREHOUSING, INC.

Keltner W. Locke, Esq., for the General Counsel.
Rayford T. Blankership, Labor Consultant, of Greenwood, Illinois, for Respondent.

DECISION

STATEMENT OF THE CASE

BURTON S. KOLKO, Administrative Law Judge. The Lexington Oil Corporation purchased certain assets from Steel Warehousing of Illinois, Limited, an Iowa corporation (SWI), and it purchased the land and buildings used by SWI from the persons who owned SWI. Thereafter, the purchaser operated as American Steel Warehousing, Inc. (ASW), the nominal Respondent in this case.[1] From 1973 the Union that is the Charging Party in this case had a collective-bargaining agreement with SWI, and after American Steel Warehousing began operating the Union requested recognition by ASW. In effect that request was denied, and the Union's charge followed.[2] As a result of that charge the General Counsel complains that ASW as a successor to SWI violated Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), by failing to recognize and bargain with the Union. Also, the complaint alleges that ASW discriminated against former SWI employees by hiring others in their stead who did not belong to the Union, thus violating Section 8(a)(3). The Respondent denies the allegations.

FINDINGS OF FACT

The Lexington Oil Corporation negotiated with SWI to purchase SWI on 8 January 1986. Before the closing the sellers discovered that the transaction would cause them a tax liability that was unacceptable. The transaction was postponed and restructured. SWI's land and buildings were sold by Mr. and Mrs. Blumenthal, their owners. The remainder of the sale consisted of SWI's inventories of raw materials and supplies, work in progress, finished materials, machinery, equipment, furniture, cash, accounts receivable, customer lists, telephone listings, trade secrets, etc., which were conveyed on 27 January 1986.

The purchaser immediately began operating as ASW, like SWI distributing steel products. It immediately sent this letter to the customer list that was stored on the computer that SWI had used.

> American Steel Warehousing, Inc. has purchased the steel inventory of Steel Warehousing of Illinois, Ltd. located in Granite City, Illinois. It has also acquired the land and buildings on Route 11 where the operation is located.
>
> The new organization is headed by John P. Stahlman formerly of Dallas, Texas. Mr. Stahlman is the President and CEO while Pam DeShasier, a longtime employee of Steel Warehousing, will serve as corporate Secretary. Pam will also be in charge of inside sales.
>
> This company has had a long history in the steel industry, having begun in 1950 as American Sheet & Strip Steel Corp. Mr. Stahlman has been in the steel industry for fifteen (15) years. He has served as a salesman as well as a service center owner. The company is greatly expanding its bar stock and sheet inventory and it will still continue to provide shearing services.
>
> You are invited to visit Pam and John via telephone or in person. Please put American Steel Warehousing, Inc. on your list to call for all your steel needs.
>
> American Steel Warehousing, Inc.
> P:O. Box 460
> Granite City, IL 62040

On the day after the sale the Union's subdistrict director, Morgan, heard of it and called ASW. The next morning Morgan met with Carman and Stahlman, ASW coowners. Morgan told them about the collective-bargaining agreement between the Union and SWI, that in his view the contract remained in effect because neither party to the contract had sent the required advance termination notice, and that he was interested in continuing to represent the employees at the facility.[3]

Carman and Stahlman replied that they did not know about the continued viability of the collective-bargaining agreement, that they would have to consult counsel, and that they would get back to Morgan. They never did. After unsuccessful attempts to make contact Morgan finally reached Stahlman, who told him that "my General Counsel told me not to talk to you anymore." So that was the end of it.

Subsequently ASW hired two additional employees, Daniel Van Scoyk on 24 March 1986 and Mark Knight on 6 May 1986. Neither of these employees was among the 17 bargaining unit employees that had been laid off by SWI the previous fall. One of the unit employees, indeed the Union's shop steward, was Thomas Cottrell. He had regularly been talking with Plant Manager Ogle

[1] The buyer chose to effect the purchase through a wholly owned subsidiary, Steel Warehousing of Illinois, Inc., an Illinois corporation, which bore no relationship to the seller, SWI, Steel Warehousing of Illinois, Limited, an Iowa corporation. Having mentioned the name of the actual purchasing entity, we shall forget about it as that entity has no further use in this discussion.

[2] The charge was filed on 26 February 1986, was amended on 8 April 1986, and was followed by the complaint on 16 April 1986. The hearing was held on 19 May 1986 in St. Louis. Briefs were received on 23 June 1986.

[3] Coincidently, the date of the sale also was the last day of the collective-bargaining agreement that had been made between SWI and the Union on 28 January 1983. By its terms it remained in effect for one more year, until 28 January 1987, since the required 60-day notice for termination or change had not been given by either party to the other.

even while laid off, as part of his steward responsibilities. On the day after the sale Cottrell went to the plant and talked with Ogle. Cottrell asked if the place had been sold, and Ogle said yes. Then Ogle was asked by Cottrell

> . . . if he was going to call any of us back now that it had been sold . . . thinking that they would have more business. And he said no. He said that they were going to be non-union plant from then on. For me to start looking for a job. They wasn't going to bring any of us back.

As Supervisor Ogle was not called to testify, Cottrell's credible testimony stands without contradiction.

Discussion

The "successor employer" issue has been summarized by the United States Court of Appeals for the Ninth Circuit in *Premium Foods v. NLRB*, 709 F.2d 623, 627 (1983):

> A new employer who conducts essentially the same business as the former employer, and who hires former employees of his predecessor as a majority of his work force is considered a successor employer. . . . Where a union has been recognized . . . as the representative of the employees of the predecessor, and his successor hires a majority of his workers from those employees, a presumption arises that the successor's employees also support the union. . . . The basic rationale is that a mere change in ownership, without an essential change in working conditions, would not be likely to change *employee* attitudes toward representation. See *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 278–279, 92 S.Ct. 1571, 1577, 32 L.Ed. 2d 61 (1972).

A similar approach has been taken by the Court of Appeals for the Seventh Circuit, see *Zim's Foodliner v. NLRB*, 495 F.2d 1131 (7th Cir. 1974); by the Court of Appeals for the Sixth Circuit, see *Service Employees Local 47 v. Cleveland Tower*, 606 F.2d 684 (1979); by the Court of Appeals for the First Circuit, see *NLRB v. Fall River Dyeing*, 775 F.2d 425 (1985); and by the Board, see *Bay Breeze Industries*, 280 NLRB 1216 (1986).[4] What we must do to deal with the issue of successorship raised by ASW's denial is to ascertain whether (1) ASW is a new employer, (2) it conducts essentially the same business as SWI at Granite City, Illinois, (3) it has hired former SWI employees as a majority of its work force, and (4) the Union had been recognized as the representative of SWI's employees. Questions (1) and (4) having already answered, we turn to the heart of the successorship issue. The record is thin but sufficient to make the following findings.

SWI had been in the business of distributing steel and steel products. That is the business that ASW was purchasing and undertaking. Evidence of this is its initial letter to SWI's customers, dated 27 January 1986, in which it apprised SWI's customers of the purchase and its intention to expand "its bar stock and sheet inventory and it will still continue to provide shearing services."

The expansion envisioned by ASW was in contrast to the contraction of operations by SWI in its final months. In November 1985, SWI's reduced sales caused it to lay off most of its unit employees, leaving only the two, Gass and Miller, that ASW started up with.[5] As ASW expanded its sales it added employee Van Scoyk 2 months later, in March, and employee Knight 2 months after that.

But, while expanding its customer base, ASW was still relying on the former SWI customers as the mainstay of its sales. Its initial revenues were totally from SWI's customers, as it purchased SWI's accounts receivable for sales that transpired after 1 January 1986, 4 weeks before ASW began its own operation. Thereafter, ASW added new customers so that by the end of February 1986 the 49 customers inherited from SWI were expanded to 103. But as the General Counsel's brief shows, relying on the sales figures in General Counsel's Exhibits 9 and 12, out of ASW's revenues of $180,858 for its first month of operations, $101,801 came from SWI's former customers, 56 percent.

This is almost all the data that we have, but it is enough for our purposes, as the Union's demand for recognition was immediate. ASW does not argue that its first month of operations is unrepresentative, nor does it challenge the fact that in the first month, when the Union made its demand, the employees of ASW were working at the same plant and were using the same equipment as they had at the predecessor SWI.

ASW claims that it is a different operation from SWI. Its evidence to support this consists solely of the testimony of its president, Stahlman:

> Q. Can you tell the Court in what respect—since you were—you have testified that you were present at the facility for a couple of weeks before the change in ownership. Can you tell the Court please in what respects the services provided changed since the change in ownership?
>
> A. Well, in many respects. The inventory at the facility was way down because of the economic conditions that Mr. O'Brien spoke about and we have added—well we have doubled the inventory. So we have many more services just due to the fact that we have the inventory in stock. So we can supply the customers. I don't know if it is the right time to say the dollar figures, but my understanding is that the people that were there before the December of 1985, that their gross sales were approximately $60,000 and in April of this year our's were approximately $300,000. So the major difference is in the—is in the amount of inventory there and we now carry more products. We carry stainless prod-

[4] See also cases cited in fn. 7, infra.

[5] Also kept on the payroll were salaried employees De Shashier, SWI's sole salesperson, and Ogle, SWI's warehouse manager. In fact, I cannot find from the record that ASW failed to take on any working SWI employees.

> ucts, aluminum products. I believe Steel Warehousing is limited to carbon products only.
>
> Q. So in other words there are more types of metal that are sheared and distributed?
>
> A. Well we do other things. We do other processing work also.
>
> Q. When did you add the new processing?
>
> A. When I got there.
>
> Q. Before or after the change in ownership?
>
> A. After.
>
> Q. And how long after?
>
> A. Immediately.
>
> Q. What does the new processing consist of?
>
> A. We do a great deal of slitting of coil and then we also do leveling, but I believe they did that before.

So the major differences are that ASW has a larger inventory of products from SWI and does slitting of coil. These do not change the employees' working conditions sufficiently to infer that their "attitudes toward representation" would be changed. *Premium Foods*, supra, 709 F.2d. at 627.

What would indicate such a change in employee attitudes toward representation would be a change in the structure of the bargaining unit, and this is the argument that ASW presses the hardest.

What ASW argues, in effect, is that having started out in January with a work force of two employees, both of whom were former SWI unit members, by May it had added three who were not former SWI unit members, thereby destroying the basis for presuming the majority status of the Union.[6]

The legal question thus posed is when did ASW have a representative complement of employees—when it started rebuilding from SWI's deteriorated base in January or when it had reached its full complement of employees in May.

The court in *Fall River Dyeing*, supra, 775 F.2d at 431, summarized this test in these words:

> In determining whether a representative complement existed at a given date, the Board first looks to see whether the job classifications for the operation were "filled or substantially filled" and whether the operation was in "normal or substantially normal production." The Board also considers the size of the complement on that date, the time expected to elapse before a substantially larger complement would be hired, and the relative certainty of the expected expansion.

I find that ASW's bargaining obligation arose on 29 January 1986, which is (1) the date that the Union through Morgan made its demand on ASW, (2) the day after ASW began its operations, and (3) 2 days after the transfer. See *Fall River Dyeing*, supra, and *NLRB v. Hudson River Aggregates*, 639 F.2d 865, 870 (2d Cir. 1981). On that date ASW employed three of the five production employees it would be using by the time of the hearing, and two of those three were from the SWI unit represented by the Union—a clear majority. While sales would continue to rise, presumably the reason for the two later hires, the two former SWI employees, Miller and Gass, represented the two classifications of employees in the bargaining unit (Miller was a shear operator/laborer, and Gass was a laborer or "shear helper"). The third employee, North, had been a truckdriver for SWI, and outside the unit. At ASW, North Miller, and Gass performed all duties, but I do not find that the change in job classifications materially bears on this case since the tasks performed did not change. The essential structure of ASW's operations was set with the initial hire of these three workers.

Finally, we come to Stahlman's testimony that 2 weeks after the sale Gass told him that he did not want the Union. I am not persuaded that this helps ASW's case. First, Gass' statement and any doubt it caused ASW that the Union no longer represented a majority of its former SWI employees came *after* ASW's bargaining obligation arose, too late for ASW to rely on. *Fall River Dyeing*, supra, 775 F.2d at 433–434. Secondly, as I have no reason to doubt Stahlman's credibility, that hearsay alone is not "substantial evidence sufficient to support a finding for the company." *TRW-United Greenfield Division v. NLRB*, 716 F.2d 1391 (11th Cir. 1983). I reject any claim of good-faith doubt about ASW's bargaining obligation.

In fact, not only was there no doubt, there was no good faith. Plant Manager Ogle told Union Steward Cottrell on the day after the sale that "they were going to be [a] non-union plant from then on." Clearly an antiunion modus operandi had been established long before Stahlman heard from Gass, and explains why when the two new employees were later hired they were not from the pool of laid-off SWI unit members. The lame excuse that Cottrell was not hired because he was a workers-compensation risk has no support, and does not explain why none of the other 17 laid-off bargaining unit members was hired. Ogle's admission does explain it, and establishes a violation of Section 8(a)(3). *Peng Teng*, 278 NLRB 350 (1986).

In sum, there is no good-faith doubt advanced by ASW why the Union no longer represents these employees, and there is insufficient difference between SWI and ASW[7] to overcome the presumption that "the employees' desires concerning unionization" are unchanged.[8] I conclude that the Union, which has represented employees at this facility since 1973, is to be recognized as the ongoing representative.

[6] There were two new hires, Van Scoyk and Knight, and the elimination of the truckdriving classification freed up former SWI employee North, who as a truckdriver for SWI was not in the bargaining unit, to do production work for ASW.

[7] In other words, the plant's "operations, as they impinge on union members, remain essentially the same after the transfer of ownership." *Electrical Workers IUE v. NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979). See *NLRB v. Hudson River Aggregates*, 639 F.2d 865, 869 (2d Cir. 1981).

[8] *Ranch-Way, Inc.*, 183 NLRB 1168, 1169 (1970).

CONCLUSIONS OF LAW

1. The Respondent, American Steel Warehousing, Inc., is an employer within meaning of Section 2(6) and (7) of the Act.[9]

2. The Union, United Steelworkers of America, AFL-CIO-CLC, constitutes a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit that is appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production, maintenance, shipping and receiving employees employed by Respondent at its Granite City, Illinois facility excluding office employees, plant clerical employees, guards, watchmen, professional employees, foremen, assistant foremen and all other supervisors as defined in the Act.

4. United Steelworkers of America, AFL-CIO-CLC has been and is the exclusive representative of all employees in the above-described appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to recognize and bargain collectively with the Union as the exclusive representative of all of Respondent's employees in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(5) and 8(a)(1) of the Act.

6. By discriminatorily refusing to hire laid-off members of the Union Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(3) and 8(a)(1) of the Act.

7. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, American Steel Warehousing, Inc., Granite City, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the United Steelworkers of America, AFL-CIO-CLC as exclusive representative of the following unit:

> All production, maintenance, shipping and receiving employees employed by Respondent at its Granite City, Illinois facility excluding office employees, plant clerical employees, guards, watchmen, professional employees, foremen, assistant foremen and all other supervisors as defined in the Act.

(b) Refusing to hire employees because they had or were believed to have joined, supported, or assisted the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody it in a signed contract.

(b) Offer in writing immediate employment to each of the employees of SWI who had been laid off in November 1985 for whom Respondent had vacancies between 27 January through 31 May 1986 and whom it could have employed but declined to employ for discriminatory reasons, if necessary replacing employees who had not been employed by SWI on 27 January 1986 but who were hired by Respondent after that date and before 1 June 1986, such employment to be offered for the classifications, at the rates, and under the conditions pertaining to the replaced employees.

(c) Make whole the employees offered employment under subparagraph (b), above, for any loss they may have suffered from the discrimination against them by paying to each money that he would have been paid in Respondent's employ from the putative date of hire to the actual date of hire, less their respective net earnings elsewhere during this period, computed as in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as stated in *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(d) Mail to the SWI employees laid off in November 1985, and post at its Granite City, Illinois plant copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[9] During the calendar year ending December 31, 1985, Respondent sold and shipped products valued in excess of $50,000 from its Granite City, Illinois facility directly to places that are outside the State of Illinois.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

UARCO Incorporated *and* Graphic Communications Union District Council No. 2, International Printing and Graphic Communications Union, AFL–CIO *and* Graphic Communications District Council No. 2, and its Local 388M, International Printing and Graphic Communications Union, AFL–CIO. Cases 21–CA–24219 and 21–CA–24425

19 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 30 September 1986 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief. The Respondent further filed a motion to reopen the record for the purpose of introducing additional evidence. The General Counsel filed an answering brief and a response to the motion to reopen the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's ruling, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, UARCO Incorporated, Riverside, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent in its motion to reopen urges that the record be reopened to permit the introduction of certain records regarding the relative number of data mailer operators employed by it as of the date of the hearing. The Respondent does not state any reason why this evidence was not presented at the hearing nor does the Respondent state that this is newly discovered evidence or evidence which has become available only since the close of the hearing. The Respondent's motion is therefore denied.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5), we rely on the total lack of notice to the Union regarding the wage freeze prior to its implementation.

The record reveals that the Respondent has consistently used its regular press operator wage rate than its data mailer press operator wage rate for purposes of comparison in its annual wage survey. We note that the data mailer machine is unique to the Respondent and its competitors do not have data mailer operators.

The judge, in the remedy section of his decision, ordered that backpay be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). That formula is only applicable in circumstances involving computations of interim earnings. The correct backpay formula for unilateral changes is set forth in *Ogle Protection Service*, 183 NLRB 682 (1970).

Frank M. Wagner, Jr., Esq., for the General Counsel.
William P. Treacy, Esq., of Lake Forest, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Riverside, California, on 10 June 1986. The initial charge in Case 21–CA–24219 was filed on 16 October 1985 by Graphic Communications Union District Council No. 2, International Printing and Graphic Communications Union, AFL–CIO (the Union) and was amended on 28 February 1986. The charge in Case 21–CA–24425 was filed by the Union on 16 January 1986. Thereafter, on 31 March 1986, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing alleging a violation by UARCO Incorporated (Respondent) of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and counsel for Respondent.

On the entire record,[1] and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the manufacture and sale of business forms with a facility located in Riverside, California. In the course and conduct of its business operations, the Respondent annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside the State of California.

It is admitted, and I find, that the Respondent is, and has been at all times material, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Issues*

The principal issues raised by the pleadings are whether the Respondent, in violation of Section 8(a)(3) of the

[1] The General Counsel's motion to amend exhibit by attaching to G.C. Exh. 11 a 7-page document entitled "1984 Area Wage Summary" is granted. Further, the General Counsel's unopposed motion to correct transcript is granted.

Act, withheld a wage increase from its Riverside employees, and whether it violated Section 8(a)(5) of the Act by unilaterally changing employees' terms and conditions of employment.

B. *The Facts*

The Union was certified on 20 December 1984 as the collective-bargaining representative of the Respondent's employees in the following unit:

> All production and maintenance employees, warehouse employees, shipping and receiving employees and truck drivers employed by Respondent at its facility located at 990 Palmyrita Avenue, Riverside, California, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The unit is comprised of approximately 85 employees. Bargaining commenced on 21 February 1985,[2] and continued until 11 December when negotiations broke off as a result of the Union's failure to accept the Respondent's last and final proposal which provided for a 12-month wage freeze. The parties had, at Respondent's request, deferred negotiations on wages and other economic items until noneconomic matters had been explored, and Respondent's first offer on wages, namely, to freeze them, came on 8 October, 2 days after the date on which the annual wage increase, infra, had always become effective.

William Gordon, who has been Respondent's Riverside plant manager for 17 years, testified that the unit employees herein have received a general pay increase the first Sunday in October in each of these 17 years except for 1985, when no pay increase was granted.[3] Gordon testified that during each prior year he announced and promised to the unit employees at company meetings that they could expect to receive a substantially similar pay increase that was granted to production employees at Moore Business Forms of Fullerton, California (Moore), a unionized plant which was Respondent's primary local competitor. Gordon testified that this had been Respondent's "principal promise" to the employees at least since he became plant manager, and that the pay scale of Moore "was the principal criteria we used in determining our wage package every year," which was based on an annual survey of local printing firms. Respondent's 1985 survey was completed in August.

Gordon testified that no 1985 wage increases were granted the production employees at the Roseburg, Oregon plant, a facility also under Gordon's supervision. Gordon's affidavit, referring to the Roseburg plant, states as follows:

> No wage increase was given for two reasons: first, it is located in the heart of the lumber industry which is suppressed and suffering large layoffs; secondly, we were able to obtain additional business if we could control our cost. We told the employees that, "In lieu of wage increases, that the wages would remain the same, but because of the increase of business they would be assured no layoffs would occur.
>
> Thus we effectively traded wage increases for assured work.

Moore's contract with Printing Specialties and Paper Products Union Local 522, a sister local of the Union herein, extended from 1 September 1983 to 31 August 1986. It provided for a wage increase during each year of the contract, including a 4-percent increase for production employees on 1 September 1985. This brought the rate of Moore's press operators from $12.45 per hour to $12.95 per hour. Respondent's 1984 rate was at $12.55 per hour for comparable positions[4] and has remained at that rate due to Respondent's failure to increase its wages in October 1985. From 1974 through 1984 the significant wage rates of Moore and Respondent, used by Respondent for comparison purposes, have been as specified in the following exhibit introduced into evidence by the Respondent:

The[5] Respondent advanced various reasons for its decision to deviate from its admitted past practice of maintaining close comparability with Moore. According to Edward Werhand, Respondent's vice president of engineering, the production standards, which are based on the time it should take to print or process a specified quantity of business forms, had declined at Respondent's Riverside plant, and compared unfavorably with the average companywide production standards of each of its 12 plants. In this connection, documentary evidence consisting of monthly published production standards data shows that since 1981 the Riverside plant has been among the top six plants in production standards. However, the most current data as of August 1985, when the Respondent determined that no wage increase was warranted, reflects that the Riverside press department was ranked number 9 out of 12 plants, with a 104.9[6] performance standard for the 13 weeks ending 30 June 1986, and was rated in finishing department standards (of the 8 plants with finishing departments), with a 96.1 performance standard for the same period of time. No evidence was presented by Respondent to show the cause for this decline. Nor was any evidence adduced to show that wage increases had ever been withheld at any of its plants because of a low performance standard ranking.

Respondent also maintains that for purposes of its 1985 area wage survey, it no longer considered Moore as the bellwether plant, apparently taking the position that the

[2] All dates or time periods hereinafter are within 1985 unless otherwise specified.

[3] However, the Respondent's clerical employees did receive a 3-percent wage increase on this day, 6 October 1985.

[4] Respondent's rate for data mailer operators is $12.76 per hour. However it appears that this rate is paid to relatively few employees, and the record evidence shows that the Respondent has consistently used its regular press operators' rate, rather than its data mailer press operator's rate, for purposes of its annual wage survey comparisons.Chart goes here

[5] This heading denotes nondata mailer press rates. Moore does not have data mailer presses.

[6] The percentage figure is based on 100 percent, which is the amount of output that all the presses, collectively, are designed to produce in a specified period of time. Thus, the Riverside plant was operating above standard in the press department.

plant had closed or moved between 1984 and 1985, and ceased to be a significant basis for comparison. Thus, Plant Manager Gordon testified that for purposes of the 1985 wage survey he never compared the Riverside plant with Moore's new plant located in the City of Industry. The evidence shows that Moore's facility was moved from Fullerton to the City of Industry, some 10 miles distant, sometime after August 1984, and that the existing collective-bargaining agreement between Moore and Printing Specialties and Paper Products Union, Local 522 was continued without negotiation or interruption at the new location. While the Union's president, Bernard Sapiro, testified that he believed Moore's new plant employs fewer than 100 employees, Sapiro's testimony reveals that he is not entirely aware of the situation at that plant as its employees are represented by another Local Union. However, according to Sapiro, Moore's Fullerton plant had been gradually reduced in size since about 1975. Moreover, the Respondent's 1984 wage survey shows that Moore's Fullerton plant had 180 employees, and its 1985 wage survey, which specifically included Moore's City of Industry plant as one of the plants surveyed in Respondent's 1985 wage study, shows that it has 190 employees.[7]

C. *Analysis and Conclusions*

The reasons advanced by the Respondent for deviating from its promised annual wage increase to the production employees, consistently honored for at least the past 17 years, simply are not supported by the record evidence.

The 1985 area wage survey report was submitted to Plant Manager Gordon by R. D. Kozaki, supervisor, industrial relations, on 12 August 1985. Kozaki, who was not called as a witness in this proceeding, recommended no wage increase for 1985 despite the fact that the average increase for the Southern California firms surveyed was 4.60 percent. As noted above, assuming that the then most recent 1985 performance standard statistics, specified above, were known to Kozaki at the time he issued his report, the Respondent's press department ranked 9 (out of 12 plant) and was well above 100-percent efficiency. In the finishing department it was six (out of eight plants), with 96.1 efficiency. More importantly, the Respondent has adduced no evidence purporting to show that the employees of any of its plants, at any time during the past 17 years, have ever been punished by the withholding of a wage increase for having relatively low performance standards in any category. Further, it is significant that Respondent deemed it necessary to raise the wages of the nonunit clerical employees by 3 percent. Finally, it is clear that the Respondent's failure to grant a wage increase to the Roseburg, Oregon production employees was based on extraordinary circumstances not relevant or comparable to the issues in the instant case.

The Respondent's contention that it discontinued its policy of maintaining close comparability between its wage rate and those of its primary competitor in the area because, according to Plant Manager Gordon, Moore "closed sometime between, '84 and, '85," is patently frivolous. The clear and credible record evidence shows that Moore did not close. Rather it moved to another location just 10 miles away from its original facility. There is no evidence that its general manufacturing operations changed in any material respect. Nor does Gordon specify with any clarity what caused him to cease giving any consideration to Moore's existence for purpose of the wage survey, or why, given Respondent's position, Moore was even included in the 1985 wage survey. Indeed, the Respondent's wage survey specifically included the applicable information regarding Moore's City of Industry plant and, perhaps most importantly, the 1985 wage survey compiled by Respondent[8] shows that the number of Moore's employees increased between 1984 and 1985, and its employee complement is apparently more than double the size of Respondent's work force of some 85 unit employees. In summary, the facts prove the converse of Respondent's contention that Moore ceased to be a viable business or that Moore's work force or business operations changed in any significant respect.

The Respondent asserts that its current press wage rate, the standard used as a basis for its wage survey, is substantially similar to the $12.77-per-hour average press rate of competitors in the area, and that this is also a reason for not increasing wages in 1985. However, the evidence shows that the Respondent's area wage surveys have always been premised on the nondata mailer press rate which, for the Respondent, has remained at $12.55 since October 1984. Thus, the Respondent's nondata mailer press rate, the standard used for purpose of comparison, is some 25 cents per hour below the average press rate of its acknowledged competitors, and 40 cents per hour below the comparable press rate of Moore.

As discussed above, Respondent has presented no valid reasons for deviating from its 17-year history of granting on the first Sunday in October of each year wage increases comparable to the annual wage increases granted by Moore. There is only one additional element that may reasonably account for Respondent's deviant conduct, namely, the advent of the Union. On the basis of the foregoing it is clear, and I find, that the 1985 wage increase was denied because the employees selected the Union as their collective-bargaining representative, and that Respondent's conduct is therefore violative of Section 8(a)(1) and (3) of the Act.

The Respondent's promise to grant and the granting of an annual wage increase at the same time each year makes this wage increase a condition of employment. Its decision to withhold any wage increase, which was always instituted in October of each year, was made in mid-August at a time when the parties were engaged in negotiations. However, the Respondent admittedly did not so advise the Union of this change in past practice

[7] In 1983, according to Respondent's survey, Moore's Fullerton plant had 197 employees.

[8] I regard this as more reliable evidence as to the number of employees at Moore's City of Industry plant than Union President Sapiro's testimony. Sapiro was admittedly not conversant with the details of Moore's plant, having no direct relationship with it, whereas Respondent's survey is apparently based on specific information furnished by Moore subsequent to its move from Fullerton to the City of Industry.

until about 8 October. By failing to timely notify the Union of this change in a condition of employment, the Respondent has violated Section 8(a)(5) of the Act, as alleged. *Liberty Telephone & Communications*, 204 NLRB 317, 318 (1973).

The Respondent's unfair labor practices herein, tending to cause employee disaffection, clearly have a substantial adverse effect on the Union's status as representative of the Respondent's employees. Such, it appears, was Respondent's contrived intent. It may fairly be presumed that this conduct on the part of Respondent resulted in the filing of the decertification petition by the employees, on which the Respondent now relies as a basis for establishing doubt about the Union's majority status and permitting it to withdraw recognition. Under the circumstances, the Respondent is not privileged to withdraw recognition or to refrain from bargaining with the Union. Moreover, such conduct is violative of Section 8(a)(5) of the Act. *Sacramento Clinical Laboratory*, 242 NLRB 944 (1979); *Guerdon Industries*, 218 NLRB 658 (1975); *Abbey Medical/Abbey Rents*, 264 NLRB 969 (1982).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1), (3), and (5) of the Act as alleged.

THE REMEDY

Having found that the Respondent violated and is violating Section 8(a)(1), (3), and (5) of the Act, I recommend that it be required to cease and desist therefrom and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Moreover, Respondent shall be required to post an appropriate notice attached as an Appendix.

Further, the Respondent shall be required to grant the wage increase to the bargaining unit employees it would have granted, retroactive to 6 October 1985, and make the bargaining unit employees whole by paying them backpay in the amount of the wage increase that they would have received from that date in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).[9] The Respondent shall also be required to bargain, on request, with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, UARCO Incorporated, Riverside, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully withholding the 6 October 1985 annual wage increase from the unit employees because the employees selected the Union as their collective- bargaining representative.

(b) Refusing to negotiate in good faith with the Union by failing to timely advise the Union of the decision to withhold the annual wage increase.

(c) Withdrawing recognition from the Union and thereafter refusing to bargain with the Union.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purpose of the Act.

(a) Place in effect the hourly wage increases which would have been granted the unit employees on 6 October 1985.

(b) Make the unit employees whole for the discrimination against them by paying them backpay in the amount of the wage increase they would have received, retroactive to 6 October 1985, with appropriate interest.

(c) Bargain, on request, with the Union as the representative of employees in the following unit:

> All production and maintenance employees, warehouse employees, shipping and receiving employees and truck drivers employed by Respondent at its facility located at 990 Palmyrita Avenue, Riverside, California, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Post at Respondent's facilty at Riverside, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[9] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT unlawfully withhold the 6 October 1985 annual wage increase from you because you selected Graphic Communications Union District Council No. 2, and its Local 388M, International Printing and Graphic Communications Union, AFL–CIO as your collective-bargaining representative.

WE WILL NOT refuse to negotiate in good faith by failing to timely advise the Union of our decision to withhold the annual wage increase.

WE WILL NOT unlawfully withdraw recognition from the Union and thereafter refuse to bargain with it as the certified collective-bargaining representative of employees in the following unit:

> All production and maintenance employees, warehouse employees, shipping and receiving employees and truck drivers employed by Respondent at its facility located at 990 Palmyrita Avenue, Riverside, California, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL place into effect the wage increase which the unit employees were entitled to receive on 6 October 1985 and WE WILL pay the unit employees backpay, with appropriate interest, for the wages they would have received since that date.

WE WILL bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of our employees in the unit described above.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the National Labor Relations Act.

UARCO INCORPORATED

Interstate Food Processing Corp. *and* Local Lodge No. 1198, District Lodge No. 99, Interstate Association of Machinists and Aerospace Workers, AFL–CIO. Case 1–CA–22743

20 March 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 21 March 1986 Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.

The judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to respond to requests by the Union for information. We agree with the judge's conclusion, but only for the reasons set forth below.

The essential facts are as follows. Historically, the Respondent's management kept track of employee status by means of seniority lists, which were updated and reissued several times a year and provided to the Union on request. The record reflects that on 15 June 1984[1] the International Union's Grand Lodge representative, William Layman, requested that the Respondent furnish a seniority list of all permanent and temporary employees with their classifications and home addresses. The Respondent sent Layman a seniority list dated 21 June which designated employee name, social security number, shift, hire date, department, occupation, and phone number. The 21 June seniority list also contained a blank "Comments" column. In the autumn of 1984 Layman concluded that the Union needed additional information from the Respondent. Layman's conclusion was based on his belief that the Respondent's seniority list did not indicate the status of all employees, including employees laid off, and on the fact that a mistake by the Union about the status of an employee had led to an unfair practice charge against the Union.

By letter dated 25 November Layman wrote the Respondent requesting "a new listing of all employees who were terminated, hired, layed [sic] off, discharged, rehired, or quit since June 1, 1984." In that summary paragraph of the 25 November letter Layman requested a "new listing of all new hires, [t]erminations, rehires or quits." The Respondent's general manager, Christopher French, responded by letter dated 4 December that "[t]he company has kept the Union up-to-date on terminations and will supply you a new seniority list as of this date." Enclosed was a copy of a 30 November seniority list indicating employees' hire dates. That copy also contained a "Comments" column in which handwritten notations such as "probationary," "sick," "w/c," "restricted," and "service under Dr [sic] care," appeared beside certain employees' names.

Layman responded by letter dated 7 December, stating:

> [T]he company has not been notifying the Union whenever possible in advance in all cases of discharge. In the future, please forward all copies of terminations of all kinds to Charlotte Nelson, Financial Secretary. All new hires are [sic] reinstatements of employees should also be sent to Mrs. Nelson so she can have a record of who should be paying their financial obligation.

The final sentence of Layman's 7 December letter read, "I have had no response to my letter dated November 25, 1984, so I am making the requests again."

By letter dated 26 December 1984 French advised Layman, "We will discuss the information the Union is requesting" at a grievance meeting set for 8 January 1985. At the meeting, Layman and French briefly discussed the Union's information concerns while, as French testified, "going out the door." Layman complained that the Union was not getting the information it needed and questioned French about employees hired after a Christmas holiday layoff. French promised to "get back to" Layman about Layman's complaints.

The parties stipulated that on 11 February 1985 Layman wrote a letter to the Respondent's labor counsel, Peter Kraft, that stated:

> We have consistently requested the company to give the union secretary the names of new hires, quits, leave of absence [sic], employees out sick or on workmen's compensation and terminations. To date, the company is complying only with the termination notices.[2]

By letter dated 5 March 1985 Kraft wrote Layman advising that Layman's reference to requests for information had been forwarded to French for response and that, to Kraft's knowl-

[1] All dates refer to 1984 unless otherwise indicated.

[2] French testified that he never saw Layman's 11 February 1985 letter nor heard about it from Kraft.

edge, the Company had always complied with Layman's requests for information in a timely fashion.

On 1 March 1985 the Union filed the instant charge. Complaint issued on 17 April 1985 alleging, inter alia, that since 25 November the Respondent had failed and refused to furnish the Union with names of employees who were laid off or rehired since 1 June and that, since 7 December, it had failed to furnish the Union with the names of all employees reinstated.

By letter dated 13 May 1985 Layman requested that French supply "a new and up todate [sic] seniority list" and substantial additional information.[3] On 20 May 1985 French wrote Layman, "Enclosed is the information you requested from your May 13 1985 letter, concerning employee status. . . . feel free to ask any questions in regard to this information." Enclosed was an employee seniority list dated 20 May 1985 plus a 28-page listing of "Information Requested by Union."[4]

Based on the foregoing, the judge found that the requested information about layoff, rehires, and reinstatements was needed by the Union "for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). The judge found, however, that "until Layman's letter of 13 May, the manner in which the Union asked for the information made it a virtual certainty that the Union would not get the information it wanted." First, the judge noted that until May 1985 the Union had never specified that it considered seniority lists to be inadequate for its needs. He also found Layman's letters of 25 November and 7 December ambiguous in important respects.[5] Third, the judge found that most of what Layman's November and December letters requested was in fact readily available from information the Respondent had been providing to the Union.[6] Fourth, he found that Layman's 11 February 1985 letter to Kraft "did nothing to reduce the confusion" because it failed to mention the kinds of information specified in the unfair labor practice complaint. Finally, Layman impressed the judge as having "such a combative and suspicious personality that virtually any employer is likely to consider any communication with him, especially oral communication, to be difficult, irritating, and confusing."

On the other hand, the judge found it reasonable for the Union to seek a better source for information than "awkward" seniority lists. Moreover, he found that Layman's 7 December letter and 8 January oral complaint made it clear that the Union wanted information that it thought it was not getting.[7]

The judge concluded that the Respondent "violated Section 8(a)(5), notwithstanding the ambiguity of the Union's requests." He noted that imprecision in the wording of an information request does not entitle an employer to ignore the request. E.g., *Postal Service*, 276 NLRB 1282, 1287 (1985). More basically, the judge found that the Respondent would have advised the Union of its confusion regarding Layman's December and January requests had the Respondent's attitude been one of good faith. Next addressing "the obstacle to communication presented by Layman's personality," the judge found that the Respondent failed to show it would have been futile to ask the Union for clarification. See *Postal Service*, 276 NLRB at 1287. Finally, the judge found that the failure of Layman's 11 February letter to refer to the kinds of information specified in the complaint did not excuse the Respondent's obligation to respond to the Union's requests of 7 December and 8 January in a timely fashion.[8] Thus, the judge found that by 11 February the Respondent had already violated the Act. *Aeolian Corp.*, 247 NLRB 1231, 1243–1244 (1980).

While we agree with the judge's ultimate conclusion that the Respondent unlawfully failed to respond to the Union's information requests,[9] we disagree with the judge's finding that "the manner in which the Union asked for the information made it

[3] Layman requested the names, addresses, hiring dates, recall dates, leave of absence and workmen compensation dates, and bargaining unit and layoff status data for all employees who were new hires, on workmen's compensation, on layoff status, or on leave of absence of any kind.

[4] By that time the Respondent had installed a new computer records system from which the requested information was more readily available.

[5] The judge found two problems with Layman's 25 November letter. First, the letter did not specify that Layman wanted something other than a seniority list and could, he believed, be interpreted as a request for an updated seniority list. Second, in one place the letter asked for one set of information while in another place—purportedly a summary of the first—it asked for different information. Although the judge noted that French arguably would have had a duty to clear up the confusion had Layman clearly specified the inadequacy of seniority lists, he concluded that under all the circumstances, including the Union's long-time use of seniority lists, French reasonably could have assumed that Layman's letter was merely a request for an updated seniority list.

Similarly, the judge found that French could be excused for not realizing that Layman was asking for a new kind of information (reinstatements) in his 7 December letter since "the principal purpose of the letter" was to advise the Respondent that information should from then on be sent to the Union's secretary. More importantly, the judge found the last sentence of such letter, i.e., "I have had no response to my letter dated November 25, 1984, so I am making the requests again," factually inaccurate and ambiguous.

[6] This finding was not supported by examples or evidence.

[7] The judge found, however, that it was unclear what "general category of information" the Union was seeking.

[8] The judge also found that Layman's 11 February letter provided no justification for French's failure to respond to the Union's requests inasmuch as French had no knowledge of that letter until the hearing.

[9] The judge's finding of an 8(a)(5) violation was limited to the Respondent's failure to respond to the Union's requests of 7 December and 8 January.

a virtual certainty that the Union would not get the information it wanted."

We find, contrary to the judge, that the Union's 25 November and 7 December requests were sufficiently clear to place the Respondent on notice that the Union was requesting information different from that requested in the past and to place the burden on the Respondent to ask for clarification if it was, in fact, confused by the Union's requests. Compare *Postal Service*, 276 NLRB at 1287. The 25 November request for a "new listing" was reasonably specific and precise in enumerating what categories of information the Union desired. Although the summary paragraph arguably was inconsistent in enumerating fewer categories of information concerning employee status, we note that French testified that he was not aware of any ambiguity in the letter until the hearing. He testified that when he received Layman's 25 November letter he circled "the summation paragraph, sent it to the personnel gal, and said take care of it." Therefore, any ambiguity in the 25 November letter appears irrelevant to the Respondent's state of mind at the time of receipt and to the sufficiency of the Respondent's response based upon French's understanding of the request. In any event, French never asked Layman for clarification.

Even assuming, as found by the judge, that French reasonably could have construed Layman's 25 November letter as merely a request for an updated seniority list,[10] French's 4 December response, which stated that the Company had kept the Union up-to-date on terminations and enclosed the 30 November seniority list, was inadequate to meet the Union's demands in its 25 November letter. Aside from handwritten notations next to a few names, the list included only hire dates. Thus, notwithstanding the Respondent's contention that it kept the Union current on terminations, the list failed to denote employees laid off, discharged, rehired, or quit since 1 June 1984. Moreover, the list also failed to denote the information requested in the summary paragraph of the 25 November letter. Accordingly, we find French's 4 December letter nonresponsive and insufficient to satisfy the Union's 25 November request.

Regarding Layman's 7 December request, while we agree with the judge that the last sentence of such letter was factually inaccurate and ambiguous to the extent that French did in fact respond to Layman's 25 November request, that sentence, as found elsewhere by the judge, did make it clear that Layman wanted information that he thought he was not getting.[11] Again, French never asked Layman for clarification. Instead, he ignored Layman's 7 December letter until 26 December, when he informed Layman he would discuss the information requests at an 8 January 1985 grievance meeting. As the judge found, Layman briefly complained at the conclusion of the grievance meeting that the Union was not getting the information it needed. Although French promised to "get back to" Layman, he did not do so until mid-May 1985, i.e., after complaint had issued in the instant case and after the Union had made another information request. Again, we find such treatment of Layman's request to be nonresponsive and insufficient to satisfy the Union's 7 December and 8 January 1985 request.

Most significantly, we disagree with the judge's unsupported finding that most of what the Union's November and December letters requested was readily available from information the Respondent had been providing to the Union. Although the Respondent claims that the Union had access to changes in employee status through updated seniority lists available to the shop stewards on request, the evidence establishes that such seniority lists failed to indicate requested changes in employee status, that the Respondent was itself unsure how the requested information could be gleaned from the seniority lists, and that the requested information could not in fact be gleaned accurately from such lists.[12] Moreover, in response to the judge's inquiry as to how the Union would find out about new hires, French responded, "Through the shop stewards," who would either see someone show up or check the seniority listing in the Respondent's offices. The fact, however, that shop stewards may have had access to updated seniority lists on request did not satisfy the Respondent's statutory obligation to furnish Layman the requested information. *New York Times Co.*, 265 NLRB 353 (1982); *Kroger Co.*, 226 NLRB 512 (1976).

Regarding Layman's 11 February 1985 letter to Kraft, we find it unnecessary to pass on the judge's

[10] We note that Layman's prior request on 15 June specifically referred to a seniority list whereas his 25 November letter requested the Respondent to furnish a "new listing" of enumerated information. Therefore, contrary to our dissenting colleague's assertion that the Union's request suggested that it wanted a mere update of prior listings, the Respondent arguably had reason to know that the Union's 25 November request was different from its usual requests and required something more than the provision of another seniority list.

[11] Thus, contrary to our dissenting colleague, whatever may have been the "main thrust" of the 7 December letter, the letter did reiterate the prior request, and there is no basis for an assertion that it was an "untelated afterthought."

[12] In this regard, the record demonstrates that on cross-examination French initially testified that Layman could determine that nobody was laid off at the time he sent the 30 November seniority list because the list showed new hires in mid-November and employees on layoff status would have been recalled prior to the hiring of new employees. Thereafter, the General Counsel demonstrated, and French conceded, that employee Ruth Adams was in fact laid off in November 1984.

finding that such letter "did nothing to reduce the confusion" since we agree with his later finding that by 11 February 1985 the Respondent had already violated the Act. We, however, disavow any implication that Kraft's knowledge of the contents of the letter cannot be imputed to French.

We also note that, in concluding that it was a "virtual certainty" that the Union's requests would not elicit the information it sought, the judge mistakenly relied on the "impression" he formed concerning Layman's "personality," apparently on the basis of Layman's demeanor at the hearing. Whatever the accuracy or inaccuracy of this "impression," it is immaterial to the essential questions presented here: the sufficiency of the Union's written requests for information and the adequacy of the Respondent's response.

In agreeing with the judge's finding of an 8(a)(5) violation, we note that it is well settled that when a request for relevant information adequately informs the employer of the data needed, the employer must supply the information or adequately explain why it is unable to comply. *Kroger Co.*, 226 NLRB at 513. We have already found that the Union's requests for information were adequate to inform the Respondent of the data needed. The Respondent, however, gave no explanation for not complying with the Union's initial requests. Although the Respondent eventually complied with the Union's requests in May 1985, it never informed the Union that it was unable to provide the requested information earlier. Moreover, this belated compliance, which occurred after issuance of the unfair labor practice complaint, cannot now retroactively cure the unlawful refusal to supply the information. *U.S. Gypsum Co.*, 200 NLRB 305, 308 (1972); see also *Postal Service*, 276 NLRB at 1288. The Respondent's continued inattention to Layman's requests therefore was unjustified. Accordingly, we conclude, as alleged in the complaint, that since 25 November and 7 December the Respondent has refused to provide the Union with information in violation of Section 8(a)(5) and (1).

In light of the above, we therefore disagree with the judge's statement in the remedy section of his decision that the "Respondent's only wrongdoing was its failure to communicate with the Union about Respondent's lack of understanding of the Union's information requests." Furthermore, and in view of the Respondent's compliance on 20 May after the Union's 13 May request, we disagree with the judge's recommendation to remedy the Respondent's violation of the Act by requiring it to "respond in timely fashion to future Union requests for information." A cease-and-desist order will fully remedy the violation found herein.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Interstate Food Processing Corp., Fort Fairfield, Maine, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a).

2. Substitute the attached notice for that of the administrative law judge.

MEMBER JOHANSEN, dissenting.

I am not persuaded that a violation has been established. For years prior to the Union's 25 November 1984 request for information, the Respondent had complied with similar requests by providing an updated seniority list, as it did here on 4 December. The Respondent itself relied solely on these lists for information on employee status. The Union's 25 November 1984 request asked for a "new listing," suggesting that it wanted an update of the prior listings. The main thrust of the Union's next communication, a 7 December 1984 letter, was to direct the Respondent to keep the Union's financial secretary abreast in the future of terminations, hirings, and reinstatements so that she could keep a record of employees owing union dues. The reference in that letter to Union Representative Layman's 25 November 1984 request for information appears to be an unrelated afterthought, and reasonably could be interpreted as indicating Layman's mistaken belief that there had been no response to his request.

The Union did not take advantage of the Respondent's 26 December offer to discuss the Union's request for information at a scheduled 8 January 1985 meeting and specify what information the Union needed. It appears that the Union's 11 February 1985 letter to the Respondent's attorney refers to its desire that the union secretary be informed of personnel action to assess dues liability, and not to Layman's 24 November 1984 request for a listing of the status of all employees. Moreover, the letter does not refer to the information that the complaint alleges the Respondent failed to provide.

In my view, the evidence indicates that the Respondent complied in good faith with the Union's request by providing an updated seniority list and proves nothing beyond confusion. I am unable to conclude that the burden rested with the Respondent, and not the Union, to clarify the Union's request, when the Union was departing from the sole manner in which the parties had traditionally shared the kind of information sought. Once the complaint issued clearly setting forth the informa-

tion sought, the Respondent furnished it, evidencing its good faith. That the Respondent eventually sent the Union a detailed breakdown of the requested information does not change my view. The breakdown was expressly in response to the Union's more specific 13 May 1985 information request. In addition, it was made possible by a newly installed computer system designed to allow the Respondent itself access to more complete employee data than previously had been the case. Accordingly, I dissent from my colleagues' conclusion that the Respondent violated Section 8(a)(5) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with your Union, Local Lodge No. 1198, District Lodge No. 99, International Association of Machinists and Aerospace Workers, AFL–CIO, by failing to respond to requests by the Union for information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

INTERSTATE FOOD PROCESSING CORP.

Robert Pulcini, Esq., for the General Counsel.
Peter R. Kraft, Esq., of Portland Maine, for the Respondent.
William H. Layman, Grand Lodge Representative, of York, Maine, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEPHEN J. GROSS, Administrative Law Judge. Respondent Interstate Food Processing Corporation (Respondent or IFP) processes vegetables at a plant in Fort Fairfield, Maine. Its employees are represented by Local Lodge No. 1198, District Lodge No. 99, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union).[1]

The General Counsel alleges that Respondent: (1) made coercive statements to employees in violation of Section 8(a)(1) of the National Labor Relations Act (the Act); and (2) failed to provide information to the Union that the Union had requested, in violation of Section 8(a)(5) and (1) of the Act.[2] Respondent denies that it has violated the Act in any respect.

I heard the case in Presque Isle, Maine, on 12 and 13 June 1985. The General Counsel subsequently moved to reopen the hearing; but I denied that motion by Order dated 26 September 1985. The General Counsel and Respondent have filed briefs.

I. FRENCH'S CONVERSATION WITH GALLOP

A group of Respondent's employees filed a deauthorization petition with the Board in July 1984. That led to an election on 1 November 1984. The weeks prior to the election were tumultuous at the IFP plant. Feelings ran deep among both the prounion and antiunion employee groups, and electioneering led to spats between employees.

A. *The Poirier Incident*

Theresa Poirier is an IFP employee and is a prounion member of the bargaining unit. Hope Doughty, another IFP employee, opposed the Union. About 7 October 1984 Doughty called Respondent's general manager, Christopher French, to say that Poirier "was bothering her and it was making her very uncomfortable during work and it was difficult for her to do her job." Doughty sounded very upset. About the same time another employee called French, referred to Poirier, and said that Doughty "was extremely upset about what was going on.[3]

Lawrence Gallop is president of the Union and is an IFP employee. According to undisputed testimony, Gallop frequently plays a "peacemaker" role in the plant. And when French gets reports of union adherents bothering other employees about union-related matters he routinely asks Gallop to investigate. (French calls on the leader of the antiunion group to investigate reports of problems being caused by antiunion employees.) Accordingly, on 10 October French spoke to Gallop about Poirier.

French repeated what Doughty had said about Poirier and expressed his concern about a possible decline in production stemming from the turmoil over the deauthorization election. French went on to tell Gallop to investigate Doughty's complaint. If it turned out that Poirier was "harassing" Doughty, said French, Gallop should tell Poirier that if she continued that conduct she would be disciplined. French claims that he told Gallop that his only concern was employee conduct during working time, but I do not credit that testimony.[4]

[1] The bargaining unit consists of: All employees employed by Respondent at its Fort Fairfield processing plant, but excluding executives, clerical and office employees, maintenance employees, guards and supervisors as defined by the National Labor Relations Act. Respondent admits that it is an employer engaged in commerce within the meaning of the Act, that the Union is a labor organization for purposes of Sec. 2(5) of the Act, and that the foregoing unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

[2] The Union filed its unfair labor practice charge on 1 March 1985. The complaint issued on 17 April 1985.

[3] The telephone call quotations are from French's testimony.

[4] Gallop testified that French referred to Doughty as a "loyal employee." I do not credit Gallop in that respect. "Loyal employee" allegations, and the meaning to be attributed to the term "loyal employee," are discussed further, below.

French never raised the matter again. Months after his conversation with French about the Poirier incident, Gallop reported to French that Poirier had not been at fault, a report that French did not question. Poirier was never disciplined in any way about the incident.

B. *Cyr and Dorr*

On 25 October French spoke to Gallop about the activities of Clyde Cyr and Beverly Dorr. In many respects French's statements about Cyr and Dorr were similar to his statements to Gallop about Poirier.

French told Gallop that employees were complaining about the extent to which Cyr and Dorr were talking to other employees in a working area of the plant about union and deauthorization matters. French told Gallop to check out those complaints. If the complaints were accurate, said French, Gallop was to "go out and tell them to keep their mouths shut." In the course of the conversation French threatened to "file charges if the union members continued to talk to people in the plant about union business." (French did not, however, say what "charges" he was talking about.) As in the Poirier case, French did not tell Gallop that his concern was limited to Cyr's and Dorr's behavior during working time.

Gallop subsequently did tell Cyr and Dorr "to calm down, keep their remarks to themselves." Neither Cyr nor Dorr was ever disciplined for the activities to which French referred.[5]

C. *Conclusion—French's Conversations with Gallop*

French's threats of discipline. Once again the Board is faced with the need to work out "an adjustment" between, on the one hand, the protected right of employees to seek to persuade their fellow employees to support (or oppose) their union and, on the other, the "right of employers to maintain discipline in their establishments" and the right of an individual employee to be free from the improper behavior of other employees with whom he or she disagrees.[6] Here there is no doubt that Gallop could have interpreted French's remarks as a threat that any employee who talked to another employee about the upcoming deauthorization election would be disciplined if the employee on the receiving end of the discussion considered the talk to be harassment, however mild the discussion may in fact have been, and even if the discussion took place on nonworking time.[7]

On the other hand, while French's remarks could have been interpreted that way, they did not have to be. French's remarks were reasonably susceptible to the interpretation that his concern was preventing aggravated kinds of harassment of employees that occurred while the employees were at work. (In that latter respect French referred to Doughty's belief that her work was suffering and to the reports that Cyr's and Dorr's activities took place in working areas of the plant.) And Gallop had some responsibility for clarifying the ambiguity. Gallop, after all, was president of the Union, was a senior employee, and had often been called on to resolve disputes between employees. Moreover, French did not tell Gallop that he (French) knew what the facts were. Rather, French told Gallop to find out what they were. That put Gallop in the position of being able to report back to French that the complaining employees had no basis for their gripes (which, in the case of the Poirier-Doughty incident, is what he did). Finally, the General Counsel does not contend that French's remarks to Gallop were the product of union animus, and the record would not support any such contention. Rather, it appears to me that French talked to Gallop about the complaints directed at Poirier, Cyr, and Dorr solely to remedy matters French thought might hurt plant efficiency and because employees on the receiving end of Poirier's, Cry's, and Dorr's remarks had asked French for help.

Under all these circumstances, my conclusion is that those remarks did not violate the Act.[8]

French's threat to "file charges." As the General Counsel contends, an employer's threat to "file charges" against an employee can violate the Act. *Consolidation Coal Co.*, 266 NLRB 670, 675–676 (1983). But such threats do not necessarily constitute violations; they must be evaluated in light of the circumstances in which they were made. Here the considerations applicable to French's threats of discipline seem equally applicable to his threat to file charges. Accordingly my recommendation is that the Board dismiss this allegation too.

It is worth noting, moreover, that French's threat to file charges would not necessarily be a violation of the Act even if his threats to discipline employees were. One consideration is that French's statement about filing charges could readily be understood to mean filing unfair labor practice charges with the Board. (The General Counsel, in fact, does interpret French's statement that way: see G.C. Br. at 5.) In contrast, in all of the cases of which I am aware in which an employer was held to have violated the Act by threatening litigation, the employer threatened criminal or civil action.[9] Another consideration is that French made the threat to the Union's president (whom French did not accuse of personally engaging in any of the alleged harassment). Thus it is as

[5] Gallop and French were the only witnesses to the two conversations discussed above. The foregoing description of those conversations is based on Gallop's and French's testimony and on my determination about which of the two witnesses seemed more credible where there were conflicts in that testimony.

[6] The quotes are from *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945).

[7] See, in this respect, *Sierra Hospital Foundation*, 274 NLRB 427, 428 (1985), in which the Board focused on the fact that the employer carefully limited its prohibitions on union organizing activity to working time.

[8] For a case that appears to touch on some of these same issues, see *ACTIV Industries*, 277 NLRB 834 fn. 2 (1985).

[9] Cases arising during the past 10 years that involve threats of litigation by an employer include: *Consolidation Coal*, above; *Kay Fries, Inc.*, 265 NLRB 1077 (1982), enfd. mem. 722 F.2d 732 (3d Cir. 1983); *Clara's Restaurant*, 263 NLRB 37 (1982); *Cutting Inc.*, 255 NLRB 534, 543 (1981), enfd. in pertinent part 701 F.2d 659 (7th Cir. 1983); *Pabst Brewing Co.*, 254 NLRB 494 (1981); *Centre Engineering*, 253 NLRB 419 (1980); *North State Supply Co.*, 247 NLRB 1331 (1980), enfd. 649 F.2d 860 (3d Cir. 1981); *Wolverine World Wide*, 243 NLRB 425 (1979); *Pleasurecraft Marine Engine Co.*, 234 NLRB 1216 (1978); *Donn Products*, 229 NLRB 116 (1977), enfd. in pertinent part 613 F.2d 162 (6th Cir. 1980); *S.E. Nichols Marcy Corp.*, 229 NLRB 75 (1977); *San Clemente General Hospital*, 224 NLRB 378 (1976). As stated above, in all these cases the employer threatened civil or criminal litigation, not litigation before the Board.

reasonable to interpret French's statement as a threat to file charges against the Union as it is to interpret it as a threat to bring action against individual employees. Yet the cases on the subject refer to employer threats against employees, not unions.[10]

In sum, French's statement can reasonably be interpreted as a threat to file unfair labor practice charges against the Union. And it is far from clear that that kind of threat, made to a union official, ought to be deemed a violation of the Act except, perhaps, under egregious circumstances.

II. THE CYR-LEVESQUE INCIDENT AND ITS AFTERMATH

Phyllis Cyr is an IFP employee and an officer of the Union. On the day of the deauthorization election Cyr challenged the ballot of another employee who, at the time of the election, was not working due to a work-related injury. Dawn Levesque, also in IFP employee, is the leader of the antiunion faction and had petitioned for deauthorization of the Union. The day after the election, in the plant, Levesque loudly insulted Cyr for the ballot challenge. Cyr immediately reported the incident to Respondent's management.

Cyr had been involved in a similar incident about a year earlier, except on that occasion she was the one hurling the insults. As a result of that behavior Cyr received a written warning. Cyr accordingly expected that Respondent would discipline Levesque in a similar manner. But that did not happen. Instead Levesque received only a "verbal warning," which at IFP is a lesser form of punishment.

Cyr thereupon filed a grievance, claiming disparate threatment. Her grievance demanded removal of the written warning from her record. As it turns out, Respondent's actions were not disparate. (At IFP a first incidence of misbehavior results in a verbal warning. A second occurrence results in a written warning. Cyr's misbehavior was her second; Levesque's was her first.) The General Counsel does not argue otherwise. The General Counsel's contention is, instead, that French used language that implied that Respondent was not taking disciplinary action against Levesque because Levesque was opposed to the Union.

The basis of the General Counsel's claim is testimony by Gallop and by the Union's Grand Lodge representative, William Layman, that, during a meeting with French held to consider Cyr's grievance, French on the one hand did not advise Gallop or Layman that Levesque had already received a verbal warning and, on the other hand, referred to Levesque as a "loyal employee." (That claimed reference to "loyal employee" is significant because, as all parties agree, everyone in Respondent's plant understands that the term refers to any employee who crossed the picket line to work during a strike called by the Union in 1983.) Gallop's recollection was that at the conclusion of the discussion of the grievance, French said that he would "talk to" Levesque about the 2 November incident and, somewhere in the course of that conversation, referred to Levesque as a loyal employee. As Layman remembered the circumstances, after he told French that the Union wanted the same treatment for all employees, French responded, "Dawn [Levesque] is one of [Respondent's] loyal employees."

French denied that anything of the sort occurred. He testified that he did tell Gallop and Layman that Levesque had received a verbal warning and that he did not use the term "loyal employee." In that latter regard, French claimed that it was union officials who used the term frequently—as an ironic reference to employees who refused to support the strike against Respondent.

The Cyr-Levesque Incident—Conclusion

The General Counsel's contention that Respondent implied that it was favoring antiunion employees comes down to the question of whether French did in fact use the term "loyal employee." Layman and Gallop testified that French did use the term, and their testimony was reasonably consistent with each other's. Gallop, moreover, was a credible witness. (My impression of Layman, on the other hand, is that he has trouble keeping his facts straight.) But French's testimony was no less credible than Gallop's. From what I saw of French, it would be entirely out of character for him to use any expression like "loyal employee," especially when dealing with union representatives. Under the circumstances, therefore, I cannot conclude that the General Counsel has carried her burden of proof.

III. THE GUIMOND INCIDENT

Shortly before the deauthorization election the Union sent letters to Respondent's employees suggesting that only the Union's presence kept Respondent from reducing wages to minimum wage levels and from eliminating various employees benefits. Respondent, in reply, called groups of 20 to 30 employees into the plant's conference room where French and Respondent's labor counsel, Peter Kraft, spoke to them. Respondent deemed the Union's allegations to be false, and French and Kraft made that clear in the course of their comments.

Employee Gerard Guimond attended one of those meetings. The meeting proceeded without incident until Kraft had completed his remarks and French asked for questions from the employees. Management's remarks had infuriated Guimond, and that the juncture Guimond pointed at French and shouted "you're a goddamn liar." French's response to Guimond was "I understand your opinion, we'll discuss this later."

When the meeting ended French and Kraft decided to have that discussion with Guimond forthwith. Accordingly, French and Kraft stepped out of the conference room in the direction of Guimond's work station, and French told Guimond's foreman, Fred Jalbert, to have Guimond return to the conference room. Jalbert did as he was ordered, telling Guimond that French and Kraft wanted to speak to him. Guimond refused to go.

When Jalbert advised French of Guimond's refusal, French told Jalbert to repeat the order. Jalbert did, and on this second go-round Guimond did leave his work station (which was about 30 feet from the conference

[10] See the cases cited in fn. 9, above.

room) and move toward French and Kraft. But Guimond refused the order to enter the conference room.

That much of the Guimond incident is reasonably clear (notwithstanding some conflicts in testimony). At this point, however, the facts become murky. But as best I can determine, both Kraft and French spoke to Guimond, referring to his "liar" accusation, and French personally ordered Guimond to go into the conference room. Guimond responded by noisily claiming that French had no right to give such an order and by denying that he had called French a liar. (Guimond claimed that he called IFP—not French—a liar.) A loud altercation ensued. French repeatedly and at high volume ordered Guimond into the conference room and threatened Guimond with discharge if Guimond continued to disobey French's order. Guimond nonetheless refused to step into the conference room.

Gallop arrived on the scene (having been summond by another employee) and convinced Guimond to go into the conference room. (Gallop accompanied Guimond into the conference room.) Kraft thereupon told Guimond that Guimond should not have called French a liar in front of a group of employees. French reiterated that message in stronger terms, telling Guimond that French "could not tolerate a person [calling] him a liar because there [were] other employees that heard that . . . conversation and it didn't look right for an employee to be calling a supervisor, a general manager, a liar."[11]

After French permitted Guimond to return to his work station, French made a record of the incident, indicating that Guimond had received a verbal warning for "failure to obey a direct command." Guimond was not otherwise disciplined.

The Guimond Incident—Conclusion

Guimond's "you're a goddam liar" accusation was protected by the Act. It was neither "flagrant" nor "violent," there was nothing improper about Guimond's motives, and it plainly was a "spontaneous protest" uttered in "the heat of the moment."[12] French found the remark particularly offensive because it was made directly to him in the presence of numerous other employees and thus could affect his status in the employees' eyes. But that aspect of Guimond's utterance is by no means sufficient to deny it the Act's protection.[13]

The question is whether any of management's responses to Guimond's protected utterance violated the Act. My conclusion is that while the question is a close one, none of those responses was unlawful.

The most serious of management's responses was French's statement that he "could not tolerate" Guimond calling him a liar in front of other employees. If that did not violate the Act, none of management's other responses did either. (Those other responses: French's statement, made immediately after Guimond's accusation, that "we'll discuss this later"; the orders that Guimond return to the conference room; and Kraft's statement that Guimond should not have called French a liar in front of other employees.)There is no doubt that French's loud declaration that he "could not tolerate" behavior that the Act protects could readily be deemed to be coercive. It suggests that Respondent would fire Guimond were Guimond to repeat such action. (Indeed that is how Guimond interpreted French's remarks.) French made the statement while in the company of respondent's lawyer. And neither French nor Kraft advised Guimond that Respondent recognized that Guimond had the right to have said what he did.

But I think French's statement nonetheless falls within the range of permissible management responses. First, Respondent did not in fact discipline Guimond for his accusation or even explicitly warn Guimond that a repetition of his behavior would result in discipline.[14] (I will discuss below the verbal warning French gave Guimond.) Second, while Guimond was entitled to be free from being disciplined for his comment, for several reasons he was not entitled to avoid an angry retort from management: (1) virtually anyone on the receiving end of an angrily shouted "you're a goddam liar" would react strongly; (2) Guimond's accusation was inappropriate to the circumstances in that there is no indication that either Kraft or French used comparable language or tone of voice in the discussion that led up to Guimond's accusation; and (3) Guimond's repeated refusals to obey the orders of Jalbert and French had the inevitable result of further upsetting an already angry French. It would be altogether unrealistic to interpret the Act as requiring a manager to choose his phrases carefully under these emotionally charged circumstances—especially where, as here, the employees involved have a major hand in creating that emotional charge. Thus while French's language was stronger than one might wish, my recommendation is that the Board conclude that it did not violate the Act.[15]

As a last matter, I think that French's "verbal warning" of Guimond for failing to obey a direct command was lawful. I have considered the fact that Jalbert's and French's orders to return to the conference room could themselves be deemed coercive. Guimond certainly was freightened by them. (Guimond desperately wanted to avoid facing French because he knew that French was angry about the "liar" accusation). But French was entitled to talk to Guimond about Guimond's accusation and to order Guimond to go to a location where they could have the talk. I have also considered whether that disci-

[11] The quote is from Gallop's testimony.

[12] The first two quotes are from *Prescott Industrial Products Co.*, 205 NLRB 51, 52 (1973), enf. denied 500 F.2d 6 (8th Cir. 1974). The other two quotes are from, respectively, *J. P. Stevens & Co.*, 219 NLRB 850, 859 (1975), enfd. 547 F.2d 792 (4th Cir. 1976), and *Ozark Properties*, 274 NLRB 687 (1985).

[13] See *Martin Brower Co.*, 270 NLRB 805, 808–809 (1984).

[14] Compare *Ozark Properties*, above (employee discharged); *Martin Brower*, above (employee discharged); *J. P. Stevens*, above (employee discharged); *Prescott*, above (employee discharged).

[15] This discussion had proceeded on the assumption that Respondent would have violated the Act had management explicitly threatened to discipline Guimond if he made a similar accusation in the future. It is not altogether clear, however, that that assumption is a valid one. The fact that the Act protects, on one occasion, an employee's public accusation that the employer's general manager is a "goddam liar" does not necessarily mean that a second instance of such behavior would also be protected. It may be that, as in the case of some other kinds of behavior, an employee is entitled to only one such bite at the apple. See, e.g., *Mashkin Freight Lines*, 261 NLRB 1473, 1477 fn. 14 (1982).

pline might have been at least partially a function of French's anger about Guimond's accusation. But Guimond did repeatedly disobey both Jalbert and French, and the nature of the discipline certainly was not so harsh as to suggest that French was responding to something more than Guimond's insubordination.

IV. GENERAL COUNSEL'S CONTENTION THAT RESPONDENT VIOLATED SECTION 8(A)(5) BY FAILING TO PROVIDE INFORMATION TO THE UNION

For many years the only document that Respondent's management used to keep track of the status of its employees (in respect to such matters as seniority, position in the plant, out sick or on workers' compensation, in the military, and the like) was a seniority list that IFP reissued several times a year. Respondent provided copies of the seniority lists to the Union on request and, until the autumn of 1984, the Union found the seniority lists to be adequate for its purposes.

A. *The Union's Letter of 25 November*

In the autumn of 1984 the Union's Grand Lodge representative, William Layman, concluded that the Union needed additional information from Respondent. (One reason for that conclusion: a mistake by the Union about the status of an IFP employee had led to a charge that the Union committed an unfair labor practice against the employee. Another reason: Layman was not aware that Respondent's seniority lists showed the status of all employees, including employees on layoff.) Accordingly, on 25 November 1984 Layman wrote to French, requesting additional information.

According to the General Counsel, in that letter the Union requested the names of employees who had been laid off or rehired, and Respondent unlawfully failed to provide the information. Unfortunately the facts associated with that allegation are extraordinarily ambiguous.

Layman's 25 November letter did in fact request the information that the General Counsel claims it asked for. But there were two problems with the letter. First, it did not specify that Layman wanted something other than a seniority list. In fact, the letter could be read as indicating that what Layman wanted was an updated seniority list. And second, in one place the letter asks for one set of information while in another place—purportedly a summary of the first—the letter asks for another set of information.

In that latter respect, the first request for information in the 25 November letter was as follows: "We further request a new listing of all employees who were terminated, hired, laid off, discharged, rehired or quit since June 1, 1984." But the last paragraph of the letter reads: "To sum up this correspondence, we have . . . [made a] [r]equest for new listing of all new hires, [t]erminations, rehires or quits."

The table below compares the two parts of the letter.

Information Requested in First Reference	*Information Requested in Summary Line*
terminated	terminations
hired	new hires
discharged	
laid off	
rehired	rehires
quit	quits

Most conspicuously, of course, in one place Layman's letter requests layoff information; in the other it does not.

If Layman's letter had been clear that Layman considered seniority lists inadequate for his needs, French arguably would have come under a duty to clear up the confusion. But in light of all the circumstances, including the Union's longtime use of seniority list, my conclusion is that French could resonably have assumed that Layman's letter was merely a request for an updated seniority list. And, in fact, on 4 December French did send a new seniority list to Layman. (The relevant part of French's covering letter reads: "The Company has kept the Union up-to-date on terminations and will supply you a new seniority list as of this date.")

B. *The Union's Letter of 7 December*

Layman responded to French's 4 December letter with a letter dated 7 December 1984. The General Counsel alleges that in that letter the Union asked for the names of all "reinstated" employees and that Respondent failed to provide the information.

The 7 December letter did refer to information about reinstatements. But French can be excused for not realizing that Layman was asking for a new kind of information. The problem was that the principal purpose of the letter seemed to be to advise Respondent that the information that IFP had been sending to Layman should henceforth be sent to another union official, Charlotte Nelson. Thus the only reference to reinstatements was as follows:

> In the future, please forward all copies of terminations to Charlotte Nelson, Financial Secretary. All new hires are [sic] reinstatements of employees should also be sent to Mrs. Nelson . . . .

The last sentence in the letter seems to me to have greater significance to this proceeding. The sentence reads: "I have had no response to my letter dated November 25, 1984, so I am making the requests again."

As Respondent contends, that last sentence "was factually inaccurate as well as ambiguous."[16] But French did not say that to Layman or to anyone else associated with the Union. What French did do was advise Layman, by letter dated 26 December, that French would "discuss the information the Union is requesting" at a grievance meeting set for 8 January. (The grievance matter was unrelated to the Union's information requests.) While that response was better than none at all, it not only failed to provide Layman with the information he wanted, it failed to inform Layman why Respondent was not providing that information.

[16] IFP Br. at 5.

C. *The Union's 8 January 1985 Oral Request for Information*

Layman and French met on 8 January, as planned, to consider the grievance matter. They did not discuss the Union's information concerns until the conclusion of the meeting—"going out the door," as French put it. The discussion was brief. Layman complained that, among other things, the Union was not getting the information it needed. French said that he would "get back to" Layman about Layman's complaints, but he never did.

D. *The Union's letter of 11 February 1985*

On 11 February Layman wrote to Respondent's labor counsel, Peter Kraft, to complain that Respondent was not providing the Union with information that the Union needed. But Layman's letter did not refer to the kinds of information that are the subject of the complaint (layoffs, rehires, and reinstatements). Rather, it read:

> We have consistently requested the company to give the union secretary the names of new hires, quits, leave of absence, employees out sick or on workmen's compensation and terminations. To date, the company is complying only with the termination notices.

Kraft, in response, wrote to Layman 3 weeks later in a letter that concluded: "To my knowledge the Company has always complied with your requests for information in a good timely fashion in spite of your insulting, unprofessional style.

E. *The Union's letter of 13 May 1985*

By letter dated 13 May Layman asked French for an up-to-date seniority list and, in addition, for substantial additional information.

Not long before Layman sent that letter to Respondent, Respondent had installed a new information retrieval system that gave Respondent ready access to much more complete employee data than had previously been the case. Because of the relative clarity of the Union's 13 May letter and because of Respondent's new information system, Respondent was in a position to provide the Union with the information the Union sought. Accordingly, on 20 May French sent Layman a new seniority list and, additionally, a 28-page listing of "Information Requested by Union." While the Union claims that some of that information is inaccurate, it is clear that the data reasonably met the Union's needs.

V. CONCLUSION—THE ALLEGED FAILURE TO BARGAIN

There is no doubt that information about layoffs, rehires, and reinstatements was needed by the Union "for the proper performances of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). But until Layman's letter of 13 May, the manner in which the Union asked for the information made it a virtual certainty that the Union would not get the information it wanted. For one thing, until that May letter the Union never did specify that it considered seniority lists to be inadequate for its needs. For another, even apart from that first difficulty, Layman's letters of 25 November and 7 December were ambiguous in important respects. Third, most of what Layman's November and December letters said that the Union needed was in fact readily available from information that IFP had been providing to the Union. Fourth, Layman's letter to Kraft (in February) did nothing to reduce the confusion since it made no mention of the kinds of information the General Counsel claims that Respondent was failing to provide. Finally, the impression I got at the hearing is that Layman has such a combative and suspicious personality that virtually any employer is likely to consider any communication with him, especially oral communication, to be difficult, irritating, and confusing.

On the other hand, seniority lists were an awkward way for the Union to obtain information about rehirings and reinstatements, and it was reasonable for the Union to seek a better source for that information. Moreover Layman did make it clear that he wanted information that he thought he was not getting—in his letter of 7 December and his oral complaint of 8 January.

The parties have not cited any case similar to this one, and my research has found none. The problem is the ambiguity of Layman's requests for information. In every request-for-information case that I have read, the union at least made clear what general category of information it was seeking. Here that was not the case. All Respondent could be expected to have known was that the Union believed that it did not have some sort of information that the Union thought it needed.

My conclusion is that Respondent violated Section 8(a)(5), notwithstanding the ambiguity of the Union's requests.

For one thing, in cases involving imprecise union requests for information, the Board has concluded that such imprecision does not entitle the employer to ignore the requests. E.g., *Postal Service*, 276 NLRB 1282, 1285 (1985).

A more basic consideration is that the Act requires an employer to operate "in good faith" when bargaining collectively. That requirement of good faith surely also applies to the attitude with which an employer considers a union's requests for information. And as I add up the facts, Respondent would in the very least have advised the Union of its confusion about Layman's December and January requests had Respondent's attitude been one of good faith, of wanting its relationship with the Union to be characterized by "constructive, open discussions." *H. K. Porter Co.*, 397 U.S. 99, 103 (1970).

Two other points remain for consideration.

One concerns the obstacle to communication presented by Layman's personality. But while it is understandable that Respondent found it difficult to deal with Layman, there has been no showing that Respondent had any basis for concluding that it would have been futile to ask the Union for clarification. See *Postal Service*, above.

The second point involves Layman's 11 February letter to Kraft. That letter fails to mention any of the kinds of information to which the complaint refers (rehires, reinstatements, and layoffs). It could thus be

argued that the letter amounted to a withdrawal by the Union of its requests for the kinds of information that are the subject of the complaint, thereby ending any obligation on Respondent's part to provide such information. But for two reasons I think that that letter does not excuse Respondent's failure to respond to the Union's requests of 7 December and 8 January. First, Respondent had an obligation to respond in a timely fashion to those requests. *Aeolian Corp.*, 247 NLRB 1231, 1243–1244 (1980). By 11 February, therefore, Respondent had already violated the Act. Second, French, not Kraft, was responsible for providing the Union with information. But French did not learn of Layman's 11 February letter until the hearing. Thus, that letter provides no justification for French's failure to respond to the Union's requests.

THE REMEDY

Attaching a remedy to Respondent's violation of Section 8(a)(5) is awkward in that the violation is a peculiar one: Respondent's only wrongdoing was its failure to communicate with the Union about Respondent's lack of understanding of the Union's information requests. Moreover, Respondent did provide the information that the Union wanted as soon as the Union requested the information unambiguously. Under the circumstances the recommended Order will not require that Respondent furnish information to the Union (which is the typical order in cases involving information requests by a union). Rather, the recommended Order will require Respondent to: (a) cease and desist from failing to respond to requests by the Union for information; and (b) respond in timely fashion to future union requests for information.

The recommended Order will, in addition, require Respondent to post a notice advising of the Board's action.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent Interstate Food Processing Corporation, Fort Fairfield, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain collectively with Local Lodge No. 1198, District Lodge No. 99, International Association of Machinists and Aerospace Workers, AFL–CIO by failing to respond to requests by the Union for information.

(b) In any like or related manner interfering with, coercing, or restraining employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Respond in a timely fashion to requests by the Union for information.

(b) Post at its facility in Fort Fairfield, Maine, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt and maintain for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

---

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

United Steel Erectors, Inc. *and* International Union of Operating Engineers Locals 627A and 627B, AFL–CIO. Case 16–CA–12440

24 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 11 August 1986 Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order,[3] as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Steel Erectors, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

"(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

Ruth Small, Esq., for the General Counsel.
David E. Stretcher and *Katie J. Colopy, Esqs. (Conner & Winters)*, of Tulsa, Oklahoma, for the Respondent.
Gerald Ellis, Business Manager, Operating Engineers Local 627, of Tulsa, Oklahoma.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. In this refusal-to-bargain case I find that the members of a contractors association privately agreed their assignments of bargaining rights to the Association would be nonbinding. However, because I find Respondent clothed the Association with apparent authority to act on its behalf, I find that Respondent unlawfully refused to sign the 1985–1987 contract reached 9 May 1985 between the Union and the Association. I order Respondent to sign the contract and to give effect to its terms retroactive to 1 June 1985.

This case was tried before me in Tulsa, Oklahoma, on 31 March and 1 April 1986 pursuant to the 12 February 1986 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on a charge filed 31 December 1985 by International Union of Operating Engineers Locals 627A and 627B, AFL–CIO (Union, Local 627, or Charging Party) against United Steel Erectors, Inc. (Respondent or USE).[1]

In the complaint the General Counsel alleges that Respondent violated Section 8(a)(5) of the Act by refusing to execute a contract reached between it and the Oklahoma Commercial and Industrial Builders and Steel Erectors Association (Association or OCIBSEA) on 9 May.

By its answer Respondent admits certain factual matters but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel[2] and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

An Oklahoma corporation with an office in Tulsa, Oklahoma, USE is engaged in the business of crane rental, rigging, and structural steel. During the past 12 months, USE purchased and received at its Tulsa (Oklahoma) facility goods and materials valued in excess of

[1] In adopting the judge's decision, we make the following correction: the second par. of sec. III,A,4, of the decision should refer to the term of the negotiated collective-bargaining agreement as "1985–1987."

[2] In its exceptions, the Respondent contests the Union's status as the exclusive collective-bargaining representative of its employees. In the supporting brief, the Respondent notes that the Union was certified by the Board on 11 July 1986, then solely asserts, with respect to the Union's representative status, that "nothing alleged or argued in this case is intended to waive its right to contest the certification in Case No. 16–RC–8814." In agreeing with the judge's conclusion that the Union is the exclusive representative of the Respondent's employees in an appropriate unit, we note that the Respondent has raised no issue or argument in its exceptions or brief that would cause the Board to reexamine the decision made in the representation proceeding.

We agree with the judge's finding that the Respondent clothed the Oklahoma Commercial and Industrial Steel Erectors Association (the Association) with the apparent authority to act on its behalf and, in so doing, conclude that this case is distinguished from *Crane Sheet Metal*, 248 NLRB 75 (1980), enf. denied 675 F.2d 256 (10th Cir. 1982). We note that here the Respondent signed a form stating that it assigned to the Association "all of his or its rights to bargain collectively in the negotiations for a new labor agreement with the International Union of Operating Engineers Local 627," knowing that regardless of whatever private understanding it had, the Association would or might furnish the form to the Union. We find this to be overt conduct on the part of the Respondent showing an apparent intent to clothe the Association with the authority to negotiate on its behalf a binding collective-bargaining agreement. Such an overt course of conduct was not present in *Crane Sheet Metal*.

[3] The Respondent's request for oral argument is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

The judge granted the General Counsel's request that the order include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Order. We have concluded that under the circumstances of this case such a clause is not warranted. We shall modify the recommended Order accordingly.

[1] All dates are 1985 unless otherwise indicated.

[2] The General Counsel included a proposed notice to employees and order with her brief.

$50,000 directly from sources located outside Oklahoma. Respondent USE admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Union of Operating Engineers Locals 627A and 627B, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

1. Background

Merle D. Martindale is president of USE. In October 1979 Martindale signed a one-paragraph document by which USE agreed to be bound by the then current collective-bargaining agreement (CBA) between the Union and the Oklahoma Chapter-Builders Division, the Associated General Contractors of America, Inc. (AGC), plus any renewal contracts (1:24–25; 2:253;[3] G.C. Exh. 2).

Martindale never signed any document canceling his 1979 agreement with the AGC. On the other hand, Martindale never signed any subsequent similar agreement (2:253) even though the Union's practice was to send them to all the steel contractors whenever a new contract was reached every 2 years (2:198). USE was never a member of the AGC (2:253).

Since 1979 Respondent has paid the wage rates and the benefit fund contributions specified in the AGC contracts (1:31),[4] and this includes up to the time of the hearing (1:51–52; 2:254). The latest AGC contract expired on 31 May 1985 (1:104).

William H. Noble is president of Builders Steel Company, Inc. (1:102). In early 1985, Noble testified, the AGC announced that it would not negotiate renewal contracts with the unions in Oklahoma (1:102). The AGC's then current contract with Local 627 was set to expire about 1 June 1985 (1:27, 104).

Martindale testified that the AGC's notice of dissolution included a suggestion that the employer members send a notice to the unions canceling their assignments of bargaining rights (1:27). By letter dated 25 February Martindale, on behalf of USE, notified Local 627 of the AGC's dissolution, that USE terminated its CBA effective 1 June, offered to meet and negotiate a new CBA, and advised the Union that Martindale was the only person authorized to bargain on behalf of USE (G.C. Exh. 3).

2. Formation of OCIBSEA

Thinking it wise to form a new association to deal with the Operating Engineers and the Iron Workers, Noble wrote letters inviting various contractors to attend a meeting on 13 February to discuss becoming a part of the new association (1:103). Noble's letter to USE, to Martindale's attention, is dated 28 January (G.C. Exh. 5). Martindale received the letter and, along with some nine other contractors (including Noble), attended the first meeting (13 February) of what became the Association (1:32–34; 2:255–257; R. Exh. 1).

Noble testified that the purpose of the meeting was for the contractors to get together to see if they had a mutual interest in negotiating with the Union (1:119), and Martindale testified that such was his understanding also (2:260–261, 281). At this initial meeting the attendees discussed a wide range of topics on what it would take to be competitive, including rates for wages, health coverage, and pension benefits (1:35). Although formation of a new association was briefly discussed, including having a committee to negotiate, no express decision was made to form one, and Martindale was not asked to join one (2:258–259, 281–282).

Noble concedes that at the first meeting he did not ask anyone to assign bargaining rights, and he did not say anything about the attendees being bound to any agreement the group might negotiate (1:141–142).

Either at the meeting or in a telephone conversation, as Martindale testified, Noble requested the contractors to put in writing what they thought it would take to make them competitive in the market (1:119; 2:262). By letter dated 20 February, Martindale sent Noble a list with seven numbered suggestions or ideas (2:262, 283; G.C. Exh. 12). Martindale did not intend his 20 February letter to constitute an assignment of bargaining rights (2:263). Five days after this letter Martindale, as we have seen, wrote the Union and offered, on behalf of USE, to meet and bargain for a new contract to begin when the current one expired 1 June (G.C. Exh. 3).

Before the second meeting, Noble sent those he thought would be attending, including Martindale, the following note of 8 March (1:142–143; R. Exh. 2):

> This note is a reminder for the meeting next Wednesday at Builders Steel at 1:30 p.m. to review the Operating Engineers contract and bring everyone up-to-date on the Iron Worker and Operating Engineer negotiations for this spring as several things have transpired since our meeting last month.
>
> I've received letters from two of the individuals in our meeting however everyone was going to put their thoughts in written form concerning where they thought the salaries and fringe benefits should be, so try to have something written by the time the meeting starts as we are very interested in everyone's input concerning the 1985 Union Contracts.
>
> See you Wednesday afternoon.

On Wednesday, 13 March, Noble and seven other contractors attended the second meeting (1:120, 144). Martindale was not present, and neither were a couple of others who had attended the first meeting. One company[5] was represented at the second meeting which had

[3] References to the two-volume transcript of testimony are by volume and page.

[4] In fact, as Martindale testified, USE has made these payments for the 19 years USE has been in business (1:52; 2:252).

[5] National Steel Erectors, represented by R. Jack Holland.

not been represented at the first meeting (1:144–146; R. Exhs. 1, 3). At the second meeting the attendees discussed the union contract in detail, including the changes the group thought would be needed. Nothing was said about any binding effect of whatever was negotiated (1:146–147).[6]

Although Noble testified it was at the first meeting he was elected president of the new Association (1:129), he concedes there are no formal documents prepared for the Association (1:165–166). He also testified that a negotiating committee was elected, consisting of Jim Ulmer, of Jim's Crane Service, Jack Holland, of National Steel Erectors, and Noble, of Builders Steel, but that he did not recall at which meeting they were elected (1:106, 151, 172). I note that Holland was not an attendee at the first meeting (R. Exh. 1), but he did attend the second meeting (R. Exh. 3). I find that it was at this second meeting, not the first one, when the Association was formed, Noble was elected president, and a three-member negotiating committee was elected.

By letter dated 15 March Noble wrote members of the group to bring everyone up to date (1:147). The copy to Martindale reads (R. Exh. 4):

> Dear Merle,
>
> This letter is to review what our plans are at the present time concerning negotiations with the ironworkers and operating engineers. A general consensus was obtained during the last two meetings, February 13 and March 13, 1985 of our group which informally will be called the Oklahoma Steel Erectors Association as follows:
>
> It is our intent to join in with the AGC Contracting members that desire to negotiate with the two above mentioned unions. We do not feel that we will benefit the position of the employer by negotiating alone and feel that by adding to the AGC Contractors we can provide them with more numbers and make the negotiating job simpler for the union and management negotiating teams. We have discussed the areas in which we feel there is some concern and possible changes that would be advantageous to the employer and the employee. At the same time we have discussed in general where we feel wages should be in order for us to be competitive in today's market place and also be able to continue as employers with union labor. At the next meeting, which will be held on Wednesday, April 10, 1985 at Builders Steel's office in Tulsa, we will discuss the operating engineers contract in detail. Please bring with you at that time or mail to me ahead of time your comments and expectations insofar as any changes you feel might be included in the negotiations this spring. I will try to get out a letter on April 5 concerning our April 10 meeting. I appreciate the attention and time that each of you have spent on this project and hope that you feel that it is beneficial towards the operation of your business.
>
> Sincerely,
> /s/ Bill
> W. H. "Bill" Noble
> President[7]

Noble broke a leg in early April, and he is uncertain whether a meeting was held on 10 April as scheduled in his letter, and he has no attendance roster for any meeting on that date (1:120, 149). Martindale attended no meeting that date.

On 9 April Noble wrote to Business Manager Gerald Ellis of the Union that nine named firms desired to meet and bargain for a new CBA (1:104, 117–118, 173). Clayton Walker, a business representative of Local 627 for over 25 years, testified that the Union received the letter and that USE was one of the companies listed (2:181). The 9 April letter, which does not mention the Association, reads (G.C. Exh. 6):

> Dear Gerald:
>
> This letter is to serve official notice that the following companies wish to negotiate with you to place in effect a contract that will continue after the present contract expires on June 1, 1985. We wish to negotiate for every Classification that we presently have in our work forces. We anticipate that negotiations should start somewhere around April 25, 1985. Any subsequent meetings that would need to transpire would then be set at the conclusion of each succeeding meeting.
>
> The following companies are presently interested in negotiating with the Operating Engineers: Jim's Crane Service, Oklahoma City, Chowning Logan, Logan and Company, Coffeyville, Kansas, Bennett Steel Erectors, Sapulpa, Okie Steel Inc., Bartlesville, National Steel Erectors, Muskogee, Copeland Steel, Tuloma, Inc., United Steel Erectors, and Builders Steel Co., Inc., of Tulsa.
>
> Please contact me as soon as possible in order that we will be able to start negotiating for a new contract.
>
> Sincerely,
> /s/ W. H. Noble
> W. H. "Bill" Noble

Some 9 days later, by date of 18 April, Noble sent letters on plain stationery to the contractors informing them of meeting dates scheduled with the unions. Attached to the 18 April letter was a copy of the 9 April letter which Noble had sent to Local 627 (1:105, 126). The copy of Noble's 18 April letter to USE reads (G.C. Exh. 7):

> Dear Merle:
>
> This letter is to keep you informed concerning the negotiations with the Operating Engineers and

[6] Noble concedes that nothing was said about any binding effect until the meeting of 7 May (1:152, 160).

[7] As the letter is on the stationery of Builders Steel (the Association had no stationery, 1:165), the "President" reasonably refers to Noble's position at his company rather than with the Association. His previous letters were written in the same fashion, including his letter of 28 January—which well predates formation of the Association.

Iron Workers. As of this date the first meeting with the Iron Workers will be Tuesday, April 23, at 1:30 p.m. at the apprentice hall which is located about one mile East of the Iron Workers hall on 46th Street. We also have a meeting with the Operating Engineers for April 25, Thursday, at 1:30 p.m. at their Union hall on East Skelly bypass, just East of the 11th Street exit.

If you have any questions concerning this please do not hesitate to give me a call.

Everyone is invited to these negotiations, however I would like to know if you're going to attend as I can then let the Unions know how many people we will have in attendance and tell you where and when we need to meet before each meeting. From time to time they request that we have no more at the negotiating table than they do.

Look forward to seeing you Tuesday and Thursday.

Sincerely,
/s/ W. H. Noble
W. H. "Bill" Noble
President

Martindale testified that even though he did not authorize Noble to list USE in the 9 April letter, he voiced no objections about Noble's 9 April letter to the Union because he knew he had not signed anything that would obligate USE. Martindale was unconcerned because Noble several times had said the contractors needed to present a show of force, and Martindale considered the 9 April letter as part of that show of force (2:266–267, 283).

The Association and the Union held three bargaining sessions before reaching a contract (1:106). The first meeting was held 25 April, the second on 2 May, and the last on 9 May (1:107, 121, 134; 2:231).

Martindale apparently did not attend any of the three bargaining sessions (1:106, Noble). At the first session Business Manager Ellis asked the members of the Association's bargaining committee whether they had authority to bargain for everyone named in the letter of 9 April, and the members answered that they did (2:219–220).

Apparently not satisfied, Ellis raised the subject again at the second meeting of 2 May. It appears that he told Noble he needed something more specific on whom the Association represented, and he asked about assignments of bargaining rights. Noble said he was inexperienced at bargaining, that Okie was not bound and any contract with Okie would have to be negotiated individually, that Tuloma was in bankruptcy, and that Copeland had no operating engineers (2:234–235).

Apparently after the 2 May bargaining session Noble checked with Representative Don Zippert of the AGC who informed Noble that written assignments of bargaining rights were necessary (1:108, 138–139).[8]

This brings us to the crucial meeting of the contractors at a Furr's Cafeteria in Tulsa on 7 May.[9]

3. The 7 May 1985 meeting; the "Gentlemen's" agreement; and the assignment of bargaining rights

On 7 May 1985 the Association held a last meeting before agreement was reached with the Union for a new CBA. From six to nine firms were represented (1:49, 111, 122, 2:269). Martindale was there representing USE. Leon Potts, a witness in this proceeding, attended on behalf of Tuloma, Inc.[10]

The meeting was at Furr's Cafeteria in Tulsa. The group began their discussion there after lunch. When the meeting ended most or all of those present, including Martindale, went to a bargaining session with the Iron Workers (1:169). The cafeteria meeting was devoted chiefly, but not completely, to the bargaining session which was to follow the cafeteria meeting.

At the Furr's Cafeteria meeting Noble distributed forms for the contractors to sign by which they would assign their bargaining rights to the Association.[11] The copy in evidence is that signed by Martindale (1:46; 2:268). The document provides (G.C. Exh. 9):

ASSIGNMENT OF BARGAINING RIGHTS

The undersigned employer hereby assigns to the Collective Bargaining Committee, Oklahoma Commercial and Industrial Steel Erectors Association, all of his or its rights to bargain collectively in the negotiations for a new labor agreement with the International Union of Operating Engineers Local 627.

This assignment and the authority herein granted is limited solely to the undersigned employer and is not intended to be a general grant of assignment affecting the bargaining rights of any subsidiary or affiliated firm, partnership or corporation.

It is understood and agreed that the undersigned employer will remain a party to the collective bargaining unit until an agreement is signed or until released from this assignment, in writing, by the Oklahoma Commercial and Industrial Steel Erectors Association. The undersigned employer further agrees not to enter into any separate negotiations or agreements with the above designated union and agrees to accept the terms and conditions of the agreement negotiated by the Collective Bargaining Committee

[8] Although Noble dates that conversation in late April (1:108, 138–139), I find it far more likely that it occurred following the bargaining session of 2 May.

[9] The contractors, or the Association, also held a meeting on 2 May, the same day a bargaining session was held (1:107). An attendance roster shows a signature for Martindale (G.C. Exh. 8). Although Martindale thought he had attended only two of these meetings of the contractors, he nevertheless identified the signature as his (1:43–44; 2:269). The record contains no description of the discussion at the 2 May meeting of the Association.

[10] There is no dispute that at all relevant times Tuloma was involved in its bankruptcy proceedings. A senior vice president of Tuloma, Potts, joined Respondent's staff on 1 July (2:288, 304).

[11] Noble testified that preceding the 7 May meeting he mailed a letter to the contractors in which he enclosed copies of the assignment forms and requested the contractors to sign (1:107, 109, 153). No copy of that letter is in evidence.

of the Oklahoma Commercial and Industrial Steel Erectors Association.

THUS DONE AND SIGNED on this _____ day of _____, 1985.
EMPLOYER: United Steel Erectors, Inc. [Handwritten.]
BY: /s/ Merle D. Martindale

There is no question that at the 7 May cafeteria meeting Potts said that Tuloma could not sign anything because of its bankruptcy proceeding. The critical point in dispute is whether, on Martindale's request, either Noble or the group joined in a "gentlemen's" agreement that the assignments, or at least Martindale's, would not be binding, but would be used only for a show of strength. Of the six to nine contractors in attendance at the meeting, only three (Noble, Martindale, and Potts) testified.

According to Martindale, before signing the form he asked Noble whether it was binding, for if it was he would not sign. Noble said Martindale would need to ask an attorney.[12] Martindale responded by offering to sign if there was a "gentlemen's" agreement that the document would not be binding. Noble turned to the others and asked if they wanted to consent to the form not binding USE and the others voiced their consent (1:48–49; 2:270–273, 284).

The testimony of Leon Potts is essentially the same as that of Martindale, although there are a couple of differences. Thus, Potts recalls the "gentlemen's" agreement applying to everyone (2:298). On a second point, Potts testified that Noble said the form pertained to negotiations with the Operating Engineers (2:296).[13]

Noble testified *that* after Martindale signed the assignment he asked, "Am I bound by this?" Noble replied he was not a lawyer and could not give legal advice, but if he signed it he would feel bound by it (1:111, 123, 161, 164). Noble at first testified he did not recall saying anything about a showing of solidarity, and that he believed he would recall if he said it (1:118), but he later testified he could have said it (1:168). He concedes that at some point in the meeting someone mentioned the phrase "gentlemen's" agreement, but he does not recall who said it or in what context (1:122–123, 166). To his knowledge there was no discussion, in conjunction with the phrase, that a signed assignment would not be binding (1:123–124). Noble denies turning to the rest of the group and asking them if they wanted to agree that the assignment would be a nonbinding gentlemen's agreement (1:124, 163, 172). As previously noted, none of the other members of the group, who might be considered neutrals,[14] testified.

Noble's admission that the phrase "gentlemen's agreement" was used, in a context he cannot recall, tilts the evidence in favor of the Martindale-Potts' version of the critical discussion at the cafeteria meeting on 7 May. Therefore, I find the Association agreed that the assignment form would be nonbinding and used only for the bargaining tactic of presenting a united front to Local 627.[15]

4. New contract reached; USE never signs

At the third and final bargaining session on 9 May, the Association and the Union agreed on a CBA effective by its terms from 1 June 1985 to 1 June 1987 (1:112; 2:231; G.C. Exh. 11 at 1, 11). Either before the session, or at that 9 May session, Noble furnished the Union copies of the executed assignments of bargaining rights (2:182, 230–231).

Attached to the 1984–1987 CBA is a "Designation of Agent" paragraph in which the Labor Relations Committee of the Association warrants that "the contractors listed below have assigned their bargaining rights" to OCIBSEA and that the contractors agreed to be bound by the negotiated agreement.[16] Six contractors are named, including USE and the three companies (Builders Steel, Jim's Crane Service, and National Steel Erectors Corp.) whose representatives (Noble, Ulmer, and Holland) were on the Labor Relations Negotiating Committee of the Association.

After the new CBA was typed, reviewed by the Union and the Association's committee, and signed, copies were mailed around 1 June (the execution date) to the contractors, including USE (1:122–113). Martindale left for a 3-week trip to Alaska about mid-May (2:274–275). Martindale testified that about 7 June, the day after he had returned and examined the new CBA, he telephoned Noble and notified him that he could not live with the conditions set forth in the CBA. Noble made no claim that USE was bound, but told Martindale "You do what you have to do." (2:275–276)

Despite the CBA's inclusion of USE's name as one of the contractors bound to the contract, it appears that Martindale did not call or write the Union and disavow the CBA and inform the Union that the Association never had any authority to bargain on his behalf. Indeed,

[12] When called as the General Counsel's first witness, Martindale testified that he recalled no statement that he should check with his attorney to see whether the assignment would be binding (1:50). After hearing Noble testify that he answered Martindale by saying he was not an attorney but would feel bound if he signed (1:111, 123, 164), Martindale (when called later as Respondent's witness) testified that Noble said something about Martindale's needing to ask a lawyer (2:270).

[13] Noble testified he distributed assignment forms for both the Operating Engineers and also the Iron Workers for those who had not brought their forms and that Martindale signed the former but not the latter (1:110, 163). According to Martindale, he received only the one form (for the Operating Engineers) at the cafeteria meeting, he did not read it, and he thought it pertained to the Iron Workers because they had been talking about the bargaining session to be held that afternoon with the Iron Workers (1:147; 2:272, 274, 283). Although Respondent has employed iron workers in the past, at no relevant time here has it done so (1:47; 2:286). I credit Noble on this, and I find that Martindale knew that the form pertained to the Operating Engineers.

[14] Leon Potts works for Martindale. It is clear that Martindale, even though he pays the wages and benefits called for by the new CBA, does not want to be bound by that contract. Although Martindale testified that Noble's Builders Steel is a competitor of USE (2:255), Noble explained that there is not much competition because USE does mainly renting of cranes whereas Builders Steel works mainly in steel fabrication and erection (1:128).

[15] As previously noted, Business Manager Ellis testified that Noble explained at one of the first bargaining sessions that he was inexperienced in collective-bargaining matters (2:233).

[16] The new CBA names the Association as the "Oklahoma Commercial and Industrial *Builders* and Steel Erectors Association" (emphasis added). The assignment of bargaining rights form, in evidence as G.C. Exh. 9, names it without the word "Builders."

Martindale concedes that USE adopted the pay scale set forth in the new CBA, and USE has continued to pay into all contractual benefit funds (1:31, 51–52; 2:254, 275–277, 280; G.C. Exh. 10). USE does so, Martindale testified, in order to keep its operators, and to avoid problems with the Union, and not because it feels legally bound to do so (2:254, 276–277).

Noble testified that about early July, while he and Martindale were in a telephone discussion on another matter, he asked Martindale whether he had signed the CBA. Martindale said, "No." Noble did not pursue the matter then. In a similar conversation with Martindale in August Noble asked if he was going to sign and Martindale replied that he would take care of that with Clayton Walker, a business representative of the Union (1:114–115). Following this conversation, Noble informed Walker of Martindale's statements, and at that point Noble ceased pursuing the matter with USE (1:115).

I credit Noble concerning the timing and general substance of his conversations with Martindale after 1 June. I find it unlikely that Martindale, who supposedly did not consider himself bound, initiated a call to Noble as his first order of business after returning from Alaska. In any event, USE never signed the new contract.

There is a substantial amount of evidence concerning additional events. Clayton Walker testified to having about four conversations with Leon Potts beginning after Noble called him in midsummer and informed him that USE had not signed the contract (2:183, 213). Walker initially dated his first call to Potts as occurring in May. In this he was in error, for Potts did not join USE until 1 July.

I find Walker's description of events, including not only the timing but also the contents, of his conversation with Potts,[17] to be rather unreliable. However, to a limited extent I credit Walker. Although Martindale testified that no one ever asked him to sign the new CBA (2:277), I credit Walker that, when his conversations began with Potts about August, he asked for USE to sign the new CBA but Potts kept putting him off by saying he (Potts) would have to talk with Martindale on the matter and get back with Walker. When Potts called Walker back that day or the next he would say "We will get with you and take care of it." (2:184, 199–201.) This continued into October when Walker finally lost patience and reported the situation to Business Manager Ellis (2:185, 199–200).[18] Ellis testified that USE was the only contractor who had not signed the new CBA (2:221).

[17] According to Walker, in May and later Potts said USE was part of the Association. Walker concluded from Potts' statements then and later that USE would be bound by the new CBA (2:183, 193–195, 201–202).

[18] I do not credit Potts that Walker called only once, in July or August, and that was to request that USE meet to negotiate a CBA. Nor do I credit Potts, after checking with Martindale when he returned to the office, that Martindale said to arrange a meeting on neutral grounds, and that Potts conveyed that information to Walker. Finally, I do not credit Potts' denial that Walker ever requested that USE sign the CBA the Association had negotiated (2:299–300). To the extent that Potts' testimony about meeting to negotiate a contract is consistent with Walker's version of events in October-November then I credit Potts. Indeed, Martindale dates the request to Potts as mid-October, shortly before Martindale was to leave again for Alaska (2:278).

5. The election and Case 16–RC–8814

Business Manager Ellis decided that in these circumstances, and because of perceived problems arising under Section 8(f) of the Act, it would be wise to obtain certification (2:227–228, 241). He and Walker discussed the matter (apparently by telephone because Ellis was out of the State, 2:242), and they decided that certification of the Union might encourage Martindale to go ahead and sign the CBA (2:185). Ellis instructed Walker to obtain the assistance of a Board agent at the Tulsa Resident Office and to file an election petition (2:227, 242).

Walker did so on 22 October with the assistance of Board Agent Paul Blackwell; it was the first petition Walker had ever filed (2:185–186, 202–203).

In the ensuing election which was conducted on 12 December, the vote was 4 to 3 in favor of the Union.[19] USE filed objections, a hearing was held,[20] and the matter is pending before the Board on USE's request for review (1:84).

The parties dispute the significance of certain statements either made, or assertedly made, by the Union's representatives during the preelection and postelection period. Respondent contends that they, particularly Ellis, told employees that if the Union won the election it would *negotiate* a contract with Respondent. In the Union's response (served 12 February 1986) to USE's exceptions to the hearing officer's report on objection, the Union wrote at 13 (R. Exh. 7):

> It would appear in the present case that the company seeks only to delay the time when it must begin negotiations with the union. During this time, it is using the process of administrative delay to discredit the union that was lawfully elected to represent the employees. Through this process, the company must anticipate that it will gain additional leverage to avoid any good faith collective bargaining.

At no point in the foregoing response does the Union assert that USE was bound to the 1985–1987 CBA. Respondent argues that the Union's statements during the preelection and postelection period and, indeed, the petition which it filed,[21] demonstrate a belief on the Union's part that Respondent was never bound by the CBA (Br. 29–32).

Respondent never makes clear why that asserted fact is significant. It possibly could bear on the credibility of Walker's testimony concerning his conversations with Potts. (I already have found much of Walker's testimony

[19] On 31 December the Union filed the instant refusal-to-bargain charge.

[20] Respondent asserts that the hearing was held on 6 January 1986 (Br. 14).

[21] For some reason, the Union's petition has no answer in the spaces provided for the questions on the petition asking whether there is a recognized bargaining agent or a collective-bargaining agreement (G.C. Exh. 13). Respondent emphasizes (Br. 30) that it recognizes a union's right to seek certification even when it is a party to a CBA. *Duke Power Co.*, 173 NLRB 240 (1968); *General Dynamics Corp.*, 148 NLRB 338 (1964). But Respondent points to the blank spaces on the petition as admissions by the Union that it never thought Respondent was bound to the CBA.

concerning those conversations to be unreliable.) However, the implied thrust of Respondent's argument seems to suggest that if the Union believed USE was never bound, that belief somehow nullifies the General Counsel's refusal-to-bargain allegation.

There is no evidence that the Union was ever told the assignment forms, copies of which were furnished to the Union on or before 9 May, were signed under a "gentlemen's" agreement that they would be nonbinding. The executed CBA carries USE's name as one of the contractors bound to the CBA, and Martindale never telephoned or wrote the Union disavowing the listing of his name on the CBA. Indeed, USE implemented the terms of the new CBA. Accordingly, I find no legal significance here in any statements by the Union several months after the fact in Case 16–RC–8814.

There is yet another reason I see no need to resolve the disputed statements made by or attributed to the Union in Case 16–RC–8814. The Union filed the refusal-to-bargain charge in the instant case on 31 December. It there charges a refusal to bargain by Respondent's "refusing to sign a collective bargaining agreement negotiated by a multi-employer association to which the Employer had assigned its collective-bargaining rights." Thus, regardless of whatever Ellis told the employees during the election campaign, and whatever he wrote in Case 16–RC–8814, it is clear that in the midst of it all he filed the refusal-to-bargain charge. Accordingly, I find the evidence concerning events surrounding Case 16–RC–8814 to be irrelevant.

B. *Analysis and Conclusions*

1. Applicable law

A multiemployer bargaining relationship is established when employers manifest an unequivocal intention to be bound by group bargaining and the union assents and enters into negotiations with the group as a unit. *Hillsdale Inn v. NLRB*, 764 F.2d 739, 743 (10th Cir. 1985); *NLRB v. Beckham, Inc.*, 564 F.2d 190, 192 (5th Cir. 1977); *Acropolis Painting*, 272 NLRB 150, 154 (1984). An employer indicates the unequivocal intention to be bound by the results of group bargaining if he gives a multiemployer association either actual or *apparent* authority to negotiate and execute on his behalf with the union as part of the multiemployer unit. *Hillsdale Inn*, supra at 743; *Beckham*, supra at 194; *Acropolis Painting*, id.

Quoting from one of its earlier cases, the court in *Hillsdale Inn* states:

> To establish that an agent had apparent authority to bind its principal it must be shown that the principal knowingly permitted the agent to exercise the authority in question, *or in some manner* manifested its consent that such authority be exercised. [Emphasis added.]

Where the agent is clothed with apparent authority, the agent may bind the principal even though the agent misrepresents to third parties crucial facts pertinent to the basis or extent of his authority. *Crane Sheet Metal*, 248 NLRB 75, 76 (1980), enf. denied on other grounds 675 F.2d 256 (10th Cir. 1982).

2. Discussion

As I have found, the Association misrepresented to the Union the important fact that the assignment form USE had signed was not what it purported to be, for at a meeting on 7 May the contractors had agreed that the form would be nonbinding.

Notwithstanding that misrepresentation, I find that USE is bound to the new CBA because the course of all events reflect that USE clothed the Association with apparent authority to act on its behalf. USE's conduct in this regard is shown particularly by its failure to voice any objection when Noble named USE in Noble's letter of 9 April to the Union. By his silence, Martindale allowed the Union to rely on the assertion in that letter that USE was one of the companies interested in negotiating with the Operating Engineers. It is true Noble does not mention the Association in the letter. Even so, Martindale said nothing and permitted Noble to continue his correspondence and contacts with the Union.

Against this background (not even to count the additional background of his earlier assignment to the AGC and his implementation of the terms of all AGC contracts over several years) Martindale allowed Noble to take his signed assignment knowing that Noble would, or might, furnish it to the Union. It will not do for USE to rely on a private agreement that the form was nonbinding when Martindale knew, or should have known, that all other facts indicated that the Association's negotiating committee had USE's express authorization to bind USE. Respondent, I find, clothed the Association with apparent authority to act in its behalf. To paraphrase Lord Byron's verse about Julia, although Martindale insists that he never consented, his actions reflect not only that he did consent, but also that he allowed the Union to believe he had consented.[22]

All the contractors named in the CBA's attachment signed the CBA except one—USE. Then when Martindale received the executed CBA he did nothing[23] (except implement the terms of the new CBA), and he continued to let the Union, as well as the Association, believe that USE was bound. Finally, as I have found, beginning in early August Leon Potts repeatedly assured the Union that USE would "take care of" signing the contract. It never did. By its failure and refusal to sign the CBA reached on its behalf, USE violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. USE is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

---

[22] Byron, *Don Juan*, canto I, stanza 117 (1818), quoted in *The Poetical Works of Byron* (Cambridge ed., 1975) at 761:

> A little still she strove, and much repented,
> And whispering 'I will ne'er consent'— consented.

[23] Even under his own version (which I have discredited), Martindale called only Noble—not the Union.

2. Operating Engineers Locals 627A and 627B are labor organizations within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of USE who operate such equipment as cranes, winch trucks, forklifts, oilers, maintenance mechanics and apprentices, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

4. At all times material the Union has represented a majority of the employees in the unit described above.

5. By virtue of the 1985–1987 collective-bargaining agreement between the Association and the Union, at all times since 1 June 1985 the Union has been the exclusive collective-bargaining representative of the employees in the unit described above within the meaning of Section 9(a) of the Act.

6. By refusing since early August 1985 to sign the 1985–1987 CBA negotiated by the Association and the Union, USE has violated Section 8(a)(5) and (1) of the Act.

7. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed the unfair labor practice as alleged,[24] I shall order it to cease and to take affirmative action designed to effectuate the policies of the Act.

In the suggested notice to employees and order which she has submitted, the General Counsel proposes that Respondent not only be ordered to sign the 1985–1987 CBA, but also be ordered to "abide by and adhere to" the terms of the CBA. Although the record indicates that Respondent apparently has implemented all terms of the CBA relating to wages and benefit payments, I shall leave to the compliance stage the determination of whether there are any provisions of the CBA Respondent has not implemented, and I shall order Respondent to give effect to the CBA retroactive to 1 June 1985. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, United Steel Erectors, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to sign the collective-bargaining agreement, effective by its terms from 1 June 1985 to 1 June 1987, between the Oklahoma Commercial and Industrial Builders and Steel Erectors Association and Operating Engineers Locals 627, 627A, and 627B.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Sign the 1985–1987 CBA and give effect to its terms retroactive to 1 June 1985.

(b) Post at its Tulsa, Oklahoma plant copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors, or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States court of appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the court.

[24] The sole violation alleged is Respondent's refusal "to execute a written contract embodying the agreement." Complaint par. 16.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to sign the collective-bargaining agreement (CBA), effective by its terms from 1 June 1985 to 1 June 1987, between the Oklahoma Commercial and Industrial Builders and Steel Erectors Association and Operating Engineers Locals 627, 627A, and 627B.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, sign the 1985–1987 CBA, and WE WILL give effect to its terms, retroactive

to 1 June 1985, covering our employees in the following appropriate bargaining unit:

> All employees of USE who operate such equipment as cranes, winch trucks, forklifts, oilers, maintenance mechanics and apprentices, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

UNITED STEEL ERECTORS, INC.

Wagner, a Division of Cooper Industries, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 26–CA–11690

25 March 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 2 December 1986 Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wagner, a Division of Cooper Industries, Inc., Tullahoma, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In agreeing with the judge that the Respondent violated Sec. 8(a)(1) of the Act by coercively interrogating employee Walls, we note that his conclusions are in accordance with the principles set forth in *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). See also *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Jane Goldman, Esq., for the General Counsel.
David R. Sheil, Esq., of Houston, Texas, for the Respondent.
Michael Wilson, of Chattanooga, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. Questions and statements purportedly made in three conversations are alleged here as unlawful in three paragraphs of the Government's complaint. I find merit to the first two allegations, and I dismiss the third.

I heard this case in Manchester, Tennessee, on 17 September 1986 pursuant to the 5 August 1986 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 26 of the Board. The complaint is based on a charge, subsequently amended, filed 3 July 1986 by United Steelworkers of America, AFL–CIO, CLC (Union or Steelworkers) against Wagner, a Division of Cooper Industries, Inc. (Respondent or Wagner).[1]

In the complaint the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act when Anthony L. Sutton, warehouse supervisor, second shift, interrogated one employee (Stephen R. Walls) on 20[2] and 27[3] February, and again in May[4] when Sutton interrogated a second employee (Jeffrey W. Cunningham) and, during the conversation, "conditioned a permanent job for the employee upon a promise by the employee not to engage in union activities," and "threatened to discharge employees who talked about the Union."

By its answer Respondent admits certain factual matters but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

A corporation with a place of business in Tullahoma, Tennessee, the facility herein, Respondent packages and distributes automotive parts. During the 12 months ending 31 July Respondent sold and shipped from its facility products and materials valued in excess of $50,000 directly to points outside the State of Tennessee. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

The parties stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act (1:6).[5]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Howard K. Tucker is the manager of employee relations at Respondent's Tullahoma facility (1:63). Tucker testified that the facility serves as the distribution center for Wagner. It replenishes the inventories of Wagner's zone warehouses throughout the country. In addition to its large warehousing operation at Tullahoma, Wagner has a customer service function there plus a planning office. Respondent employs some 250 employees at the facility, with about 150 being classified as hourly and the other 100 as salaried (1:63–64).

[1] All dates are for 1986 unless otherwise indicated.
[2] Complaint par. 7(a).
[3] Complaint par. 7(b). This subparagraph also alleges that Sutton ordered the employee (Walls) to report on the union activities of other employees.
[4] Complaint par. 7(c).
[5] References to the one-volume transcript of testimony are by volume and page.

As Tucker described, in addition to its own employees, Wagner uses a number of employees whom it obtains under a contract with N. R. Temps, a firm which refers temporary workers. Tucker testified that such workers are employees of N. R. Temps and not employees of Wagner (1:65–66; R. Exh. 1). During the relevant time, Respondent paid N. R. Temps for the services of some 8 to 12 workers (1:73).

At the hearing the General Counsel called two witnesses: Stephen R. Walls and Jeffrey Wayne Cunningham. The Union called no witnesses. Wagner called two witnesses: Manager of Employee Relations Howard K. Tucker and Warehouse Supervisor Anthony L. Sutton.

Formerly employed in the warehousing operation under the supervision of Sutton, Walls worked at Wagner from November 1984 to mid-August (1:9, 20). Although Cunningham worked in the warehouse under Sutton from 10 February to his layoff around 1 June, Cunningham at all times was an employee of N. R. Temps (1:38–40, 45–48).

Sutton concedes that he spoke twice with Walls about the Union,[6] but he contends it was Walls who approached him and volunteered information. Sutton gave similar testimony regarding the alleged May 1986 conversation between himself and Cunningham.

Cunningham had difficulty with the timing of the alleged conversation, first placing it the day before his layoff (1:43), but later testifying he could be mistaken and that it could have been a couple of weeks earlier (1:54), and finally conceding that in his pretrial affidavit he placed the event as a month before his layoff—a timeframe he then rejected (1:58–59). Respondent introduced certain evidence bearing adversely on Cunningham's credibility (R. Exhs. 1 and 2). Because I find Cunningham to be an unreliable witness, I shall dismiss complaint paragraph 7(c).

B. *The Two Conversations Between Stephen Walls and Supervisor Sutton*

1. The conversation in the men's restroom

As he was working in the warehouse one day in late February, Stephen R. Walls testified, Supervisor Sutton approached and engaged him in conversation (1:10, 24–25). Expressing the opinion that he thought they were friends, Sutton said he wanted to ask Walls something as a friend.[7] Sutton then asked if Walls was aware of any union activity. Although Walls had attended a union meeting a few days earlier (1:25), he replied that he knew nothing of any union activity (1:11, 25). Walls never wore any union insignia and never gave any outward expression of support for the Union (1:33). He and Sutton had never previously talked about a union or about organizing (1:26).

Sutton stated that attendees at a management meeting had learned of recent union activity, and that Walls had been named as one of the leaders along with employees Paul Crabtree, Lynn Byrum, Danny Brewer, Ricky Tawwater, and Nancy Almacher (1:11, 24). Sutton asked whether any of the employees he named were involved in union activity, and Walls replied that he did not know of any such activity by them (1:11, 24). Walls testified that some of those named by Sutton had not been at the union meeting (1:27).

As Sutton prepared to leave, he asked Walls to assure him one more time that Walls had nothing to do with the union, "and you'll be taken care of. I'll assure the management, if a meeting occurs again, that you don't have anything to do with it." Walls so assured him (1:12–13, 26–27).

This conversation is the subject of complaint paragraph 7(a).

Sutton's version is quite different. Sutton testified that about early March, as he made one of his rounds by Walls' work station, Walls said he needed to speak to Sutton in private. Sutton suggested his office, but Walls wanted to meet in the restroom.[8] About 5 minutes later they met in the men's restroom (1:78–81).

According to Sutton, Walls reported that the name of Walls had been mentioned as being involved in some union meetings which were being held. "Before we go any further," Sutton interposed, "why don't you go to Bruce [Bruce Nemec, director of distribution] or to Howard [Howard K. Tucker, manager of employee relations]?"

"No," replied Walls, "I just want you, as being part of management, to let them know that I'm not involved, because I don't want . . . my name [mentioned as] being involved in any kind of union attempt, to my mother." (1:82, 84) It is Sutton's understanding that Walls' mother, a clerk in the CDC department, is opposed to the Union (1:82–83).[9]

Testifying further, Sutton asserts that Walls confided that he had attended one union meeting out of curiosity. When Sutton again said Walls needed to discuss this matter with someone else, Walls replied that he wanted to tell him and for Sutton to notify management that Walls was not involved in any union activity. Sutton said he would do so, and that concluded the restroom conversation. Sutton denies that he, Sutton, listed the names of several employees during the conversation (1:84).

Sutton testified that he thinks he gave Walls the impression, during their conversation, that Sutton did not believe Walls, for Walls produced a blank union card and said, "Hey, here it is, it's here." (1:87–88) According to Sutton, rumors of union organizing are rather frequent (1:88), and in fact there was a previous organizing cam-

[6] The Union made an earlier organizing effort in September-October 1984 (1:100). The record is unclear whether either the 1984 or 1986 efforts reached the election stage. Whatever stage they reached, the organizing efforts apparently were unsuccessful.

[7] Although Walls and Sutton had discussed horses on previous occasions, they did not socialize outside work (1:19–20, 76–77, 99). Walls came to the second shift about the same time, April 1985, that Sutton was promoted from a quality inspector to second-shift supervisor (1:74–76).

[8] Sutton's office is enclosed by walls of clear glass (1:80).

[9] Although I overruled the General Counsel's objection to Sutton's "understanding" of the mother's views (1:83), I consider Sutton's "understanding," possibly based on hearsay, as simply his explanation of why he thought Walls would not want his mother hearing that the son was supporting a union.

paign (unsuccessful, apparently) in September-October 1984 (1:100). At that time Sutton was a nonsupervisory employee who actively opposed the Union (1:100).

2. The conversation in Henninger's office

Walls testified that about 2 to 3 weeks after the restroom conversation Sutton came to him at his work station (on the second shift) and asked him to go to the office of Richard E. Henninger (1:14). As the pleadings and testimony establish, Henninger is a zone manager (1:14, 85).[10] Presumably this was after the office staff had departed for the day. In any event, Walls testified that only he and Sutton were present in Henninger's office (1:14).

In the office,[11] Walls testified, Sutton informed Walls that management had held another meeting regarding a union, that Walls' name had been mentioned again, and he again asked whether Walls had anything to do with a union. When Walls denied any involvement, Sutton said that he had heard Walls' name listed as one of the union ringleaders along with 8 or 10 others, including Paul Crabtree, Lynn Byrum, Sue England, Tom England, Nancy Almacher, Ricky Tawwater, and David York (1:14–15).

Replied Walls, "No, I don't have anything to do with it; I don't know what they have to do with it." Sutton kept asking if there was any union activity Walls could tell him about, that he would appreciate any information. He asked Walls to inform him if Walls heard of any union activity, saying he would appreciate Walls' telling him.[12] Sutton finished by asking whether Walls was sure he had nothing to do with the union activity, and Walls answered that he did not have anything to do with it (1:15).[13] Walls testified that after this conversation Sutton seemed to avoid him, and that 3 to 4 weeks would pass before Sutton would even speak to him (1:20).

Sutton's version, as with the restroom conversation, is significantly different. According to Sutton, when he was making one of his normal rounds of the warehouse a couple of days after the restroom conversation, Walls asked whether Sutton had "taken care of that," and Sutton answered yes. Walls asserted that he really needed to talk with Sutton again. This time Sutton suggested the men's room. Walls vetoed that location, but agreed to Sutton's next suggestion of Henninger's office (1:85). Sutton went ahead and a few minutes later Walls joined him there.

Inside Henninger's office, Walls, who appeared "distraught," began by reporting, "Somebody dropped a bunch of union cards off at my house." Walls said he was going to return them, but "I can tell you who it is." "Steve, I don't want to know," Sutton responded. Nevertheless, Walls said he could tell him, and he named Paul Crabtree as the employee who delivered the cards (1:87).

Having named Crabtree, Walls offered to name all those attending the union meetings. Sutton replied that he really did not need to know, but if it would make Walls feel better, he could do so, although "I really don't need to know this." (1:87)

"Before I could stop him," Sutton testified, Walls began listing the names, reported they were meeting every 2 weeks, and gave the number of votes they had (1:87). Sutton stated that he had already told his boss that Walls had insisted he was not involved. Sutton told Walls not to worry about the matter. "I don't need to know all this other junk you're trying to run by me," Sutton advised Walls, and the meeting ended (1:89).

Sutton denies asking Walls to report to him about union events, and he insists that on the two occasions he and Walls talked about union matters, Walls volunteered the information (1:89–90).

Conclusions

Walls testified with a favorable demeanor and I credit him and his version of the two occasions when Sutton interrogated him.

Walls was not an open supporter of the Union, and Sutton's questions were probing and asked in a coercive context and in a coercive manner. I find that Respondent, by Sutton's conduct, violated Section 8(a)(1) of the Act as alleged.[14]

CONCLUSIONS OF LAW

1. Respondent Wagner is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when Supervisor Anthony L. Sutton about late February to early March 1986 twice coercively interrogated employee Stephen R. Walls about his union activities and those of other employees, and when Supervisor Sutton, during the second interrogation, requested employee Walls to report the union activities of other employees.

4. Respondent did not, as alleged in complaint paragraph 7(c), violate Section 8(a)(1) of the Act in May 1986 by, nor engage in the conduct of, coercively interrogating contract employee Jeffrey Wayne Cunningham, by promising him a permanent job conditioned on unlawful considerations, or by illegally threatening to discharge employees.

5. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to

[10] Sutton testified that he currently reports to Henninger (1:5). It is unclear whether he reported to someone else during February-March 1986.

[11] The conversation in Henninger's office is the subject of complaint par. 7(b).

[12] Complaint par. 7(b) alleges both an interrogation and that Sutton "ordered" Walls "to report on the union activities of other employees." It is clear that Sutton requested rather than ordered.

[13] Although Walls, at the hearing, reported that his answer to Sutton was "No," his overall testimony makes clear that the sense of his answer was as I have summarized.

[14] As earlier noted, Sutton requested, not ordered, Walls to report back on any union activity he learned about. The distinction is without any material difference as far as the nature of the violation.

cease and to take certain action designed to effectuate the policies of the Act.

On these findings of fact, conclusions of law, and the entire record, I issue the following recommended[15]

ORDER

The Respondent, Wagner, a Division of Cooper Industries, Inc., Tullahoma, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Requesting any employee to report to supervision/management about union activity by other employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Tullahoma, Tennessee facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that complaint paragraph 7(c) is dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT request you to report to supervision/management on the union activities of your fellow employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WAGNER, A DIVISION OF COOPER INDUSTRIES, INC.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Atlanta Dairies Cooperative, Inc. *and* **United Food & Commercial Workers International Union, District Union #442, Petitioner.** Case 10–RC–13206

25 March 1987

DECISION AND DIRECTION

BY MEMBERS JOHANSEN, STEPHENS, AND CRACRAFT

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held 26 November 1985 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 183 for and 181 against the Petitioner, with 10 challenged ballots.[1]

The Board has reviewed the record in light of the exceptions and briefs and has adopted[2] the hearing officer's findings and recommendations as modified.

The Petitioner challenged Wayne Winsett's ballot, contending that he has not worked for the Employer for several years due to a disability, and that he has no reasonable expectation of returning to work. The hearing officer found Winsett ineligible to vote because he has not worked in 3 years and has no estimated date of when he may return to work. The Employer contends that the hearing officer applied an incorrect legal standard in sustaining the challenge to Winsett's ballot. The Employer argues that an employee on sick leave is presumed eligible to vote absent evidence that the employee has been terminated or has resigned. The Employer submits that there is no such evidence and, therefore, Winsett is an eligible voter. We agree with the Employer.

Winsett has worked for the Employer for 20 years, and worked in a unit position until approximately 3 years before the election, when he left work due to a disability. Although his physician has not yet declared him well enough to return to work, Winsett intends to return as soon as he is able to do so. Winsett draws Social Security benefits and also receives a monthly disability benefit from the Employer's insurance carrier. The Employer continues to pay for Winsett's health insurance. Winsett has not retired from work, nor has the Employer terminated his employment. Winsett is in regular monthly contact with the Employer concerning his health condition.

The Employer's credit manager, who handles the disability program, testified that it is the Employer's policy to carry a disabled and nonworking employee on its employment rolls until that employee retires. The credit manager described the case of an employee who was disabled for approximately 11 years, but who was considered to be an employee during his period of disability.

We recently restated the Board's rule concerning the voting eligibility of an employee on sick or maternity leave. In *Red Arrow Freight Lines*, 278 NLRB 965 (1986), we stated that such an employee "is presumed to continue in such status unless and until the presumption is rebutted by an affirmative showing that the employee has been discharged or has resigned."[3] Here the evidence shows that Winsett did not retire, nor was he discharged, before the election. Accordingly, we overrule the challenge to Winsett's ballot and direct that it be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 10 days from the date of this Decision and Direction, open and count the ballots of Eddie Bailey, Maudie Bauknight, Jack Carr, Edgar Blanton, Chris Wisniewski, and Wayne Winsett, and prepare and serve on the parties a second revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

[1] The original tally of ballots showed 181 for and 165 against the Petitioner, with 34 challenged ballots. The Regional Director directed that 18 ballots be opened and counted and that the challenges to 6 ballots be sustained. With respect to the 10 remaining challenged ballots, the Regional Director found that the challenges raised issues which could best be resolved by a hearing. He ordered that a hearing be held if the 10 challenges remained determinative after the other 18 ballots were opened and counted. Since the revised tally of ballots showed that they were, in fact, determinative, a hearing was held.

[2] Absent exceptions, we adopt, pro forma, the hearing officer's recommendations that the challenges to the ballots of Joann Diaz, Paul Wiley, and Walt Roberson be sustained. At the hearing, the parties stipulated that the ballot of Clarence Kemp should not be opened.

[3] 278 NLRB at 966.

Member Stephens agrees that the eligibility of employee Winsett is governed by the holding in *Red Arrow Freight*. He was not a member of the panel in that case, however, and he observes that even under the test that Member Babson would have applied, Winsett would be eligible to vote because he possessed a reasonable expectation of future employment.

Coors Distributing Company of San Jose, Inc., d/b/a California Beverage Company *and* Professional & Clerical Employees Division Teamsters Local Union #856, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 20–RC–15989

25 March 1987

DECISION AND DIRECTION

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held 21 March 1986 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of the ballots shows 3 for and 0 against the Petitioner, with 4 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings and recommendations, only to the extent consistent with this Decision and Direction.[1]

The hearing officer found that Stephanie Sung is a supervisor within the meaning of Section 2(11) of the Act and recommended that the challenge to Sung's ballot be sustained. The Employer excepts, contending that Sung neither exercises independent judgment in connection with her duties nor possesses any of the indicia of supervisory status as enumerated in Section 2(11) of the Act. We find merit in the Employer's exceptions.

It is well settled that the possession of any one of the indicia of supervisory authority specified in Section 2(11)[2] of the Act, provided that such authority is exercised with independent judgment on behalf of management, is sufficient to confer supervisory status on an employee. *Commercial Fleet Wash*, 190 NLRB 326 (1971); *Indiana Refrigerator Lines*, 157 NLRB 539, 550 (1966). However, isolated or sporadic exercise of this authority is insufficient to predicate a supervisory finding. See *George C. Foss Co.*, 270 NLRB 232 (1984); *Teamsters Local 574*, 259 NLRB 344 (1981). Further, employees who are merely conduits for relaying management information to other employees are not true supervisors. *George C. Foss Co.*, supra; *Bowne of Houston, Inc.*, 280 NLRB 1222 (1986); *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

The burden of proving supervisory status rests on the party alleging that such status exists. *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979); *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982); *Hydro Conduit Corp.*, supra. As shown below, we find that the Petitioner has not met that burden.

The Employer is a wholesale beer distributor with offices in San Francisco and San Jose, California. The San Francisco office employs various sales, warehouse, and delivery persons, along with seven office clerical employees, six of whom work in the front office. The Employer's president and general manager, Edward Derry, and its sales manager, Peter Marino, are located at this office. Controller Mark Blair has his office at the San Jose facility. Sung is the most experienced employee, having worked for the Employer for 14 years, and in 1985 Sung was given the title of office manager.

In finding that Stephanie Sung is a supervisor, the hearing officer relied mainly on the testimony of clerical employee Janet Davis, the only clerical employee who has been hired since Sung became office manager. Davis testified that she had two interviews, both with Sung. In the first interview, Sung asked about Davis' general employment history and background. In the second interview, Sung and Sharon Hom showed Davis what type of work she would be doing. Within a week of the second interview Sung called Davis and told her she was hired.[3] From this testimony, which he characterized as "pivotal and persuasive," the hearing officer concluded that Sung had hired Davis or effectively recommended that Blair hire her.

In addition, the hearing officer also found that because Sung talks with Blair daily and "lets him know how the office is running," she has become his "eyes, ears, and mind in the San Francisco office." In making these reports to Blair, the hearing officer reasoned that Sung was using independent judgment.

The hearing officer also pointed to Sung's title[4] and higher salary[5] as further indicia of her supervisory status. While he accepted the Employer's explanation that both are merely functions of her years with the Company, he stated that through

[1] In the absence of exceptions, we adopt pro forma the hearing officer's finding that Anna Cardinale is a confidential employee. We need not pass, therefore, on the Employer's contention in its exceptions that Cardinale is also a managerial employee.

[2] Sec. 2(11) of the Act states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[3] Davis was hired on 30 July 1985.

[4] The hearing officer noted that other persons outside of the office clerical unit who have used the title of "Manager" on their business cards were allegedly supervisors.

[5] Sung receives several hundred dollars per month more than any of the other office clericals.

her tenure she also has accumulated "authority" and is increasingly relied on "to keep the front office operating smoothly."

The hearing officer's analysis is critically flawed. The hearing officer in his report failed to recount and completely ignored the testimony of the Employer's witnesses, much of which was corroborated and uncontradicted. This testimony, as we show below, refutes that relied on by the hearing officer to establish Sung's supervisory status.

Stephanie Sung testified as follows about her duties in the hiring process. In an initial meeting Sung reviews the written application and gathers more information orally from the applicant. Sung or Sharon Hom may also show the prospective employee around the office. Sung then calls Blair and relays the information to him and asks whether he wants to schedule an interview. Ultimately, Blair makes the decision whether or not to hire the applicant and then has Sung inform the person of the decision.[6]

Mark Blair's recounting of the hiring process confirmed Sung's description. Blair testified he never relies solely on Sung's review of an applicant, but makes a decision only after he conducts his own independent investigation.

Blair and Sung testified that this procedure was followed when Janet Roberts was hired,[7] and there is no reason to believe that this was not also the case when Janet Davis was hired. In this regard, we note that Davis' testimony does not contradict that of Blair and Sung. Davis testified that Sung conducted the interviews and informed her that she was hired, not that Sung made the decision to hire her. The hearing officer failed to recognize that Davis lacked any personal knowledge of who made the decision to hire her.

In regard to Sung using independent judgment in making her reports to Blair about employee performance, the hearing officer again ignored Blair's and Sung's uncontroverted testimony. They both testified that Blair's usual practice when a new employee is hired is to call several office clericals and talk about the employee's performance. He often received such reports from Sharon Hom, Viola Hom, and Janet Roberts, all three of whom voted in the election and admittedly are not supervisors.

As to the hearing officer's reliance on Sung's title, the hearing officer ignored the fact that three of the six front office employees, including Sung, have some managerial title. Sharon Hom has the title of computer supervisor and Janet Roberts has the title of credit manager. Both of these women voted in the election and admittedly are not supervisors. In addition, as noted by the hearing officer, the uncontradicted testimony of the Employer's witnesses shows that Sung received the title of office manager because of her long service to the Employer.

Further uncontradicted testimony reveals that Sung possessed none of the indicia of supervisory status. The six front office employees perform routine office work, which includes typing, phone work, filing, invoicing, and computer input. The work is repetitive and, as Derry testified, very little supervision is needed. Sung performs the same work as the other office employees and has only two unique duties: keeping track of employee absences and gathering and maintaining payroll records. Her duties in this regard are clerical; she simply records the information given to her by an employee, and she has no authority to change the information. Also, Sung is on the same pay scale and receives the same benefits as the other clerical employees. Both Edward Derry and Mark Blair testified that the office manager has no authority to hire, fire, discipline, suspend, lay off, recall, promote, evaluate an employee for a change in compensation, approve overtime, or grant vacation time or time off. Blair further testified that he alone makes all the office clericals' work assignments and reassignments.

As to hiring, Sung and Sharon Hom have conducted some second interviews with Blair. However, as Blair testified, they did so only at his request and only to answer questions about the office duties. Although Sung has voiced an opinion on whether an applicant should be hired, Blair testified that he never relies solely on her opinion in making a decision. Also, other employees have made recommendations or voiced an opinion regarding an applicant. Peter Marino testified that Janet Roberts has recommended two applicants, including Pam Howe, and Laurie Romero has also recommended an applicant. Neither Roberts nor Romero are supervisors.

In the event of a discharge, Blair testified that he conducts an investigation. He talks with the office clericals and may observe the employee himself before making a decision. According to his uncontradicted testimony, this procedure was followed in the discharge of Pam Howe. Blair talked to Janet Roberts,[8] Viola Hom, and Sung about Howe's per-

[6] During the hearing the Petitioner's counsel asked Sung to define the word "hire." Sung replied that "hire" means that she is to inform the applicant that they have a job, after Blair has told her to do so.

[7] Sales Manager Marino testified that Blair, before deciding to hire Roberts, called her former employer.

[8] By Peter Marino's uncontradicted account, Roberts has also recommended that a sales employee be discharged. She was receiving complaints from customers about the salesperson and went to Marino to suggest that the person be fired.

formance. In order to correct the problem, he had Sung explain to her what the correct procedure was. When Howe's performance did not improve, he had Sung tell her she was fired. There is no evidence that Sung was anything other than a conduit for Blair's instructions.

With regard to evaluating employees' performance, both Blair and Sung testified that Sung has done only one evaluation. When Janet Roberts complained about the delay in getting her evaluation and raise, Blair directed Sung to give Roberts a 3-month evaluation. They had discussed which boxes Sung should fill in on the form, and Sung followed Blair's instructions. Sung was not the office manager at this time.

According to uncontroverted statements by Derry and Blair, Sung cannot grant a wage increase. A request for a raise must be approved by Derry or a higher company official.[9] In Janet Roberts' case it was Derry who authorized her raise.

Both Derry and Sung testified that Sung has no authority to grant time off,[10] but merely acts as a conduit relaying information. Because of the small number of employees, the front office is "close-knit," and management allows the office employees to schedule their own vacations and time off. The employees merely report to Sung when they are going to take time off. She in turn reports to Derry, who routinely signs off on the absence form.

The record is devoid of any evidence that Sung has authority to grant overtime. The record is also devoid of any evidence that Sung has any authority to discipline workers. Rather, the power to discipline is vested in Derry, Marino, and Blair. According to the uncontradicted testimony of Derry and Peter Marino, Roberts has twice been reprimanded for tardiness, once by Derry and once by Marino.

With respect to the handling of employees' grievances, there is no evidence that Sung has authority to adjust or correct grievances. Blair testified that he generally handles all grievances through his constant contact with the San Francisco employees, either by phone or in person.

For the above reasons, we conclude that the Petitioner has not met its burden of establishing that Sung is a supervisor as defined by the Act. In analyzing the various incidents of alleged exercise of supervisory authority, we find that in each instance the evidence fails to establish that the authority exercised was anything more than of strictly routine nature, not involving the use of independent judgment.

With regard to hiring, firing, evaluating employee performance, granting time off, and adjusting grievances, the evidence shows that Sung merely receives and relays information to and from Blair and thus acts only as a conduit and not a true supervisor. See *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Chicago Metallic*, 273 NLRB 1677, 1688–1694 (1985). With regard to the remaining indicia of supervisory status, the record is devoid of any evidence to establish that Sung was a supervisor. See *Bowne of Houston, Inc.*, 280 NLRB 1222 (1986).

The record is clear that Sung's responsibilities did not confer on her supervisory status; rather, the record establishes that she performs the same work, receives the same benefits, and is on the same pay scale as the other office clerical employees. Further, neither Sung's title nor her ability "to keep things running smoothly" is sufficient to confer on her supervisory status. *Marukyo U.S.A., Inc.*, 268 NLRB 1102 (1984); *Hydro Conduit Corp.*, supra at 438.

We therefore find, contrary to the hearing officer's recommendation, that Sung is not a supervisor within the meaning of the Act, and we overrule the challenge to her ballot. Accordingly, as this ballot is sufficient in number to affect the results of the election, we shall direct the Regional Director to open and count her ballot, to prepare a revised tally of ballots, and to issue the appropriate certification.

DIRECTION

IT IS DIRECTED that the Regional Director, within 10 days from the date of this decision, open and count the ballot cast by Stephanie Sung and prepare and cause to be served on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

---

[9] Roberts testified that it was her understanding that Sung has the authority to grant her a raise. This "understanding" was based on a statement made by Sung during Roberts' evaluation, i.e., that Sung would give Roberts $50 more. However, Roberts later admitted that she was unaware of who actually granted her the raise. Furthermore, in her initial attempt to secure a raise she went to Peter Marino and not Sung, who was not the office manager at that time. When she complained about the delay in getting her evaluation and raise, Viola Hom, who was then office manager, told her to contact Blair in order to remedy the situation.

[10] According to Janet Davis' own testimony, when she was selected for jury duty, it was Davis herself who decided whether or not she would attend and, after the decision was made, Davis told Sung how she intended to change her work hours.

Kargard Industries, Inc. *and* Local 696, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Case 30–CA–9366

25 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

Upon a charge and amended charge filed by the Union 20 October and 25 November 1986, the General Counsel of the National Labor Relations Board issued a complaint 25 November 1986 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) and Section 8(d) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Company has failed to file an answer.

On 5 January 1987 the General Counsel filed a Motion for Summary Judgment. On 7 January 1987 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed by 9 December 1986, "all of the allegations in the Complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that counsel for the General Counsel, on 19 and 18 December 1986, notified the Company and its counsel, respectively, that unless an answer was received immediately, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Wisconsin corporation, engages in the manufacture, nonretail sale, and distribution of pressure vessels and related products at its facility in Marinette, Wisconsin, where it annually purchases and receives products, goods, and materials valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since about 1962 the Union has represented a unit of all production and maintenance employees, including stockroom clerks, but excluding office clerical employees, professional employees, watchmen and guards, quality control employees, and supervisory employees employed at the Respondent's Marinette, Wisconsin facility. Successive collective-bargaining agreements, the most recent effective from 23 March 1986 to 23 March 1991, embody this representative status. The Union by virtue of Section 9(a) of the Act is the exclusive representative of the unit for the purposes of collective bargaining.

The latest collective-bargaining agreement contains provisions for life, accident and dismemberment, and long-term disablity insurance for members of the unit. Since about 19 August 1986 the Respondent has failed and refused to make payment for the insurance premiums as required by the collective-bargaining agreement. The failure to make the insurance premium payments led to a cancellation of the insurance coverage on 31 August 1986 by the insurance carrier.

The Respondent failed and refused to make the payments set forth above without the agreement of the Union. By these acts the Respondent unilaterally modified its collective-bargaining agreement with the Union.

CONCLUSIONS OF LAW

1. By unilaterally discountinuing insurance premium payments as required by the collective-bargaining agreement without the agreement of the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully made unilateral changes in the employees' terms and conditions of employment, we shall order that the Respondent restore the status quo ante by reinstating the life, accident and dismemberment, and long-term disability insurance coverage for its employees in the unit as required by the collective-bargaining agreement. We shall further order that the Respondent make whole employees for any expenses or losses incurred as a result of the unilateral changes. The amounts paid to employees to make them whole for any losses they may have suffered as a result of the Respondent's unlawful unilateral action shall include interest to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). Additionally, the Respondent shall be ordered to cease and desist from implementing unilateral changes in contractual terms and conditions of employment for unit employees without the agreement of the Union. We deny as unnecessary the General Counsel's request for a visitatorial provision.

ORDER

The National Labor Relations Board orders that the Respondent, Kargard Industries, Inc., Marinette, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Local 696, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, as the exclusive representative of its employees in the following unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees, including stockroom clerks, but excluding office clerical employees, professional employees, watchmen and guards, quality control employees, and supervisory employees as defined in the Act.

(b) Changing insurance coverage or other contractual terms and conditions of employment of employees in the unit without the agreement of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate the life, accident and dismemberment, and long-term disability insurance coverage for employees in the unit as required by the collective-bargaining agreement.

(b) Make whole, with interest, all employees for any expenses or losses incurred as a result of the unilateral termination of life, accident and dismemberment, and long-term disability insurance coverage.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(d) Post at its facility in Marinette, Wisconsin, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN DOTSON, dissenting.

For the reasons set forth in my dissent in *Rapid Fur Dressing*, 278 NLRB 905 (1986), I dissent from the majority's finding that the Respondent violated Section 8(a)(5) by failing to make premium payments pursuant to its contract with the Union. There is no evidence that the Respondent has engaged in conduct reflecting a repudiation of the collective-bargaining agreement in any way tantamount to a violation of the Act or has otherwise refused to bargain. By finding a violation in these circumstances, the Board is once again allowing itself to be used as a collection agency for the Charging Party. Accordingly, I would deny the Motion for Summary Judgment.

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Local 696, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, as the exclusive representative of our employees in the following unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

All production and maintenance employees, including stockroom clerks, but excluding office clerical employees, professional employees, watchmen and guards, quality control employees, and supervisory employees as defined in the Act.

WE WILL NOT change insurance coverage or other contractual terms and conditions of employment of employees in the unit without the agreement of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate the life, accident and dismemberment, and long-term disability insurance coverage for employees in the unit as required by the collective-bargaining agreement with the Union.

WE WILL make whole, with interest, all employees for any expenses or losses incurred as a result of the unilateral termination of the life, accident and dismemberment, and long-term disability insurance coverage.

KARGARD INDUSTRIES, INC.

Peerless Publications, Inc. (Pottstown Mercury) *and* Newspaper Guild of Greater Philadelphia, Local 10. Case 4–CA–6985

26 March 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 9 August 1977 the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The administrative law judge had found that the Respondent's Code of Ethics and General Office Rules, unilaterally promulgated with their constituent penalties, constituted mandatory subjects of bargaining. On exceptions to that decision, the Board affirmed in part and reversed in part the administrative law judge's conclusions. Thus, the Board agreed that the Respondent was obligated to bargain over its General Office Rules, and that its refusal to do so was violative of Section 8(a)(5) and (1) of the Act. Consistent with the Board's decision in the *Capital Times*[2] case, however, a panel majoirty concluded, contrary to the administrative law judge, that the Respondent's Code of Ethics, as a whole, did not affect terms and conditions of employment so as to constitute a mandatory subject of bargaining, but that the Code's "penalty provision, in and of itself, directly affects employment security and, therefore, is a mandatory subject of bargaining." In the majority's view, certain portions of General Office Rule 11, like the substantive provisions of Respondent's Code of Ethics, were "essentially based on ethical considerations designed to enhance the credibility of Respondent's newspaper." Thus the cited portions of General Office Rule 11 (231 NLRB at 245) were excepted from the Board's Order requiring the Respondent to bargain over the General Office Rules, but were treated together with the Code of Ethics in finding that the Respondent was obligated to bargain only to the extent of a penalty provision for violation of such rules.

On a petition for review by the Guild, the Charging Party, and an application for enforcement of its Order by the Board, the United States Court of Appeals for the District of Columbia Circuit on 13 August 1980, issued its decision in the consolidated cases.[3] The court agreed with the Board that "protection of the editorial integrity of a newspaper lies at the core of publishing control" (636 F.2d at 560), and concluded that in order to preserve these qualities, a news publication may, subject to certain constraints, establish reasonable rules designed to prevent activity by employees which would "directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity." (Id. at 561.) However, the court deemed inadequate the rationale used by the Board majority to address the "problems presented by the tension between the employees' right to bargain collectively and the right of the owner of a newspaper to safeguard the credibility of his publication from injury through improper conflicts of interest." (Ibid.) The court also found, contrary to the Board majority, that constituent penalties for violation of rules cannot reasonably "be separated for Labor Act purposes from the substantive provisions which they are designed to enforce." (Ibid.) Accordingly, the court remanded this proceeding to the Board for determinations on the issues in light of the principles enunciated by the court.

On 19 November 1980 the Board, through its Executive Secretary, notified the parties that pursuant to the remand by the court of appeals, all parties might file statements of position with respect to the issues raised by the remand. Thereafter, the Respondent, the General Counsel, and the Newspaper Guild each filed a statement of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On further examination of the issues presented in light of the entire record, including the court's opinion and the parties' statements of positions, the Board has decided to modify its earlier Decision and Order in this proceeding.

First, our consideration of the issues leads us to conclude, in agreement with the court, that, as a general principle, rules and their constituent penalties should not be artificially severed from each other for purposes of collective bargaining under the Act. This is so because the attachment of express or implied penalties for breach of the substantive content is what transforms rules or codes of conduct from mere expressions of opinion or aspiration into terms and conditions of employment. Also, we are convinced that the impracticality of requiring parties to attempt to bargain over fragments, rather than the issues as a whole—i.e., in a vacuum—is not conducive to promoting stability

[1] 231 NLRB 244.

[2] 223 NLRB 651. The Board issued its decision in *Capital Times* subsequent to the administrative law judge's decision in this case.

[3] *Newspaper Guild Local 10 (Peerless Publications) v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980).

or effectiveness in collective-bargaining relationships.[4]

We reaffirm the view that protection of the "editorial integrity of a newspaper lies at the core of publishing control,"[5] and that in order to preserve such, a news publication is free to establish reasonable rules designed to prevent its employees from engaging in activity which would "directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity," without necessarily being required to bargain initially. It follows from this privilege—which is directly incident to a newspaper's integrity—that the newspaper will be similarly exempt from mandatory bargaining about disciplinary action for employee breach of the basic rule.[6] It must be emphasized, however, that "[t]he degree of control which may be exercised by a publication in this regard is not open-ended, but must be narrowly tailored to the protection of the core purposes of the enterprise." (Id. fn. 36.) In light of the above, and keeping in mind the language of the court, we deem it appropriate at this point to indicate the general standards under which such unilateral action is to be considered.

The concept of "terms and conditions of employment" is itself a broad one—and deliberately so, for Congress intended it to be broad.[7] Thus, rules or codes of conduct governing employee behavior with constituent penalty provisions for breach necessarily fall well within the definitional boundaries of "terms and conditions" of employment. In determining whether an employer may nevertheless impose such a term and condition of employment without prior bargaining, we begin with the principle that "labor law presumes that a matter which affects the terms and conditions of employment will be a subject of mandatory bargaining."[8] In order to overcome this presumption, therefore, it is clear initially that the subject matter sought to be addressed by the employer must go to the "protection of the core purposes of the enterprise." When that is the case, the rule must on its face be (1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives.

Turning to the provisions at issue in this case, we have reexamined the Respondent's General Office Rules and Code of Ethics under these criteria and in light of the court's opinion, and we find that the Ethics Code as a whole, as well as the General Office Rules promulgated by the Respondent, do not withstand such scrutiny and must be rescinded in their entirety. First, in affirming our holding as to the Office Rules (other than those portions of Rule 11 treated with the Code of Ethics) we reiterate our finding that they directly affect terms and conditions of employment, and the conclusion that nothing contained therein is "properly excludable from bargaining as being inherently in the exclusive" prerogative of management such as would exempt it from the normal requirements of mandatory bargaining. (See id. at fn. 38.)

With respect to the Code of Ethics, we note that the court deemed it necessary to distinguish between

> those provisions of the Code which, while central to the Mercury's interest in the preservation of its legitimate managerial prerogatives, affect the employees only minimally, and those which, although not essential to the publication's freedom to conduct its business, do have a significant impact on the employees. [Id. at 561.]
>
> . . . .
>
> Moreover, when there is a conflict between an employer's freedom to manage his business in areas involving the basic direction of the enterprise and the right of the employees to bargain on subjects which affect the terms and conditions of their employment, a balance must be struck, if possible, which will take [into] account [the] relative importance of the proposed actions to the two parties." [Id. at 562, citing *Machinists Local 1304 (Fibreboard Corp.) v. NLRB*, 379 U.S. 203 at 223 (1964), and *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. at 179.][9]

[4] Accordingly, our earlier decision in this case and the decision in *Capital Times*, supra, are overruled to the extent that they are inconsistent with our holding here.

[5] Although there may be exceptions to this general proposition (see, e.g., the court's opinion at fn. 33), we see no indication that such are involved here.

[6] As noted by Judge MacKinnon, there may be exceptional cases where an excessive penalty renders a rule mandatorily bargainable.

[7] See discussion at sec. VI of the court's opinion, and accompanying fn. 39–41.

[8] Id. at sec. VI; see *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 at 178–179 (1971).

[9] With respect to the former statement, it is clear there are multiple permutations depending on the number and complexity of the variables used. Thus, a simple matrix using just the two suggested by the court, i.e., placing the essentiality or nonessentiality to preservation of the employer's interest on one axis, and the resultant minimal or significant impact of the rule on employees on the other, would generate four combinations which can be summarized as follows: (1) nonessential to employer: minimal impact on employee; (2) nonessential to employer: significant impact on employees; (3) essential to employer: minimal impact on employees; (4) essential to employer: significant impact on employees. Where, as here, the penalty for breach of a rule consists of discipline including discharge (either discretionary or automatic) it is clear that the

Continued

Assessing the Respondent's Code of Ethics under the framework discussed above, we find it unnecessary at this time to decide specifically which, if any, of the ethics code provisions may be deemed restricted to subject matter necessary to the "protection of the core purposes of the enterprise" so as to overcome the initial presumption of mandatory bargainability. For assuming arguendo that they would overcome the presumption, we conclude that the Code as actually promulgated by the Respondent must fall in any event because it is deficient in other respects. Thus, the entire Code, together with the office rules of which the Code was deemed a part, applies on its face to "all employees," without appropriate limitation to designated categories of employees (e.g., reporters and editorial personnel as well as maintenance and circulation employees) as to which requirements differ. Moreover, each employee, with no prior requirement or opportunity for bargaining by the employees' representatives, is required by the Code's "Pledge" section to "make himself known now and state his reasons," in the event the employee does not "wholly and fully subscribe" to the tenets of the Code, in effect requiring the employee to bypass the collective-bargaining representative and bargain directly with the Employer. In addition the code provisions are in our view substantially overly broad as promulgated rather than narrowly tailored in terms of their content to meet with particularity what may be legitimate objectives of the Respondent. Also, like the court, we perceive significant differences between a gift from a news source which is designed to influence news coverage on the one hand, and a "freebie" given relatively indiscriminately—particularly so when as frequently occurred at the Respondent, such freebies or tickets were actually distributed by the editor. Similarly, where an employer wishes to address the subject matter of an employee's secondary employment, we deem it incumbent on the employer to distinguish between employment which would constitute a clear and improper conflict of interest, and that which does not. We find no such distinction made here by the Respondent.

With respect to the Respondent's attempts to curtail other outside activities of its employees, i.e., "political involvement, holding public office, service in community organizations," or failure to "conduct their personal lives," outside the office hours so as not to reflect adversely on the Respondent or cause "loss of business or patronage," we concur in the court's pointed comment that such regulation "interferes substantially with the civil and economic rights of the employees (and indeed their private lives)." (Id. at 563.)[10] The preservation of editorial integrity does not necessarily dictate a requirement of employee abstention from political participation or service in community organizations. Nor is there evident a need for a general directive aimed at regulating the employees' conduct of their personal lives, with its inherent potential for "misuse against those with whose political, social, religious, or union beliefs a publisher may disagree," (ibid. at fn. 50), or a prohibition of activities such as an "iffy" ban that hangs like a sword and squarely presents "inescapable" constitutional problems.[11] In the instant case, we find that Respondent has not demonstrated on the record that its regulation of such areas was supported by "clearly defined, directly necessary compensating benefits in terms of the employer's legitimate concerns." Id.

These deficiencies of overbreadth are in our view further compounded by the open-ended nature of the Rules and Code as written by the Respondent. The General Office Rules (of which the Code became a part) stated:

> These rules include, but are not limited to, all of the office rules for your department. Your department head may add to these rules more specific rules which apply to your department. Violation of office rules may be deemed cause for discharge except in the case of those rules where discharge is automatic.

Thus, in addition to the other infirmities discussed above, the Respondent in its rules purported to invest itself with the sole discretion to later impose additional rules subjecting employees to discipline, including discharge, without regard to their content or the presumptive requirements of mandatory bargaining. This caveat—itself unilaterally promulgated without bargaining, which we have previously ordered rescinded—cannot in our view serve to justify a subsequent avoidance of the presumptive requirements of bargaining about terms and conditions of employment, including the delicate and sensitive matters encompassed within the Code's provisions.

We also note that the Code of Ethics provisions here contain some vagueness and certain ambigu-

matter affects the "terms and conditions" of employees, and also that the impact is "significant." Hence none of the code provisions involved here fall in the third category. Combinations one and two would also appear eliminated because matters not essential to the Employer's direction of the enterprise would not in any event overcome the initial presumption of mandatory bargainability. Thus, it would seem that the court was contemplating only the fourth combination above in its statement concerning "balancing."

[10] See also *Peerless Publications*, supra, 231 NLRB at 248–249.

[11] See id. at 248 fns. 10 and 14, and related text.

ities, as well as possibly conflicting requirements. For example, paragraph 4 of the "ETHICS" section provides in part that "Newspaper people will seek news that serves the public interest, despite the obstacles." Section 2 under "FAIR PLAY," on the other hand, provides that "The news media must guard against invading a person's right to privacy." Without intruding into a debate concerning what constitutes "the public interest" in this context (a term which we note is not defined in the Code), or seeking to define what best "serves" that end, we find it unclear from the Code itself whether the "obstacles" which must be overcome under the "ETHICS" section exclude or encompass the "right to privacy" which must be guarded under section 2 of "FAIR PLAY." Nor is it clear whether either or both of the above is intended to be subordinate to paragraph 1 of "ACCURACY AND OBJECTIVITY" which provides: "Truth in all things is our ultimate goal." Paragraph 3 of the latter section asserts: "There is no excuse for inaccuracies or lack of thoroughness," while "FAIR PLAY," section 4, states that "It is the duty of news media to make prompt and complete correction of their errors"; thereby potentially presenting employees with a "Hobson's" choice: i.e., promptly correct an error and be subject to discharge, since there is "no excuse for inaccuracies," or not do so and be likewise subject to discharge for failing to make a "prompt and complete correction" of the error. We find it likewise unclear whether the "public's right to know of events of public importance and interest" as the "overriding mission" of the Respondent's publication, is intended to include an obligation to report stolen documents, or whether there is any limitation on the assertion in the "ETHICS" section that newspaper people must be free of obligation "to *any* interest other than the public's right to know," or to what extent employees must acknowledge the ethic of protecting confidential sources of information. We note also that what may be deemed to have "news value" by one publisher may be considered "insignificant" or pandering to "morbid curiosity" by another.

Infirmities such as these may be deemed tolerable where an employer wishes merely to announce its own goals as an adjunct to attempting to improve the quality of its publication or enhancing its credibility. But they are not acceptable where, as here, an employer seeks unilaterally to impose such imprecision on employees in the form of rules which affect their terms and conditions of employment, and for breach of which the employees may be subject to discharge. In the latter situation, where the impact on employees is self-evident and significant, the necessary remedy is rescission. Accordingly, we shall revise our prior Order in this proceeding, as set out in full below, to require that the provisions of the Code of Ethics, as well as the General Offices Rules, be rescinded in their entirety.

We wish to make it clear that our decision does not preclude the Respondent from establishing completely new ethics code and rules provisions subject to the standards set forth above, where the content of such rules is necessary to the credibility of the institution and/or the quality of its product, and the rules themselves are narrowly tailored, unambiguous, and designate the category of employees to whom applicable; provided, however, that such statements of ethics and rules requirements do not improperly impinge on the relevant rights of the affected employees.

ORDER

The National Labor Relations Board orders that the Respondent, Peerless Publications, Inc. (Pottstown Mercury), Pottstown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Newspaper Guild of Greater Philadelphia, Local 10, on request, about terms and conditions of employment embodied in the Respondent's General Office Rules and Code of Ethics, including their penalty provisions.

(b) Unilaterally promulgating or changing rules or codes of conduct, including any penalty provisions, which affect wages or terms and conditions of employment, or enforcing such unilaterally promulgated rules or penalty provisions, without giving the Union notice and the opportunity to bargain.

(c) Unilaterally implementing the penalty provisions of the present Code of Ethics by warning letters.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, or interfering with the Union's efforts to bargain collectively with it with respect to the following appropriate unit:

> All employees in the Editorial, Circulation, Maintenance, Telephone Operator and Advertising Departments, but excluding the managing editor, city editor, circulation manager, confidential secretary to the Publisher, county string correspondents, commission advertising salesmen, and the national, display and classified advertising managers.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind in writing the General Office Rules and the Code of Ethics, including the penalty provisions.

(b) On request, bargain with the Union concerning terms and conditions of employment to be contained in any revised General Office Rules or Code of Ethics, including any penalty provisions, and, if an agreement is reached, embody it in a signed agreement.

(c) Rescind and withdraw from personnel or other files maintained by the Respondent copies of or references to the warning letters issued to employees Dougherty and Smith dated 16 May 1974, and rescind any other disciplinary actions which resulted from enforcement of this penalty provision, notify the employees in writing that this has been done and that the discipline will not be used against them in any way, and make employees whole for any losses they may have suffered by reason of the enforcement of these penalty provisions in the manner set forth in the remedy section of the Board's decision in this proceeding, reported at 231 NLRB 244 (1977).

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Pottstown, Pennsylvania, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER STEPHENS, concurring.

I concur in the result.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the Newspaper Guild of Greater Philadelphia, Local 10, on request, about terms and conditions of employment embodied in the General Office Rules and Code of Ethics.

WE WILL NOT unilaterally promulgate rules or codes of conduct or penalty provisions affecting wages or terms and conditions of employment, or enforce such unilaterally promulgated rules or penalty provisions, without giving the Union notice and the opportunity to bargain.

WE WILL NOT unilaterally implement the penalty provisions of the Code of Ethics by warning letters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, or interfere with the Union's efforts to bargain collectively with us with respect to the following appropriate unit:

> All employees in the Editorial, Circulation, Maintenance, Telephone Operator and Advertising Departments, but excluding the managing editor, city editor, circulation manager, confidential secretary to the Publisher, county string correspondents, commission advertising salesmen, and the national, display and classified advertising managers.

WE WILL rescind in writing the General Office Rules and the Code of Ethics, including penalty provisions.

WE WILL, on request, bargain with the Union concerning terms and conditions of employment to be contained in any new General Office Rules and Code of Ethics, including any applicable penalty provisions, and, if agreement is reached, embody it in a signed agreement.

WE WILL rescind and withdraw from personnel or other files copies of, or references to, the warning letters issued to employees Dougherty and Smith, dated 16 May 1974 and any other disciplinary actions which resulted from our enforcement of these penalty provisions and notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL make the employees whole for any losses they may have suffered by reason of any enforcement of such penalty provisions, with interest.

PEERLESS PUBLICATIONS, INC.
(POTTSTOWN MERCURY)

Production Workers Union of Chicago and Vicinity, Local 707; The National Production Workers Union *and* Checker Taxi Company, Inc. *and* Yellow Cab Company Inc. Cases 13–CC–1159 and 13–CC–1160

26 March 1987

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, STEPHENS, AND CRACRAFT

On 14 December 1984 the National Labor Relations Board issued a Decision and Order in this proceeding[1] in which it found that the Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing on behalf of independent contractor taxicab drivers who had a dispute with the Charging Parties over the terms of their leases. On a petition for review and a cross-application for enforcement of the Board's Order, the United States Court of Appeals for the District of Columbia Circuit on 13 June 1986 vacated the Board's Order and remanded the case to the Board for further proceedings consistent with the court's opinion.[2]

The Board thereafter accepted the court's remand and notified the parties that they could file statements of position. The General Counsel and the Respondents have filed statements of position.

We have carefully reviewed the record in this case, as well as the statements of position, and, for the reasons discussed below, we have decided to overrule our prior decision in this case and dismiss the complaint. Specifically, we agree with the court's finding that the picketed companies were not neutral parties to the dispute and therefore the Respondents' picketing was primary activity which does not fall within the proscriptions of Section 8(b)(4).

The relevant facts, which are not in dispute, are as follows. Checker Taxi Company and Yellow Cab Company own about 80 percent of the licensed taxicabs in Chicago. Each Company operates both "lease" cabs driven by independent contractors (LCDs)[3] and "commission" cabs driven by union-represented employees.[4] Both Companies operate many more lease cabs than commission cabs.[5] The LCDs lease the cabs for periods ranging from half a day to 1 week, with daily leases being the general practice. Six of Yellow's seven garages house only lease cabs; the remaining garage houses cabs operated by commission drivers. Similarly, Checker maintains four garages with cabs operated exclusively by LCDs and one garage with cabs operated by both LCDs and commission employees.

By 1980 the LCDs had become increasingly dissatisfied with the terms of their leases and began to band together to deal collectively with the Companies under the leadership of an LCD, the Reverend Joseph McAfee. In early July 1980 McAfee consulted with officials of the Respondents, and by the end of the month the Respondents created the "Leased Taxicab Drivers Division" within their organizations. McAfee had enlisted about 1200 of the Companies' approximately 3126 LCDs in his effort, and the Respondents began signing up the LCDs and collecting initiation fees and dues. On 8 August 1980 the Respondents requested the Companies to recognize and bargain with them on behalf of the LCDs, but the Companies refused to do so.

On 12 August 1980 the Respondents and some LCDs began picketing and handbilling at the Companies' garages. Except for one brief incident on the first morning of the picketing, the Respondents and LCDs confined their picketing to garages that housed only cabs operated by LCDs.[6] The various picket signs read: "Please do not lease a cab until an agreement is signed regarding your working conditions"; "Lease Cabs on Strike Production Workers Union Local 707"; and "Lease Cab 707 Drivers 707 on Strike Yellow & Checker Taxi Cab Company." The picketing was effective in reducing the number of cabs leased by the LCDs from the Companies, and during the picketing some of the Companies' suppliers refused to make deliveries. There is no evidence that any customer declined to use the Companies' cabs during the picketing.

In its prior decision in this case, the Board observed that in enacting Section 8(b)(4), Congress had the dual objectives "of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own," quoting from *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). The Board held that since the LCDs were independent contractors, the Respondents' efforts on their behalf fell neither within "the rights of labor to organize to better its conditions"[7]

[1] 273 NLRB 1178 (1984).

[2] 793 F.2d 323 (D.C. Cir. 1986).

[3] The lease cab drivers' status as independent contractors was determined in *Seafarers Local 777 v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978).

[4] The commission drivers are represented by Seafarers Local 777.

[5] At the time of the hearing, only 340 of Yellow's 2166 cabs and 200 of Checker's 1500 cabs were operated by commission drivers.

[6] On that first morning the Respondents established a picket line at Yellow's garage which houses only employee-operated cabs. Within 30 minutes, a Seafarers Local 777 official went to the garage and advised the Respondents that no lease cabs were operated out of that garage. The Respondents promptly removed their pickets and never resumed picketing at that location. We shall discuss this incident below.

[7] *Allen Bradley Co. v. Electrical Workers IBEW Local 3*, 325 U.S. 797, 806 (1945), quoted in *NLRB v. International Rice Milling Co.*, 341 U.S. 665 fn. 7 (1951).

nor "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes."[8]

Further, the Board found no evidence that Congress intended that picketing on behalf of independent contractors is to be considered within the proviso to Section 8(b)(4) protecting primary activity. Accordingly, the Board found that the Respondents' "goal, that of causing the interruption of leases between the [cab companies] and the LCDs, in the absence of a primary labor dispute, was clearly within the scope of the broad proscription of Section 8(b)(4)(ii)(B)."[9] 273 NLRB at 1181.

In addition, the Board concluded that the Respondents' brief picketing at Yellow's garage housing cabs used only by commission drivers violated Section 8(b)(4)(i)(B). The Board stated that there was no evidence that the Respondents could not have learned that no LCDs used the garage before commencing their picketing.

Contrary to the Board, the D.C. Circuit held that Section 8(b)(4) does not prohibit union involvement in all picketing by or on behalf of independent contractors. Instead, the court asserted that Section 8(b)(4) bars only "'secondary activity': union attempts to involve neutral third parties in disputes not their own."[10] The court determined that the picketing at the LCD garages was not unlawful because it was directed against only the cab companies, who were not neutral parties, but rather were "directly and intimately involved in the underlying dispute." Thus, the court decided that Congress intended "primary activity" to include all picketing against nonneutral parties, whether by independent contractors or by anyone else. The court emphasized that a neutral is a third party "wholly unconcerned" in a dispute between two other parties, and that "Yellow and Checker are not at all neutral in this sense; the LCD's dispute over contract terms lies precisely and only with the cab companies." Accordingly, the court remanded the case to the Board for application of the correct standard, i.e., that Section 8(b)(4) proscribes only picketing against neutral parties.[11]

We now agree with the court's findings that picketing against a neutral party is a necessary predicate to finding a violation of Section 8(b)(4) and that in this case there were no neutral parties subjected to picketing. Although the picket signs appealed to LCDs to cease doing business with the Companies, the picketing was directed against the Companies, which were the only parties with whom the Respondents had a dispute. The picketing occurred only at the cab companies' premises, and the picketing concerned only the Respondents' dispute with the Companies. The Respondents did not appeal to potential customers of the LCDs or to customers or employees of other persons who do business with the Companies. In this regard, we note that we are constrained to accept the court's factual finding that the LCDs were essentially a monolithic group united in a dispute with the Companies and uniform in their definition of their mutual self-interest.[12]

That the dispute here did not concern statutory employees is not determinative of whether the picketing was primary or secondary activity. Rather, the key factor is whether the picketing was applied against a neutral party that Section 8(b)(4) is intended to insulate from labor disputes. Thus, the Board's prior decision erred by focusing exclusively on the status of the LCDs as nonemployees, and disregarding the nonneutral status of the cab companies. In this respect, we conclude that the following statement by the Supreme Court in *International Rice Milling*, supra, is applicable here:

> By § 13, Congress has made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is "specifically provided for" in the Act. . . . No such specific provision in § 8(b)(4) reaches the incident here.[13]

As the Respondents picketed no neutral party in this case, we find that the picketing was primary activity. Accordingly, we overrule our prior decision and find that the Respondents' picketing at the LCD garages did not violate Section 8(b)(4)(ii)(B).

We also reverse our previous finding and dismiss the 8(b)(4)(i)(B) allegation concerning the Respond-

[8] *Denver Building Trades*, supra at 692.

[9] As a threshold matter, the Board had reversed an administrative law judge's finding that the Board lacked subject matter jurisdiction because the case did not involve statutory employees. The Board stated that it was well established that statutory labor organizations, such as the Respondents, are subject to the proscriptions of Sec. 8(b)(4) "whether or not their activities concern statutory employees." The D.C. Circuit upheld this aspect of the Board's decision.

[10] 793 F.2d at 327.

[11] In view of the remand on this ground, the court found it unnecessary to address the Board's finding that the one-time picketing at Yellow's commission drivers' garage violated Sec. 8(b)(4)(i)(B). The court, however, noted a reservation about the Board's conclusion that the picketing at that garage was an attempt to cause the commission drivers to stop work. See infra.

[12] The finding that all the LCDs shared the same interests distinguishes this case from prior cases in which the Board has found unlawful picketing and other pressure directed against neutral independent contractors, rather than engaged in on their behalf. See, e.g., *Teamsters Local 814 (Santini Bros.)*, 208 NLRB 184 (1974), enfd. 546 F.2d 989 (D.C. Cir. 1976), cert. denied 434 U.S. 818 (1977); *Musical Artists (Washington School of Ballet)*, 157 NLRB 735 (1966).

[13] 341 U.S. at 673.

ents' picketing of the Yellow garage housing only cabs operated by the commission drivers. As noted earlier, this conduct occurred on the first morning of the picketing, lasted for at most 30 minutes, and ceased as soon as the pickets were informed that no LCDs were present. Thus, the record indicates that the employee garage was picketed only because the Respondents mistakenly believed that LCDs also used that garage. In these circumstances, we are not persuaded that the General Counsel has shown that this picketing had the necessary forbidden secondary object.[14]

ORDER

The complaint is dismissed.

[14] See *Teamsters Local 100 (Norfolk & Western Railway)*, 187 NLRB 706 (1971).

Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Chipman Freight Services. Case 32–CC–1025

26 March 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, STEPHENS, AND CRACRAFT

On 27 December 1985 Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief. The General Counsel filed limited exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing Chipman Freight Services with an object of interrupting the business relationships between Chipman and its independent contractor subhaulers, but did not violate Section 8(b)(4)(i) and (ii)(B) by picketing Chipman with an object of forcing or requiring Chipman to recognize or bargain with the Respondent as the representative of the subhaulers. For the reasons stated below, we find that the Respondent's picketing of Chipman Freight Services with either of these objectives did not violate Section 8(b)(4)(i) and (ii)(B) of the Act. Accordingly, we shall dismiss the complaint.

Chipman uses 22 subhaulers or owner-operators to transport containers to and from the Oakland dock area. The Respondent concedes that the subhaulers are independent contractors and not employees of Chipman. The subhaulers were required to sign a uniform subhaul agreement in order to do business with Chipman. That agreement was subject to immediate cancellation by either party by giving the other party written notice.

In July 1985[3] Chipman drafted a new subhaul agreement to replace the old one. The new agreement specifically states that the subhauler is an independent contractor and not an employee of Chipman. On 29 July Chipman's general manager Tucker notified all the subhaulers that their old subhaul agreements were canceled and told them that they would have to sign the new agreement in order to do business with Chipman. Only two subhaulers signed new agreements 29 July; two others signed 26 August.

In attempting to regain work from Chipman, some of the subhaulers sought the assistance of the Respondent, which had in June and July already begun efforts to organize the approximately 400 owner-operators in the Oakland area.

On 30 July Alex Ybarrolaza, the director of the Teamsters owner-operater division, attempted to convince Tucker to reinstate the old subhaul agreements and to recognize the Respondent as the representative of the owner-operators. Tucker refused.

On 6 August Ybarrolaza wrote to Chipman that the Respondent represented Chipman's subhaulers and enclosed a blank copy of a recognition agreement. He also sent similar letters to other companies in the area.

On 7 August Ybarrolaza met with most of Chipman's subhaulers. He suggested that the subhaulers sign the new agreement but attach a cover letter prepared by the Respondent stating that the agreement does not accurately define the subhaulers' employment status, and it was not the subhaulers' intent to redefine their status. The subhaulers rejected this course of action because they wanted to work under the old agreement.[4] They voted to picket Chipman, and the Respondent agreed to support the picket line until Chipman took back all the subhaulers under the old agreement. On 7 August the Respondent began picketing Chipman with signs reading, "CHIPMAN FREIGHT SERVICES—UNFAIR TO OWNER OPERATORS—TEAMSTERS LOCAL 70."

The four subhaulers who signed new agreements with Chipman have not performed work at Chipman because of the picketing. Some of Chipman's customers have also refused to cross the picket line.

On 13 August Tucker responded to the Respondent's 6 August request for recognition by refusing to recognize the Respondent because the subhaulers are not Chipman's employees, but independent contractors.

On 15 August the Respondent responded that while it would like to gain recognition at Chipman, the picketing was for the sole purpose of returning

[1] The Respondent, the General Counsel, and the Charging Party also filed supplemental statements of position.

[2] The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] All dates are in 1985 unless otherwise indicated.

[4] The new agreement, among other things, provided for a different method of compensation.

all Chipman subhaulers to their jobs and not for the purpose of gaining recognition, and that the subhaulers would return to work if Chipman would not require them to sign the new subhaul agreement.

On 16 August Tucker wrote to the subhaulers that he was still interested in meeting with them to negotiate new contracts.

On 22 August Ybarrolaza wrote that the subhaulers had selected a committee of three subhaulers to discuss a new contract with Chipman and that the Respondent would not participate in those discussions that could begin as soon as the subhaulers were allowed to resume work under the old agreement.

On 23 August Tucker replied that he would not reinstate the old contracts and that he was not willing to meet with groups of owner-operators because of potential antitrust ramifications.

In finding that the Respondent violated Section 8(b)(4)(B) of the Act by picketing with an object of forcing independent-contractor subhaulers to cease doing business with Chipman, the judge found that the ultimate object was to force Chipman to do business with the subhaulers under the old, rather than the new, subhaul agreement.

The judge rejected the Respondent's contention that the picketing was primary. The judge relied on the Board's decision in *Production Workers Local 707 (Checker Taxi)*, 273 NLRB 1178 (1984) (*Checker I*),[5] which held that a union is not engaged in primary activity when it brings economic pressure against a company to cause a cessation of business between the company and its independent contractors, where the union has no dispute concerning the company's own employees. The judge concluded that here the Respondent was not engaged in primary activity because the Respondent picketed Chipman to cause a cessation of business with Chipman's independent contractor subhaulers absent a dispute concerning Chipman's employees. Thus, the judge found that the picketing violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Following the issuance of the judge's decision in the instant case, however, the D.C. Circuit vacated the Board's *Checker I* decision and remanded that case to the Board. *Production Workers Union of Chicago v. NLRB*, 793 F.2d 323 (D.C. Cir. 1986). The court disagreed with the Board's premise that Section 8(b)(4) of the Act prohibits union involvement in all picketing on behalf of independent contractors. Rather, the court held that Section 8(b)(4) bars only secondary activity, which the court defined as "union attempts to involve neutral third parties in disputes not their own." 793 F.2d at 327. The court found that the picketing was not unlawful because it was directed against the cab companies, nonneutral parties, who were directly and intimately involved in the underlying dispute. The court remanded the case to the Board for application of the proper standard.

Following the remand, the Board reconsidered its *Checker I* position, and in *Production Workers Local 707 (Checker Taxi)*, 283 NLRB 340 issued today (*Checker II*), the Board agreed with the D.C. Circuit that Section 8(b)(4) of the Act prohibits only picketing against neutral parties, those "wholly unconcerned in the disagreement." 793 F.2d at 328. Applying that standard to the facts in *Checker*, the Board found that because the underlying dispute was with the cab companies, the cab companies are not neutrals. Thus, the Board found that the picketing against the cab companies is primary activity and does not violate Section 8(b)(4) of the Act.

We believe that *Checker II* controls the instant case. Here, the complaint alleges that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing Chipman with an object of interrupting the business relationships between Chipman and its subhaulers and with an object of forcing Chipman to recognize the Respondent as the subhaulers' representative. Chipman, however, is not a neutral party but is directly and intimately involved in the underlying dispute. The subhaulers' dispute was solely with Chipman, and the Respondent's picketing on behalf of the subhaulers was directed against Chipman. As Chipman is not a neutral, the Respondent's picketing against Chipman, with either of the alleged objectives, is primary activity that does not violate Section 8(b)(4)(B) of the Act. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Rony Clements and *Barbara D. Davison*, for the General Counsel.

Duane B. Beeson and *Kenneth C. Absalom (Beeson, Tayer & Silbert)*, for the Respondent.

John M. Skonberg and *Patricia A. Shepherd (Littler, Mendelson, Fastiff & Tichy)*, for the Charging Party.

[5] *Checker I* involved taxicab companies that lease cabs driven by independent contractors (LCDs). Some of the LCDs became dissatisfied with the lease arrangements offered by the companies. They approached the union, which formed a "Leased Taxicab Drivers Division" within the union. The union began collecting dues and initiation fees from the drivers, and sought recognition and bargaining from the companies on behalf of the LCDs. When the companies refused to recognize the union, the union and the LCDs began picketing and handbilling at the companies' garages. The picket signs stated that the LCDs were on strike and requested, inter alia, that the drivers refuse to lease cabs until an agreement was signed. The Board found that the picketing violated Sec. 8(b)(4)(i) and (ii)(B) of the Act because picketing on behalf of independent contractors was not lawful primary activity.

James C. Paras (Morrison & Foerster), for Sea-Land Services.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. The hearing in this case held 30 October 1985 was based on an unfair labor practice charge filed in Case 32–CC–1025 on 7 August 1985 by Chipman Freight Services, and an amended complaint issued 4 October 1985 on behalf of the General Counsel of the National Labor Relations Board, by the Board's Regional Director for Region 32, alleging that Teamsters Local 70 (Respondent) was engaging in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the National Labor Relations Act. The amended complaint, as amended at the hearing, alleges that Respondent violated Section 8(b)(4)(ii)(B) of the Act by picketing at Chipman Freight's facilities and by picketing Chipman Freight's trucks at the facility of Sea-Land Services with an object of forcing and requiring Sea-Land and other persons to cease doing business with Chipman Freight, and with an object of forcing and requiring Chipman Freight to recognize and bargain with Respondent for the subhaulers with whom Chipman Freight was doing business.[1] Respondent filed an answer denying the commission of the alleged unfair labor practices.

On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Chipman Freight, a California corporation, is engaged in the transportation and transhipment of freight and operates two terminals in Oakland, California. Its Oakland terminals, during a 12-month period material to this case, earned more than $50,000 from transporting freight in interstate commerce and as a link in commerce.

Sea-Land, a New Jersey corporation, is engaged in the international and interstate transportation of freight by water and operates a facility in Oakland, California. Its Oakland facility, during a 12-month period material to this case, earned more than $50,000 from transporting containerized cargo in interstate commerce and as a link in commerce.

During the time material to this case Chipman Freight, at its Oakland terminals, used the services of 22 truckdrivers, who owned their own trucks, to perform drayage and other trucking services. The relationship between Chipman Freight and these 22 owner-operators (subhaulers) will be described in detail infra. Respondent admitted for purposes of this litigation that the subhaulers are independent contractors and not employees of Chipman Freight.

Chipman Freight and Sea-Land are employers engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act and Chipman Freight, Sea-Land, and each of the above-described subhaulers has been a person engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent, Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

Chipman Freight operates two terminals in Oakland, California, where it provides warehouse space and facilities for transloading cargo being shipped into or out of the Port of Oakland in marine containers. Freight is transported to and from these terminals by drivers employed by Chipman Freight, by drivers employed by Chipman Freight's customers, and by the independent contractor subhaulers.

Chipman Freight employs approximately 25 employees at its Oakland terminals, including managerial and supervisory employees. The rank-and-file employees—truckdrivers, warehousemen, hostlers, and freight handlers—are represented by the Diversified Transportation Specialist Union. Their terms and conditions of employment are established by a collective-bargaining contract between that union and the employer.

In addition to its employee-drivers, Chipman Freight uses the services of the 22 independent contractor subhaulers to move containers to and from the Port of Oakland dock area, and in some cases to make deliveries away from the Port of Oakland. Most of these subhaulers are owner-operators; that is, they own, maintain, and drive their own trucking equipment used to haul containers for Chipman Freight. Five of the subhaulers, however, own one or more trucks used by Chipman Freight, which are driven by employees of the subhauler. Prior to the events in this case all the subhaulers, including the owner-operator group, were required to sign a uniform "sub-haul agreement" in order to work for Chipman Freight. This agreement refers to the subhaulers as independent businesspersons, and obligates them to "provide transportation services for such shipments as [Chipman Freight] may from time to time tender." The drivers' compensation under the agreement was computed on the basis of a percentage of the rates charged by Chipman Freight. The subhaul agreement was subject to immediate cancellation by either party "by giving the other party written notice."

[1] The amended complaint contained an 8(b)(4)(ii)(B) allegation based on an unfair labor practice charge filed in Case 32–CC–1026 by Sea-Land. The parties at the start of the hearing represented that they had agreed to a settlement of the complaint's allegation encompassed by that charge. Accordingly, I granted the General Counsel's unopposed motion to sever the charge in Case 32–CC–1026 from this proceeding and to remand it to the Board's Regional Director.

In July 1985[2] Chipman Freight's general manager, Jon Tucker, drafted a new uniform subhaul agreement to replace the existing one. The new uniform agreement entitled "Sub-haul Agreement With Independent Contractor" changed the existing agreement in two significant respects. The old one was silent about the subhauler's independent contractor status, whereas the new one specifically stated that the signatory subhauler was an independent contractor and not an employee of Chipman Freight, and further stated that the subhauler would in all respects direct the operation of the equipment he used to perform under the agreement, and described in detail the authority and responsibilities of the subhauler in this respect. Also, whereas under the old subhauler agreement Chipman Freight agreed to pay the subhauler 70 percent of the rates charged customers by Chipman Freight, the new uniform agreement proposed that Chipman Freight and the signatory subhauler negotiate flat rates for the subhauler's services according to the particular hauls.

On 29 July General Manager Tucker notified each of the Company's 22 subhaulers that effective immediately their subhaul agreements were canceled. On that day and the days immediately following, Tucker met with each of the subhaulers individually. He showed them a copy of the new uniform subhaul agreement, explained the Company's reasons for changing the old agreement, stated that the terms of the new proposed agreement and rate schedule were negotiable, and offered to negotiate with the individual subhaulers. Tucker also told the subhaulers that they would have to sign a new subhaul agreement before being allowed to do business with Chipman Freight. In fact, none of the subhaulers were allowed to continue to work for Chipman Freight until they entered into a new subhaul agreement. Only 4 of the 22 subhaulers, at the time of the 30 October hearing, had negotiated new subhaul agreements; Tyrone Searcy Trucking and Max Lopez Trucking on 29 July, Hunter Trucking and Cliffs Trucking on 26 August.

In June and July, prior to 29 July, Respondent's owner/operator division was conducting a campaign to organize the approximately 400 owner-operators in the trucking business in the Port of Oakland and vicinity. Alex Ybarrolaza, the director of Respondent's owner/-operator division, was in charge of this campaign. Prior to 29 July Ybarrolaza conducted several organizational meetings which were each attended by between 100 and 200 owner/operators. He told the owner/operators that Respondent wanted to represent them in order to improve their rates and conditions of employment and asked them to sign cards authorizing Respondent to act as their collective-bargaining representative. Some of Chipman Freight's subhaulers attended these meetings.

On 30 July Ybarrolaza visited General Manager Tucker. He told Tucker that the subhaulers "terminated" by Chipman Freight on 29 July had signed cards authorizing Respondent to represent them. Ybarrolaza asked Tucker to reinstate the subhaul agreements which were canceled 29 July and to put all the subhaulers back to work. He explained to Tucker that Respondent was in the process of formulating new proposals or programs for the subhaulers, which Respondent wanted to discuss with Chipman Freight, but they were not quite ready for presentation and, in the meantime, Ybarrolaza wanted Chipman Freight to return to the "status quo." Tucker responded by advising Ybarrolaza to contact Chipman Freight's attorney.

On 5 August Respondent filed an unfair labor practice charge (Case 32–CA–7414) with the Board's Regional Office. It alleged that Chipman Freight violated Section 8(a)(1) and (3) of the Act by discharging 18 named individuals on 29 July because of their participation in concerted activities.[3] The 18 individuals named in the charge were, for the most part, the subhaulers whose subhaul agreements on 29 July had been canceled by Chipman Freight. The record reveals, however, that 3 of the 18 were employees of subhauler Clifford Reich d/b/a Cliffs Trucking.

On 6 August the director of Respondent's owner/-operator division, Ybarrolaza, wrote Chipman Freight that Respondent represented all of its subhaulers and enclosed for Chipman Freight's signature a blank copy of an "Owner-Operator Division Recognition Agreement." This agreement stated in substance that the signatory company agreed to recognize Respondent as the exclusive bargaining representative of its owner-operator truckdrivers based on the Company's acknowledgement that the owner-operators were employees within the meaning of the National Labor Relations Act and that the Company also agreed to begin bargaining about the terms and conditions of employment of the owner-operators and to expeditiously conclude the negotiations.

On the morning of 7 August Ybarrolaza met with a majority of Chipman Freight's subhaulers whose subhaul agreements had been canceled. The meeting took place at the subhaulers' request and was held at Respondent's headquarters. Ybarrolaza suggested that each of the subhaulers return to work under the terms of the new uniform subhaul agreement being proposed by Chipman Freight, but that when they signed this agreement that they also give to Chipman Freight a signed copy of a letter which Ybarrolaza had prepared for the subhaulers' signatures. Ybarrolaza circulated copies of this letter, which reads as follows:

> Gentlemen:
>
> As directed by you, I have signed your "Independent Contractor Agreement." I signed this Agreement in compliance with your directive, which indicated that I would be terminated or no longer allowed to work for you unless I signed this Agreement. This Agreement, however, does contain several misrepresentations and does not accurately define our relationship nor the manner in which your work is performed or allocated. It is not my

[2] All dates hereinafter refer to the year 1985, unless otherwise specified.

[3] The Board's Regional Director for Region 32 found the charge to be without merit because the 18 individuals involved were not entitled to the protection of the Act as they were independent contractors. Respondent's appeal to the General Counsel's Office of Appeals was denied for the same reason.

intention to redefine my present employment status by signing this Agreement.

This letter has been prepared for me by Teamsters Local 70 at my request. I have authorized them to represent me in this matter, and you should contact them if you have any further questions.

Very truly yours,
(Signature)

cc: Alex Ybarrolaza, Teamsters Local 70

Ybarrolaza's recommended course of action was discussed and rejected by the subhaulers, a majority of whom indicated they wanted to return to work under the terms of the old uniform subhaul agreement which had been canceled by the Company. Ybarrolaza then indicated that he thought the subhaulers should vote on whether they wanted to picket. He explained that if they voted in favor of picketing, that Respondent would support the picket line until Chipman Freight took them back to work under the terms of the old subhaul agreement, and further explained that the picketing would continue until each of the subhaulers was put back to work. The subhaulers voted to picket.[4]

On 7 August Respondent began picketing Chipman Freight's Oakland terminals. The picket signs read: "CHIPMAN FREIGHT SERVICES—UNFAIR TO OWNER OPERATORS—TEAMSTERS LOCAL 70." Also on 7 August through 9 August the pickets followed Chipman Freight's trucks to numerous facilities in the Port of Oakland and picketed with the above-described picket signs at a gate reserved for Chipman Freight's trucks at Sea Land's Port of Oakland facility. On 30 October, the date of the hearing in this case, Respondent's picketing at Chipman Freight's Oakland terminals was still in progress.[5]

The four subhaulers, who, as described supra, signed new subhaul agreements with Chipman Freight, have not made any pickups or deliveries for Chipman Freight at the picketed terminals because the employees of these subhaulers and/or the subhaulers themselves have refused to cross Respondent's picket lines. Also the record shows that truckdrivers employed by Chipman Freight's customers, or by agents of the customers, have refused to cross the Respondent's picket lines at Chipman Freight's terminals to make pickups or deliveries and that this has prompted some of Chipman Freight's customers to threaten Chipman Freight with the loss of their business.

On 13 August General Manager Tucker rejected Ybarrolaza's 6 August demand that Chipman Freight recognize Respondent as the bargaining representative of Chipman Freight's subhaulers. Tucker explained to Ybarrolaza that the demand was inappropriate because the subhaulers were not Chipman Freight's employees, but were independent businessmen.

On 15 August Ybarrolaza wrote Chipman Freight's attorney, in pertinent part, as follows:

> In our telephone conversation of July 30, 1985, and on two other occasions prior to August 3, 1985, we discussed the matter of Chipman Freight Services' termination of its owner-operator drivers, and on each occasion I indicated to you that we were simply asking Chipman Freight Services to return to the status quo that existed on July 29, 1985. That all the Chipman owner-operator drivers be allowed to return to work under the terms and conditions of their respective contracts then in effect. We also outlined this position to Mr. Jon Tucker at Chipman Freight Services Warehouse on July 30, 1985, and this still remains our position.
>
> . . . .
>
> In the event you are under the misconception that our position has changed, please be advised that it has not. I specifically told you on August 2, 1985, that while we would like to gain recognition at Chipman it was not required, and that the owner-operators would be willing to return to work as long as Chipman would not compel them to sign the new "Independent Contractor Agreement," and was willing to accept the return of all of the owner-operators that it had terminated on July 29, 1985; that we would deal with the question of recognition later as our program on behalf of all of the owner-operators operating on the waterfront [was] not designed for just Chipman or any single company, but for all of the companies involved in the hauling of containers. Letters requesting recognition were sent by us to 35 companies whose employees, owner-operators or non-owner drivers, have indicated a desire to be represented by Local 70. All these letters were sent out at about the same time. Chipman was the only company picketed. Our picketing Chipman Freight Services is for the sole purpose of returning all of the Chipman owner-operators to their jobs and not for the purpose of gaining recognition.

On 16 August Tucker wrote identical letters to some of the subhaulers. He informed them, among other things, that Chipman Freight was still interested in meeting with them to negotiate new contracts, that the only substantial change in the contract which it had proposed was in the rates, that this change was favorable to the subhaulers, and explained that if there were provisions in

[4] Ybarrolaza and subhaulers Reich and Levasseur testified about this meeting. The above description of what occurred is based on Ybarrolaza's testimony. Ybarrolaza's testimonial demeanor was good, whereas Reich's and Levasseur's was poor. Moreover, Ybarrolaza's testimony was corroborated by Reich's in a number of significant respects, whereas there was a sharp conflict between Reich's and Levasseur's testimony. Levasseur's testimony that Ybarrolaza suggested the subhaulers sign the old subhaul agreement, rather than the new one, was contradicted by Reich, who corroborated Ybarrolaza's testimony in this respect. Likewise, Reich's description of the contents of the cover letter which Ybarrolaza suggested that the subhaulers give to Chipman Freight, corroborates Ybarrolaza's description and contradicts Levasseurs'.

[5] On 13 August the Board's Regional Director in Oakland sought a temporary injunction of this picketing under Sec. 10(l) of the Act in the United States District Court for the Northern District of California, pending disposition of this proceeding. The Regional Director's petition was denied by the court on 22 October. However, the parties in their posthearing briefs have advised me that on 15 November the Circuit Court of Appeals for the Ninth Circuit issued an order, pursuant to the General Counsel's motion, enjoining Respondent from picketing Chipman Freight or its customers pending an appeal of the district court's order denying injunction or until the Board issued a final decision in the matter, whichever occurred first.

the new contract which a subhauler desired to change, that Tucker would be happy to consider the subhauler's proposed changes.

On 22 August Ybarrolaza wrote Chipman Freight's attorney and with respect to Tucker's 16 August letter, in pertinent part, stated:

> We are glad to hear that Chipman is very interested in meeting with the owner-operators, and on our recommendation they have selected a committee of three who would meet with Mr. Jon Tucker to review and discuss a new contract. The owner-operators further indicated that these discussions could begin as soon as Chipman allows all of their owner-operator drivers to return to work and the talks could be held after normal working hours. Teamsters Local 70 would not participate in these discussions. Pending final resolution for a new contract, they would also agree to continue to work as they had in the past and under the terms of their respective past agreements and either the old or more favorable rates than Chipman seems to be offering, all of which Local 70 is not a party to.

On 23 August Tucker wrote Ybarrolaza in response to Ybarrolaza's 22 August letter. With respect to Ybarrolaza's proposal concerning the negotiation of a new contract by and between the subhaulers and Chipman Freight, Tucker wrote the following:

> We are still not willing to return to the prior contracts while we discuss revisions in those contracts. Nor are we willing to meet with groups of owner-operators to discuss rates. As I am sure you are aware, the joint discussion of such rates could have serious anti-trust ramifications for both the company and the owner-operators.
>
> As I said before, we are, however, willing to meet at any time, individually, with the owner-operators to work out satisfactory contracts.

B. *Discussion and Conclusions*

I.

The amended complaint, as further amended at the hearing, alleges Respondent violated Section 8(b)(4)(ii)(B) of the Act by picketing Chipman Freight at Chipman Freight's Oakland terminals and at the entrance reserved for Chipman Freight at Sea-Land's Oakland facility, with an object of forcing or requiring Chipman Freight to recognize and bargain with Respondent on a collective basis for the independent contractor subhaulers with whom Chipman Freight was doing business. I shall recommend the dismissal of this allegation for the reason that the record does not establish that an object of Respondent's picketing was to force or require Chipman Freight to recognize or bargain with Respondent as the representative of Chipman Freight's subhaulers.

On 7 August, when the subhaulers voted to picket Chipman Freight, Ybarrolaza, the director of Respondent's owner/operator division, explained if they voted to picket that Respondent would support their picketing until Chipman Freight took all of them back to work under the terms and conditions of the recently canceled subhaul agreements and also promised that the picketing would continue until Chipman Freight put all of them back to work.[6] Subsequently, on 15 August, Ybarrolaza wrote Chipman Freight advising it that Respondent's picketing was not for the purpose of gaining recognition, but the picketing's sole purpose was to return all of Chipman Freight's subhaulers to their jobs. In his 15 August letter Ybarrolaza also advised Chipman Freight that Respondent would end its picketing if Chipman Freight took back all the subhaulers under the terms and conditions of the recently canceled subhaulers agreements.[7] The legend on the picket signs was consistent with Ybarrolaza's stated purpose. In view of the foregoing circumstances, I am persuaded the General Counsel has failed to prove that an object of the Respondent's picketing was to force or require Chipman Freight to recognize or bargain with Respondent as the representative of Chipman Freight's subhaulers. I therefore shall recommend the dismissal of this allegation.

In reaching this conclusion I have considered that on 6 August, the day before the start of the picketing, Ybarrolaza asked Chipman Freight to acknowledge that the subhaulers were Chipman Freight's employees and to recognize and bargain with Respondent as the subhaulers' collective-bargaining representative. I also have considered that at his 7 August meeting with the subhaulers, Ybarrolaza recommended a course of action which included a letter to Chipman Freight stating, among other things, that Respondent represented the subhaulers. The subhaulers, however, rejected this recommendation and, as described supra, it is clear from what occurred later during the 7 August meeting when the vote to picket was taken, that the decision to picket and Respondent's decision to sponsor the picketing was unrelated to Respondent's efforts to represent the subhaulers for collective-bargaining purposes.[8] I also note that Ybarrolaza's 15 August letter to Chipman Freight explained that Respondent's 6 August demand for recognition and bargaining had been made in the context of Respondent's campaign to organize all the subhaulers doing business in the Port of Oakland companies whose employees and subhaulers had expressed a desire to be represented by Respondent. Also, Ybarrolaza's letter further explained that Chipman Freight was the only com-

---

[6] As described supra, Ybarrolaza, before the subhaulers voted to picket, suggested a different way for them to solve their problem. His recommendation involved, among other things, Chipman Freight's recognition of Respondent as the subhaulers' representative. The subhaulers, however, rejected Ybarrolaza's recommendation and voted to picket instead.

[7] "In considering a union's motivation for striking or picketing, [the Board and] courts have found it useful to ask what concessions the company would have to make to abate the union activity [cases cited]." *NLRB v. Union de Empleados (National Packing Co.)*, 455 F.2d 1248 (1st Cir. 1972).

[8] The record fails to establish that when Respondent asked Chipman Freight to return all of these subhaulers back to work under the terms and conditions of the recently canceled subhaul agreements, that Respondent was seeking to represent the subhaulers in the negotiations with Chipman Freight for the terms and conditions of the new subhaul agreements. As a matter of fact, Ybarrolaza's 16 August letter to Chipman Freight expressly states that "Teamsters Local 70 [Respondent] would not participate in these discussions."

pany picketed, and that the picketing had nothing to do with Respondent's request for recognition, but would end if all of Chipman Freight's subhaulers were allowed to return to work under the terms and conditions of the recently canceled subhaulers agreements.

II.

The amended complaint, as further amended at the hearing, alleges in substance that Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing Chipman Freight at Chipman Freight's Oakland terminals and at the entrance reserved for Chipman Freight at Sea-Land's Oakland facility, with an object of forcing or requiring the independent contractor subhaulers to cease doing business with Chipman Freight. I am persuaded for the reasons set forth hereinafter that this allegation is meritorious.

Although Section 8(b)(4)(B) prohibits classic "secondary boycotts"—when a union brings economic pressure against a neutral employer to obtain economic leverage against another employer who is engaged with his employees in a primary dispute—that phrase is not used in the statute, and the statute is not limited to addressing that wrong. See *Maritime Union v. NLRB*, 346 F.2d 411, 416–417, fns. 8, 11, 12 (D.C. Cir. 1965). Congress did not by the passage of Section 8(b)(4)(B) seek to ban only some forms of secondary conduct; rather, Congress recognized that "illegal boycotts take many forms" and "purposefully drafted [Section 8(b)(4)(B)] in [the] broadest terms." *Longshoremen v. Allied International*, 456 U.S. 212, 225 (1982). Thus, the statute comprehends not only "the familiar patterns of a secondary boycott" but "variations from those patterns." *Maritime Union v. NLRB*, supra, 346 F.2d at 417 fn. 8, quoted in *Soft Drink Workers Local 812 v. NLRB*, 657 F.2d 1252, 1259 (D.C. Cir. 1980). Accordingly, "[w]here . . . act and object fall comfortably within the letter of the statute, the Board's hand is to be stayed only upon a pervasive showing that they are beyond its spirit." *Soft Drink Workers Local 812 v. NLRB*, supra, 657 F.2d at 1259. See also *Longshoremen v. Allied International*, supra, 456 U.S. at 225 (1982).

In the instant case, as described in detail supra, Respondent picketed Chipman Freight in order to persuade the independent contractor subhaulers to cease doing business with Chipman Freight, with the ultimate object of forcing Chipman Freight to do business with the subhaulers under the terms and conditions of the subhaul agreements recently canceled by Chipman Freight, rather than under the terms and conditions of the new subhaul agreements being proposed by Chipman Freight. This picketing satisfies the standards of prohibited "act" and prohibited "object" of Section 8(b)(4)(B). For it is settled law that picketing constitutes "induce[ment] or encourage[ment]" within the meaning of Section 8(b)(4)(i)[9] and also "coerc[ion] or restrain[t]" within the meaning of Section 8(b)(4)(ii) (see for example *Electrical Workers IBEW Local 501 v. NLRB*, 341 U.S. 694, 701–704 (1951); *NLRB v. Teamsters Local 85*, 454 F.2d 875, 878 (9th Cir. 1972)) and that a disruption of the neutral party's business satisfies the "cease doing business" requirement of Section 8(b)(4)(B). See for example *Longshoremen v. Allied International*, supra at 222–226 fn. 21 (1982). Respondent contends, however, that its picketing was primary and thus not encompassed by Section 8(b)(4)(B). As discussed below, this contention is without merit.

The Board indicated in *Teamsters Local 814 (Santini Bros.)*, 208 NLRB 184 (1974), affd. in relevant part 512 F.2d 564, 566–566 (D.C. Cir. 1975), and *Musicians Local 16 (Bow & Arrow Manor)*, 206 NLRB 581, 581–582 (1973), enfd. 512 F.2d 991 (D.C. Cir. 1975), and expressly held in *Production Workers Local 707 (Checker Taxi)*, 273 NLRB 1178 (1984), that a union is not engaged in primary activity—and therefore violates Section 8(b)(4)(B)—when it brings economic pressure against a company to cause a cessation of business between the company and independent contractors with whom it does business, where the union has no dispute concerning the company's own employees. In such circumstances, be the independent contractors employers themselves (see *Musicians Local 16*, supra) or self-employed persons (see *Teamsters Local 814*, supra, and *Production Workers Local 707*, supra), the picketing union satisfies the "act and object" language of Section 8(b)(4)(B) and is not involved in a primary labor dispute with the picketed company.[10] Moreover, this result is unaffected by the legiti-

[9] Respondent's picketing took place at Chipman Freight's Oakland terminals where Chipman Freight's employees, represented by another union, were employed. Also employees of the subhaulers and of Chipman Freight's customers picked up and delivered at these terminals.

[10] I recognize that Chipman Freight is not a "wholly unconcerned" or "neutral" party in the dictionary sense but, in fact, is involved in the dispute herein. However, such terms as "neutral" and "wholly unconcerned" are terms of art in 8(b)(4) adjudication and must be understood in light of the statutory objectives. As the court explained in *Carpet, Linoleum, Soft Tile Local 419 v. NLRB*, 467 F.2d 392, 400–401 (D.C. Cir. 1972):

> [T]he mere fact that the relationship between two parties involves some economic interdependence is not sufficient in and of itself to cause one of the parties to lose its "secondary" status, for section 8(b)(4)(B) purposes, *vis-a-vis* the other party. This conclusion is dictated by the very nature of secondary boycotts. It is intuitively obvious that a union which is engaged in a labor dispute with one party will not endeavor to enlist the support of another party, *unless* ...ere is some relationship present, direct or indirect, between the two parties. This most frequently involves an economic relationship. Without the presence of some interrelationship between the two parties, it would be an exercise in futility for the Union to seek the aid of the second party, since it would necessarily have no possible means of providing meaningful support for the union. It is therefore logically apparent that something more than mere economic interdependence between two parties is required before one loses its "secondary" status with respect to the labor disputes of the other.

Chipman Freight's status as a neutral does not derive from a complete lack of involvement in the dispute, but from its noninvolvement in a primary labor dispute. Similarly, the fact that Chipman Freight possesses the power to end the picketing by agreeing to the Respondent's demands does not render the dispute "primary"; for, as indicated in *Carpet Layers*, supra, it is not unusual for a secondary employer to possess the power to resolve—or substantially aid the resolution of—a labor dispute. Yet that power has never been deemed sufficient to convert the secondary employer into a primary. See *Electrical Workers IBEW Local 399 (Illinois Bell)*, 235 NLRB 555, 555–556, 559–562 (1978), enfd. 601 F.2d 593 (7th Cir. 1979).

macy of the union's ultimate goal. *Production Workers Local 707 (Checker Taxi)*, 273 NLRB 1178. See also *Musical Artists (Washington School of Ballet)*, 157 NLRB 735, 741–742 (1966); *Federation de Musicos Local 468 (Pat Mills & Co.)*, 246 NLRB 782, 785–787 (1979). Because Respondent engaged in just such secondary conduct here—picketing Chipman Freight to cause a cessation of business with their independent contractor subhauler,[11] in the absence of a dispute concerning Chipman Freight's employees—the General Counsel has established, as alleged in the complaint, Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act. *Production Workers Local 707 (Checker Taxi)*, supra.[12]

[11] It is clear that a natural consequence of Respondent's picketing was the cessation of business between Chipman Freight and the independent contractor subhaulers. Respondent had every reason to foresee that the subhaulers, in deference to the picket line, would not resume doing business with Chipman Freight until the ultimate object of the picketing was accomplished. Under the circumstances, a prohibited cease-doing-business object was necessarily subsumed with Respondent's ultimate object for picketing, and Respondent necessarily had this subsidiary object regardless of its ultimate object. Also, with respect to the picketing's ultimate object—requiring Chipman Freight to do business with the independent contractor subhaulers under the terms and conditions of the subhaul agreements recently canceled by Chipman Freight, rather than under the terms and conditions of the new agreements being proposed by Chipman Freight—it required Chipman Freight to change its method of doing business with the independent contractor subhaulers in significant respects, thus satisfying the "cease doing business" requirement of Section 8(b)(4)(B). See *NLRB v. Operating Engineers Local 85*, 400 U.S. 297 (1971). Chipman Freight was faced with the option of suffering a severe disruption of its business, including a loss of customers, or doing business with the independent contractor subhaulers under the terms and conditions dictated by the Respondent's picket line, rather than under the terms and conditions of the new subhaul agreements being proposed by Chipman Freight.

[12] I agree with the General Counsel and Chipman Freight that the facts in the instant case fall squarely within the rule set forth in *Checker Taxi*. There, two taxicab companies employed drivers who leased cabs from the companies. The drivers were independent contractors. The respondent unions demanded that the companies recognize the unions as the leased cab drivers' bargaining representative and negotiate an agreement establishing uniform conditions regarding the leasing of cabs. The companies rejected this demand and the Unions picketed the companies' garages used by the leased cab drivers, with picket signs stating that the leased cab drivers were on strike and asking that they not lease cabs until an agreement was reached regarding their working conditions. It was disputed that the unions picketed in order to persuade the independent contractor leased cab drivers to cease doing business with the companies, with the ultimate goal of forcing the companies to recognize and bargain with the unions. The Board found that "[b]y picketing the Charging Parties with an object of interrupting the leases between the Charging Parties and the leased cab drivers . . . the Respondents have violated Section 8(b)(4)(i) and (ii)(B) of the Act." In the instant case, as I have found supra, Respondent picketed Chipman Freight with picket signs informing the independent contractor subhaulers that Chipman Freight was unfair to them. Respondent picketed in order to persuade the subhaulers to cease doing business with Chipman Freight, with the ultimate object of forcing Chipman Freight to do business with the subhaulers under the terms and conditions of the subhaulers agreements previously canceled by Chipman Freight, rather than under the terms and conditions of the new agreement being proposed to the subhaulers by Chipman Freight. Plainly, one of the objects of Respondent's picketing—requiring Chipman Freight to do business with the independent contractor subhaulers only under the terms and conditions of the canceled subhaul agreements rather than under the new agreements being proposed by Chipman Freight—was similar in significant respects to "an object of interrupting the leases between the Charging Parties and the leased cab drivers" found by the Board in *Checker Taxi* to have constituted a prohibited cease-doing-business object.

CONCLUSIONS OF LAW

1. Respondent Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

2. By picketing Chipman Freight Services with an object of interrupting the business relationships between Chipman Freight Services and the independent contractor subhaulers, the Respondent has violated Section 8(b)(4)(i) and (ii)(B) of the Act.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, shall recommend that it be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

I have granted the General Counsel's request for a broad remedial order because in *Teamsters Local 70 (Department of the Navy)*, 261 NLRB 496 (1982), the Board found that respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act and remedied the violation with a broad remedial order inasmuch as respondent's proclivity to violate Section 8(b)(4)(B) had been established. Id. at 502–503. Respondent here urges that a broad remedial order is not appropriate because it had legitimate grounds for believing that its picketing was not prohibited by Section 8(b)(4)(B) of the Act and because of the lapse of time between its picketing and the Board's order in *Department of the Navy*. I disagree. As I have indicated supra, any doubt that a union is not engaged in primary activity when it brings economic pressure against a company to cause cessation of business between the company and independent contractors with whom it does business, when the union has no dispute concerning the company's employees, was removed by the Board's decision in *Checker Taxi*, which was issued approximately 6 months prior to the Respondent's picketing. And, with respect to the lapse of time between the Respondent's picketing herein and the broad remedial order issued against Respondent in *Department of the Navy*, the order which issued 29 April 1982 was not based merely on the 1981 picketing involved in that case, but on other picketing of Respondent which violated Section 8(b)(4)(B) engaged in during the 1960s, the 1970s, and the 1980s.[13] In view of these circumstances, I am not persuaded that the approximately 3 years which elapsed since the Board's order in *Department of the Navy* and Respondent's illegal picketing herein, constitute a sufficient lapse of time so as to make a broad remedial order inappropriate.

[Recommended Order omitted from publication.]

[13] The broad remedial order issued in *Department of the Navy* was based on respondent's proclivity to violate Sec. 8(b)(4)(B) of the Act as was evidenced by Board orders issued in 1969, 1971, 1978, and 1981 as well as by Respondent's illegal conduct found in that case. *Teamsters Local 70*, supra, 261 NLRB at 502–503.

Burkart Foam, Inc. *and* District 111, Lodge 1076, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 14–CA–17995

26 March 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 1 April 1986 Administrative Law Judge Bernard Ries issued the attached decision.[1] The Respondent filed exceptions and a supporting brief,[2] and the General Counsel filed an answering brief.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Burkart Foam, Inc., Cairo, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The judge issued an erratum to his decision on 15 April 1986.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The General Counsel filed a motion to strike certain portions of the Respondent's supporting brief. In view of our disposition of this case, we find it unnecessary to pass on the General Counsel's motion.

[4] We note that no exceptions were filed to the judge's use of 25 February 1985 as the date the economic strike converted into an unfair labor practice strike.

Keltner W. Locke, Esq., for the General Counsel.
Donald E. Egan, Esq. (Katten, Muchin, Zavis, Pearl & Galler), of Chicago, Illinois, for the Respondent.
Harold P. Lorenz, of Bridgeton, Missouri, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This matter was tried in St. Louis, Missouri, on 17 September 1985, on a charge filed on 7 June 1985 and a complaint issued on 24 July 1985. The complaint alleges that Respondent has violated Section 8(a)(5) of the Act: (1) since about 20 February 1985, by refusing to reduce to writing a full and complete agreement that it had reached with the Charging Party, and (2) since about the same date, by refusing to provide the Charging Party with certain information requested at that time. The complaint also asserts that a strike among Respondent's employees that began on 5 September 1984 was prolonged by the alleged unfair labor practices.

Briefs were filed by the General Counsel and Respondent on 5 November 1985.[1] My consideration of the entire record, the briefs, and the demeanor of the parties leads me to the following conclusions.

I. THE FACTS

Respondent and the Charging Party have engaged in collective bargaining for a number of years, covering a unit now consisting of nearly 500 production and maintenance employees. Their last 3-year bargaining agreement expired on 4 September 1984. Negotiations for a new agreement began in August 1984, and a total of six sessions were held, the last two began on 1 and 4 September, in the presence of a mediator from the Federal Mediation and Conciliation Service.

The chief spokesman for the union negotiators throughout the bargaining was David M. Garner, the directing business representative of District 111. Present at all sessions for Respondent was its personnel manager, Lawrence A. Davis; although Davis had been the recognized chief spokesman for Respondent in the 1981 negotiations, John W. Noble Jr., a Chicago attorney, testified that in 1984 he had been appointed by Respondent to head its 1984 negotiating team. Noble further testified, without contradiction, that at the first session he told Garner that Respondent's division head had given Noble "complete authority to negotiate the contract."

On 1 September, Respondent gave the Union a nearly complete written proposal, except for the final version of the wage appendix that was given to the Union on 4 September. On the latter day, Respondent made a last economic offer of a 10-percent decrease in the first year, a "recouping" of half of the decrease in the second year, and a 7-1/2-percent increase in the third year. It also provided some new language about combining jobs, and revision of some old language. Personnel Manager Davis, an unreliable witness, testified, when called by the General Counsel as an adverse witness, that Respondent had made "no offer" to the Union either on 1 or 4 September, and that Noble had simply told the Union that the company negotiators were there "to listen." Later that day, however, in his second appearance as Respondent's witness, Davis not only conceded that the Company had made a "complete offer for a labor agreement" as of 4 September ("as far as I know, yes"), but also that he knew that the Union was going to take the proposal to its membership for a ratification vote that same day.[2]

The membership rejected the offer and went on strike at 12:01 a.m. on 5 September.

The next negotiating meeting was called by the mediator on 31 October. When he asked if either party had

[1] By letter of 6 November, Respondent requested an opportunity to file a reply brief, which request was opposed by the General Counsel and the Charging Party and denied by my order denying request filed 18 November 1985.

[2] The Union's two very credible witnesses, Garner and Local Lodge President Gwendolyn Agnew, both testified to the effect that Noble had said, as Garner put it, "We had their proposal and to take it back to the membership."

changed position, Noble stated that "the Company had not changed its position from the September 4th offer." Garner responded that "the Union's position had changed in one respect," that "upon the settlement of the strike we would want the Company to lay off all employees and to recall by seniority." Noble replied that "that was not going to happen."[3]

On 7 February 1985 the strike was still on and the mediator called the parties together again. The Union made some new proposals, which the Company rejected. Noble said that "the Union had not given the Company any reason to change its offer . . . and that the offer made on September 4th, 1984, was not going to be changed one iota."

The union membership met again on 10 February, and again voted down Respondent's 4 September offer. However, soon thereafter, a circulated petition came to Garner, asking the Union to "accept the contract and call off the strike," and the grand lodge representative for the area thereafter received written authorization from a union general vice president in Washington to "sign . . . the company's best and final offer."

On 19 February 1985 a decertification petition was filed with the Regional Office.

On 20 February 1985 Garner and two other union representatives went to Davis' office. Although Garner thought that the first thing he did was to hand Davis a letter, dated 20 February, stating, inter alia, that "[e]ffective immediately," the Union "unconditionally accepts Burkart Foam, Inc.'s, final offer," apparently, judging from Davis' markings on the letter, Garner did not do so until the end of the meeting, about an hour later. Davis nonetheless agreed that Garner opened the meeting by saying that "the Union had accepted the contract unconditionally as it was at the end of the last meeting in February."

Garner had brought with him two clean copies of a complete contract that he had prepared, and he asked Davis to check over the drafts to see if they corresponded to Respondent's own understanding of its final offer. With Davis going over his own notes, they found 11 passages in the 37-page agreement in which Garner's draft did not dovetail with Davis' version of the offer. Garner thereupon changed his draft in accordance with Davis' understanding of the discrepancies, and they both initialed each modification on Garner's draft. The process took an hour or so.[4]

When Garner asked Davis (who would have signed the agreement had it been signed; he had been the sole company signatory to the preceding agreement) to execute the agreement, Davis said that "he would have to get with Mr. Noble on arranging a date for the signing of the contract." Davis' account was essentially the same: "I was not going to sign the contract without Mr. Noble being there." Garner was left with the impression that "Davis was going to contact Noble to arrange a date on which to sign it."

Another part of the letter Garner handed to Davis before he departed stated, "The employees will return to work on Thursday, February 21, 1985. Those not put to work will be on a preferential recall list." The remainder of the letter requested certain information, a subject that will be discussed in more detail below. On leaving, Garner told Davis, according to the uncontroverted testimony of the latter, that he was going to have his secretary prepare on her word processor a completed contract in accordance with the changes they had made.

Garner heard nothing more from Davis, and called him on "two or three occasions between February 20th and February 27th, trying to get from him some sense of when people would be returned to work and when we would be signing the agreement."[5] On 27 February, Garner wrote Davis reminding him of the Union's 20 February acceptance of the Company's offer and its expressed desire to sign a bargaining agreement. He went on: "At that time you declined, stating that you needed to seek advice from the Company's attorney, and in subsequent phone conversations, including one this morning, you continued to decline signing the agreement."[6] Garner reiterated the Union's desire to sign that agreement and, among other things, said "Also, we wish to reitterate [sic] the availability and willingness of our membership to return to work."

Noble was in the hospital on 20 February, and heard about the Union's acceptance at some brief, but unidentified, time thereafter. After Davis forwarded to him a copy of Garner's 27 February letter, Noble wrote a lengthy letter to Garner on 6 March, referring to both the Union's 20 and 27 February letters. Noble said, inter alia, that he was, as the Union knew, the "sole spokesman" for Respondent; that, based on the membership's two rejections of "what you refer to as the Company's 'best and final offer'" and "the 80 percent of working employees who support a decertification proceeding," Respondent "maintain[ed] a good faith doubt that Lodge 1076 is the representative of its employees" and believed that question "best left to a resolution by the National Labor Relations Board"; that his reading of the Union's constitution and bylaws "suggests" that membership ratification was necessary to commit the employees to a "new, 3-year agreement" (Noble asked Garner for clarification of this point); and that, in response to Garner's purported "request [for] notification concerning the procedure by which unconditional application may be made by nonworking employees to return to work," Respondent had provided and would continue to provide strikers the opportunity to return where vacancies existed.

On 18 March Garner wrote Noble, declaring, among other things, that "this Union was within its rights in ac-

[3] Agnew thought that this exchange occurred at the next meeting.

[4] Working from a draft contract, which Respondent itself had prepared after the 4 September meeting, Davis made two changes in that draft, which brought Garner's draft and Respondent's draft into exact correspondence, according to Davis.

[5] Davis agreed with the first part, but did not mention the second.

[6] Garner testified that these words did not accurately reflect the tone of his earlier conversations with Davis. He explained that he gave a general outline of the letter to his secretary over long-distance telephone while he was in Washington (the signature on the 27 February letter is clearly not Garner's) and that she failed to properly portray Davis' initial reaction. Davis himself implicitly confirmed that he had said nothing to Garner on 20 February about needing to "seek advice" from Noble; as shown above, he testified that he merely said that he "was not going to sign the contract without Mr. Noble being there."

cepting the Company's best and final offer . . ."; that, in writing in his 27 February letter about employees returning to work, Garner was simply attempting to have the Company put in writing Davis' statement to him on 20 February that the strikers could not all return on 21 February and that "he would call them in as needed"; and that (quoting Noble) while the issue of whether Respondent entertained a "good-faith" doubt of majority status was "best left up to the National Labor Relations Board," "[i]n the meantime, you are under obligation to execute the already agreed upon collective-bargaining agreement," and the Union awaited Respondent's suggestion of a time and place for that transaction.

II. THE REFUSAL TO SIGN THE AGREEMENT

A. *Davis Had No Authority to Bind Respondent*

Section 8(d) of the Act specifically defines the duty "to bargain collectively" to include "the execution of a written contract incorporating any agreement reached if requested by either party." On brief, Respondent advances five separately stated arguments to explain why the section does not apply to Respondent in this case.

The claim that "Davis had no authority to bind the Respondent" misses the point. The testimony clearly shows that by 4 September 1984 Respondent had made a complete contract offer to the Union, one which Noble himself reaffirmed and saw no reason to "change . . . one iota" at subsequent meetings on 31 October 1984 and 7 February 1985. On 20 February, the Union was quite willing to accept what it thought was Respondent's offer, and when it learned from Davis that it had misunderstood the offer in certain respects, it was still prepared to, and did, accept Respondent's offer as clarified. In so clarifying, Davis was not, as Respondent asserts on brief, "negotiating." He was simply an expert witness to the negotiations who understood the terms of Respondent's offer and was making them available to the Union; nowhere in Noble's testimony or elsewhere does he challenge the accuracy of Davis' understanding, as expressed on 20 February, of the terms offered by Noble during the bargaining.

Because there is in fact no question as to what terms constituted the Respondent's final offer; because there is no question that Respondent never changed that offer and in fact twice reaffirmed it; and because there is no question that Respondent became aware of the Union's acceptance of the offer at the time that Garner notified Davis, Respondent became obligated to abide by that agreement and, by vitue of Section 8(d), to execute a written contract incorporating the terms of that offer as reasonably promptly as possible.[7]

B. *No Binding Agreement was Reached Between the Parties on February 20, 1985*

Noble testified to a melange of what he referred to as "open issues" which precluded the possibility of agreement being reached on 20 February. The nature of the arguments as to each such issue is not uniform.

1. Reinstatement of strikers

Noble testified that the Union made a "new proposal" "which had not been taken off the table" when, on 31 October, Garner stated that "[T]he Union's position had changed in one respect, and only one respect, and that was since the Company had hired replacement employees, that upon the settlement of the strike we would want the Company to lay off all employees and to recall by seniority." Assuming arguendo that this was intended to be a modification of the Union's proposals (although, in the position of the Union, one can hardly suppose that the Union had any great expectations about its prospects of success), it makes no difference. For one thing, Noble immediately rejected the notion, saying that "that was not going to happen." The dispositive point is, however, that the Respondent did not modify its contract offer throughout the material period, and the Union had a right to accept it on 20 February, abandoning, if it wished, any "new proposals" of its own.[8] On brief, Respondent argues, "The contention that the Charging Party *accepted the Respondent's last offer* could not constitute a withdrawal or resolution of this issue." (Emphasis in original.) One wonders why not; acceptance of the Respondent's "last offer" presumably constituted a withdrawal or resolution of many proposals of its own that the Union had advanced.[9]

2. Absenteeism clause

At the hearing, Noble stated:

> There was also, as I looked over [the draft contract mutually corrected by Garner and Davis], a great inconsistency between the language of I think Section 34, which relates to absenteeism, and Section 9.10 of the contract, which makes mention of unexcused absences. I say that because all through negotiations I told Mr. Garner that there was no such thing as unexcused absences that did not go on

[7] In *Pepsi-Cola Bottling Co.*, 251 NLRB 187, 189 (1980), the Board held that an offer remains viable and subject to acceptance "unless expressly withdrawn prior to such acceptance, or defeased by an event upon which the offer was expressly made contingent at a time prior to acceptance." In enforcing the decision, *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89-90 (8th Cir. 1981), the court approved a similar formulation with the additions of (1) the requirement of acceptance being made "within a reasonable time" and (2) the absence of "intervening circumstances which make it unfair to hold the offeror to his bargain." The Board has adopted the "reasonable time" consideration, *Crown Cork & Seal Co.*, 268 NLRB 1089 (1984), but there is no basis here for concluding that an unreasonable amount of time had elapsed before the Union's acceptance. As discussed, on 7 February 1985, only 13 days before the Union capitulated, Respondent reaffirmed that its offer was still on the table and would not be changed "one iota."

[8] *Shawn's Launch Service*, 261 NLRB 836, 839 (1982) (even if union's inquiry amounted to "counterproposal," it does not amount to rejection of employer's offer, which was never withdrawn).

[9] The fact is that the Union clearly was not making a "new proposal" in this and subsequent references to reinstating the strikers. Garner obviously was simply attempting to promote an idea to take place "upon the settlement of the stike," which was "never intended to be a contractual provision," *Georgia Kraft Co. v. NLRB*, 696 F.2d 931, 934 (11th Cir. 1983), enfg. 258 NLRB 908 (1981). It might be emphasized that in his 6 March letter, Noble construed the Union's request for striker reinstatement as merely a "request [for] notification concerning the procedure by which application may be made by nonworking employees to return to work."

the employee's absenteeism record, and there is still a reference to unexcused absences there.

The Charging Party's corrected draft contract recites in article 9 ("Overtime") that when employees are scheduled for a sixth day of overtime, absences on that day "without a reasonable excuse will be counted as an unexcused absence and will be handled in accordance with Article 34 of this Agreement . . . ." Article 34 ("Absenteeism") of the Union's corrected draft, while making no reference to the term "unexcused absence," does refer to absences for illness of 3 days or more, which require a "doctor's excuse" and clearly preclude disciplinary action if such "excuses" are precluded; the granting of time off for "serious reasons" where "reasonable advance notice" is given; and the concept of an "approved leave of absence," which exempts an employee from reporting his absence from work on a daily basis. Thus, there plainly are circumstances in which an employee scheduled for a sixth day of overtime in a week may be effectively "excused" or not, and if not, his case will be subject to the "progressive discipline for absenteeism" set out in article 34.[10]

More importantly, the record shows that the complete written company proposal made to the Union on 1 September and unchanged (except for wages) on 4 September contained precisely the same alleged inconsistency as appeared in the Union's final draft: the use of the term "unexcused absence" in article 9.10 and the omission of any such term in article 34. If, as he testified, Noble did say to Garner "all through negotiations . . . that there was no such thing as unexcused absences that did not go on the employee's absenteeism record," Noble, who was presumably closely conversant with the terms being offered by Respondent, evidently did not understand that any "great inconsistency" existed, since he sought to change the terms neither on 1 September, 4 September, 31 October, or 7 February. Indeed, as I read article 34, it is not at all inconsistent with the notion that "there was no such thing as unexcused absences that did not go on the employee's absenteeism record." Respondent consciously set the term; there is no facially fatal inconsistency between them; and the Union accepted them. The matter need not be pursued further than that.

3. Effective dates of the agreement

The expired contract term had been 5 September 1981–5 September 1984. The Respondent's 1 September 1984 offer proposed a 5 September 1984–5 September 1987 term.[11] Davis was asked on cross-examination whether the "proposal the Company had on the table September 4th ha[d] the effective date and duration of the agreement?" and he volunteered in his answer, "Yeah, it's September 5th, 1984, to September 5th, 1987, in contemplation of an acceptance at that time." Davis did not say whether this was his own opinion or whether it had been the subject of discussion at the bargaining table.[12]

Respondent now contends that because no new agreement was reached by 5 September 1984, "the submitted contract dates were effectively withdrawn" on that date. No precedent for this contention is cited. Respondent's construction would mean that the complete contract proposal, first presented to the Union on 4 September, was effectively intended to expire (or at least the duration clause thereof) the next day if not ratified by then. But this is contradicted by Noble's statements on 31 October and 7 February that "the offer made on September 4th, 1984, was not going to be changed one iota." It seems clear from these statements that Respondent did not believe—and certainly did not communicate to the Union—that the effective dates of its proposal had simply evaporated on 5 September.[13]

4. Wages

Respondent writes on brief that because, on 5 September 1984, it implemented the proposed first-year 10-percent decrease, it expects the General Counsel to "suggest . . . that the Charging Party accepted Respondent's last wage proposal and that the Respondent intended the wage proposal to have a September 5th anniversary date throughout the term of the agreement." Respondent's explanation for the decrease effected on 5 September is that it believed it would have violated the law had it instituted a wage increase greater than the last one offered to the Union.

The General Counsel points out that on 3 September 1985 Respondent also raised employee wages by 5 percent, in consonance with its final offer. The General Counsel goes on to argue that "Respondent may hardly be heard to assert that the parties had not reached agreement regarding effective dates, when it already had implemented the wage scale of its final offer, and when the Union unequivocally accepted this final offer, with 'no strings attached.'"

I do not find much worth discussing here. The fact that Respondent's post–4 September 1984 changes in its wage scale tracked part of its original offer might have some meaning in a case in which the issue presented is a factual dispute over whether one of the negotiating parties actually accepted the offer of the other. That is not the question here, where the uncontroverted evidence shows that Respondent made a full-fledged proposal

[10] On brief, counsel for Respondent asserts that art. 9 of the union draft "was not reviewed and initialed by Davis and Garner." The article is not "initialed" because the two men made no changes in the typed copy; whether it was "reviewed" is not clear from the record.

[11] Respondent's brief states that these dates were "submitted to the Charging Party at the initial bargaining session August 16, 1984," but there is no evidence in the record to that effect.

[12] With only this evidence to rely on, Respondent's brief perches on a slim reed when it argues that the 5 September 1984 commencement date "was proposed *only* in the event an agreement was reached without a work stoppage."

[13] In *Mercedes-Benz of North America*, 258 NLRB 803 (1981), cited by Respondent, the Board found that no commencement date for the contract had ever been discussed and the parties "did not reach a meeting of the minds on that issue." Here, a commencement date had been offered and was, eventually, accepted. That the acceptance came after the proposed commencement date seems irrelevant, given my conclusion, as stated above, that Respondent could not sensibly have anticipated only a 1-day life for its proposal and that it demonstrated so twice thereafter by Noble indicating that the offer was open and unaltered.

never disavowed it, twice confirmed it, and the Union finally accepted it.

5. The withdrawal of recognition

As shown above, by letter of 6 March 1985, Respondent, expressing a "good-faith doubt," withdrew recognition from the Union as the collective-bargaining agent of the employees "[p]redicated upon the total fact situation, including but not limited to the substantial number of employees requesting a decertification vote." Noble did not further define the "total fact situation." Other "facts" mentioned in Noble's letter were: that the membership had rejected Respondent's "best and final offer" (Noble's language) on 4 September and 10 February; that at membership meetings, substantial fines had been threatened against resigned members who had crossed the picket line since 5 September (the record contains no direct evidence of such threats and Noble did not mention them in his testimony); "last week the Company received notice that in excess of 80 percent of Burkart's working employees supported" a decertification petition; Noble's "reading" of the union constitution as requiring membership ratification of a "new 3-year agreement,"[14] and a request from the Union for information setting out the names of current working employees, dividing them into categories of replacements and exmembers.

In *Dresser Industries*, 264 NLRB 1088, 1089 (1982), the Board overruled earlier precedent and held that "the mere filing of decertification petition will no longer require or permit an employer from bargaining or executing a contract with an incumbent union." Even if Respondent here had something more of substance to rely on than "notice" that a decertification petition was assertedly "supported" by over 80 percent of "Burkart's working employees,"[15] so as to bring it out from under one of the operative phrases in *Dresser* ("mere filing"), it would not be clear that withdrawal of recognition could be permitted here. The Union accepted Respondent's offer on 20 February; at that time, a fully developed bargaining agreement, albeit unsigned, came into being. As Noble's 6 March letter seems to say that the Company did not receive "notice" of the petition until "last week" (which would have been the week of 24 February–2 March), it would have been, under prevailing law, too late to withdraw recognition. See *NLRB v. Burns Security Services*, 406 U.S. 272, 290 fn. 12 (1972); *Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 838–839 (9th Cir. 1978).

In any event, aside from the filing of the decertification petition, there is in this record no basis for claiming a "reasonably grounded doubt of the Union's continuing majority status." *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1969).[16]

In conclusion, I find that Respondent's contract offer was outstanding and capable of acceptance on 20 February 1985; that the Union did accept the offer on that day; and that by refusing thereafter to acknowledge its contractual commitment and to embody it in a written agreement, Respondent violated Section 8(a)(5) and (1).[17]

III. THE REFUSAL TO FURNISH INFORMATION TO THE UNION

In his letter of 20 February handed to Davis, Garner requested "a list of the names, addresses, phone numbers and seniority dates of the employees hired on or after September 4, 1984 . . . [and] a separate list of the employees who returned to work during the strike setting forth the same information as well as the dates they returned to work . . . ." Garner explained that the information "is necessary so that my records can be complete of the people we represent." Finally, he requested the same information about those employees "not put to work on Thursday, 21 February 1985, as well as the reason[s] they are not put back to work." In his letter of 27 February, Garner repeated his request for these items and asked that they be supplied "immediately."

Respondent's only reply to these requests is found in Noble's 6 March letter, which states:

> Your February 20 letter requests the reporting of names of current working employees, dividing them into newly-hired employees and those strikers who have resigned union membership and crossed the picket line since September 5, 1984. The request would appear to have been made for the sole purpose of enabling Lodge 1076 to identify those resigned members it has consistently threatened to discipline and fine. The Company will not participate in that scheme, especially in the light of recent rulings by the NLRB finding such union conduct unlawful.

Noble's letter did not address the other two categories of information sought by Garner's 20 February letter. On 18 March, Garner replied to Noble and, about this particular issue, wrote:

> [W]e simply asked for information that we are entitled to by law and your assertion that our request for this information is to enable us to identify those members who crossed the picket line makes as little sense as the rest of your letter. I assure you that we know each and every one of the members who crossed the picket line as well as when they crossed and when they finally resigned from the Union. We did not ask for and do not need the information for that purpose. If that is your sole concern, let me assure you that we would accept the information requested with everyone listed together so long as

[14] The constitution was not offered in evidence.

[15] The Board holds that striking employees are also to be counted for purposes of assessing the majority status of a union. *Sanderson Farms*, 271 NLRB 1477, 1481 (1984).

[16] The complaint does not separately allege the 6 March withdrawal of recognition to be violative of the Act.

[17] By its terms, the agreement will be subject to expiration on 5 September 1987.

> you give us their names, addresses, phone numbers and dates of hire.[18]

Garner and Local President Agnew testified, without contradiction, that the Union has not been provided with the information requested by Garner's 20 February letter.

The Board has held that the names and addresses of bargaining unit employees are presumptively relevant information that an employer must generally furnish to a union on request. *Armstrong World Industries*, 254 NLRB 1239, 1244–1245 (1981). It has further expressly held that unions are entitled to the names, addresses, and seniority dates of strike replacements as well as information relating to the reasons for terminating strikers and relating to their recall. *Southern Florida Hotel Assn.*, 245 NLRB 561, 591–592, 608 (1979); *Georgetown Associates*, 235 NLRB 485 (1978); *Florida Steel Corp.*, 242 NLRB 1333 (1979).

Presumably due to the foregoing authority, Respondent's brief makes but a single argument in this area: that "[s]ince the inception of the strike, the Charging Party threatened to impose excessive fines and reinstatement fees on these individuals who had crossed the picket line" and thus Respondent was excused from releasing information about the exmembers "to protect its employees from harassment by the Charging Party." It should first be noted that the only testimony in the record that even remotely has a tendency to show either that the Union actually did "threaten to impose excessive fines and reinstatement fees" on former members who worked during the strike, or that any member of Respondent's management had so heard, is found in Noble's 6 March letter, which, as set out above, alludes to a belief that this portion of the request was aimed at "identify[ing] those resigned members it has consistently threatened to discipline and fine."

Thus, Respondent has provided no evidence at all that it had a basis for a good-faith belief that the Union intended to "harass" the resigned members. Moreover, as the Court of Appeals for the Second Circuit stated in *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1207 (2d Cir. 1970), "In determining whether a disclosure of addresses to a union violates the employees' right of privacy, the crucial factor appears to be the likelihood of a clear and present danger to the employees involved." The only "clear and present danger" that Respondent even speculates on is an attempt by the Union to fine resigned members who worked during the strike and, at the time in question, the ability of the Union to do so was very much in doubt. See *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984).

The Union's request for information about a separate list of the employees who returned to work seems, at first, a curiosity, but further conjecture affords legitimate explanation aside from Respondent's assertion that "a reasonable man would necessarily conclude that the Charging Party wanted a separate list of former members in order to carry out its previous threat to fine these individuals." It is just as plausible that the Union simply wanted current information about those employees with whom it had not had contact for several months and whom it still represented even though they might have resigned their union membership.

The only reservation I have here relates to the Union's request for the "dates they returned to work." As shown above, Garner subsequently wrote Noble, on 18 March, that he was not trying to identify those members who had crossed the picket line: "I assure you that we know each and every one of the members who crossed the picket line as well as when they cross and when they finally resigned from the Union. We did not ask and did not need the information for that purpose." Accepting that statement at face value, I must conclude that the Union had no need for the information sought in the 20 February letter regarding "the dates [the returning employees] returned to work." Otherwise, I conclude that Respondent violated Section 8(a)(5) of the Act by not timely furnishing the information requested by the Union in its 20 February letter.

IV. THE ALLEGED UNFAIR LABOR PRACTICE STRIKE

Respondent's unlawful refusal to commit its accepted proposal to writing unquestionably converted the economic strike into an unfair labor strike. On 22 February, the Union changed its picket signs from "On Strike Machinist's Union 1076" to "Employer Has Refused To Sign The Agreed Upon Contract." In doing so, the Union acted rather hastily, as both Garner and Davis testified that on Wednesday, 20 February, Davis did not say that Respondent was refusing to sign the agreement. Given that the contract needed some typing revision and the parties needed to arrange a date for signing, it would seem that a reasonable time for concluding that Respondent's refusal became effective was Monday, 25 February. I shall adopt that date as the one on which the conversion of the strike legally occurred.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section (5) of the Act.

3. All production and maintenance and inspection employees employed at Respondent's Cairo, Illinois plant, excluding office employees, professional employees, laboratory technicians, salaried chemists, superintendents, plant protection employees, executives, department foremen, and other supervisors with authority to hire, promote, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Charging Party is, and has been at all material times, the collective-bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By after 20 February 1985, refusing to acknowledge and reduce to writing the collective-bargaining agree-

[18] While Garner did not here refer to "seniority dates," it would appear that "dates of hire" was meant to convey the same thought.

ment reached on 20 February 1985 by virtue of the Charging Party's acceptance of Respondent's outstanding contract offer on that date, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By about 25 February 1985, and thereafter, refusing to furnish to the Charging Party the names, addresses, telephone numbers, and seniority dates of all unit employees hired about 25 February 1985 and, thereafter, refusing to furnish to the Charging Party the following information: the names, addresses, telephone numbers, and seniority dates of (1) all unit employees hired on or after 4 September 1984, (2) all employees who returned to work during the strike that commenced on 5 September 1984, and (3) all employees not returned to work on 21 February 1985, as well as the reasons they were not returned to work, Respondent violated Section 8(a)(5) and (1) of the Act.

7. The strike in which the employees of Respondent in the appropriate bargaining unit were engaged from 5 September 1984 was prolonged by Respondent's unfair labor practices effective about 25 February 1985, and was thereafter an unfair labor practice strike.

8. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Other than as concluded above, Respondent has not violated the Act as alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action found necessary to effectuate the purposes and policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute in writing an agreement reached with the Union, I shall recommend that Respondent be ordered to cease and desist therefrom and sign the agreement forthwith, if the Union so desires. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). It shall be recommended further that Respondent be required to give effect to the terms of the agreement retroactive to 20 February 1985, the date the agreement became effective, and that employees shall be made whole for losses they may have suffered by reason of the failure to honor and sign the agreement since that date.

Backpay shall be reduced by interim earnings and computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and all monetary redress, including backpay, shall bear interest as authorized by *Florida Steel Corp.*, 230 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Having also concluded that Respondent acted unlawfully by refusing to furnish to the Union certain information, I shall recommend that it be required to make such information available to the Union, if the Union still so desires, in as current a form as the Union requests (with the exception, as discussed above, of the times at which members and/or former members crossed the picket line; this exception does not, however, also allow Respondent to omit the other requested data about these individuals).

Although I have concluded above that the strike was converted into an unfair labor practices strike about 25 February 1985, the complaint and the record give no indication that any unfair labor practice strikers were thereafter denied reinstatement rights. I shall, however, include in the recommended Order a provision covering such a possibility, and any remedial relief required shall be based on the traditional remedy exemplified by *Sanderson Farms*, supra, 271 NLRB at 1482.

On the foregoing findings of fact and conclusions of law, I issue the following recommended[19]

ORDER

The Respondent, Burkart Foam, Inc., Cairo, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with District 111, Lodge 1076, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union), as the collective-bargaining representative of the employees in the following unit, by refusing to execute in writing and to honor the bargaining agreement consummated on 20 February 1985:

> All production and maintenance and inspection employees employed at Respondent's Cairo, Illinois plant, excluding office employees, professional employees, laboratory technicians, salaried chemists, superintendents, plant protection employees, executives, department foremen, and other supervisors with authority to hire, promote, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

(b) Refusing to furnish to the Union information to which it is entitled by law.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, execute in writing and give effect to the 20 February 1985 collective-bargaining agreement referred to above.

(b) Offer, on application, to all the employees engaged in an unfair labor practice strike, who were not permanently replaced while economic strikers, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after 25 February 1985, when the economic strike was converted into an unfair labor practice strike.

(c) Make each of the employees whole for any loss of earnings they may have suffered by reason of Respondent's failure to sign and give effect to the 20 February

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1985 bargaining agreement, and of its failure, if any, to reinstate them, on application, in the manner set forth in the remedy section of this decision.

(d) Make available to the Union, on its request, the information it sought on 20 February 1985, as delimited in this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and other sums due under the terms of this Order.

(f) Post at its plant in Cairo, Illinois, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all other allegations of the complaint as to which no violations have been found are dismissed.

---

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with District 111, Lodge 1076, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) as the collective-bargaining representative of the employees in the unit described below, by refusing to execute in writing and to honor the bargaining agreement consumated on 20 February 1985:

> All production and maintenance and inspection employees employed at Respondent's Cairo, Illinios plant, excluding office employees, professional employees, laboratory technicians, salaried chemists, superintendents, plant protection employees, executives, department foremen, and other supervisors with authority to hire, promote, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

WE WILL NOT refuse to furnish to the Union information to which it is entitled by law.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on the request of the Union, execute in writing and give retroactive effect to the 20 February 1985 bargaining agreement.

WE WILL offer, on application, to all our employees engaged in an unfair labor practice strike, who were not permanently replaced while economic strikers, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacement hired on or after 25 February 1985, when the economic strike was converted into an unfair labor practice strike.

WE WILL make each of the employees whole for any loss of earnings they may have suffered by reason of the failure of the Company to sign and give effect to the 20 February 1985 bargaining agreement, and its failure, if any, to reinstate them, on application, plus interest.

BURKART FOAM, INC.

Pottsville Bleaching and Dyeing Company *and* Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 4–CA–15420

27 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 20 May 1986 Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief in reply to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Downey.

The facts are not in dispute. Downey had been an active supporter of labor organizations at the Respondent's Port Carbon, Pennsylvania facility since 1979 when he was the steward for the independent union that then represented the Respondent's production and maintenance employees. He was an observer in a Board-conducted election in 1980 when the Textile Workers attempted to organize those employees. He solicited authorization cards and distributed pamphlets for the Teamsters and was an observer at elections held in March and December 1982. He handed out cards and pamphlets and talked with fellow employees in the Teamsters campaign in 1984 and served as an alternate observer in an election that year. He was again active in enlisting support for the Teamsters in late 1984 and early 1985. Downey also was a witness in two prior unfair labor practice proceedings involving the Respondent.[3]

Downey was on disability leave when a Teamsters election was held in March 1985, but voted in the election. As Downey stopped on his way out of the plant to talk to another employee, Plant Manager Horton told Downey to "get the hell out of the plant," but permitted another employee on disability leave to speak to other employees. At an employee meeting held in October 1984 Horton stated he could not afford any union problems, threatened to lock the Respondent's doors, and turned to Downey, saying: "Do you understand that, Ron?" Furthermore, Downey himself acknowleged that he was during this time the "leading union activist" at the facility. Thus, the judge found sufficient evidence to impute to the Respondent knowledge of Downey's union support for at least 5 years.

During the week ending 8 January 1985 Downey produced "40% bad work" on his dye machines, accounting for five out of nine lots that had to be reworked. On 14 January 1985 Horton issued Downey a "final warning," placing him on a 1-year probation and providing, in relevant part:

> Should any action on your part during this period of probation cause the issuance of a written warning *for any reason*, you shall be terminated from Pottsville Bleach and Dye immediately and irrevocably. Or, if, during the term of your probation and as a result of Company analysis, your job performance should produce an excess of seven percent (7%) rework in any one (1) week period, you shall be terminated immediately and irrevocably.

Prior to that time, Downey had received only one warning, acknowledged by the Respondent to be ambiguously worded. It was issued on 19 June 1984 for excessive absenteeism.

An unfair labor practice charge regarding the 14 January warning was filed by the Teamsters on Downey's behalf, but was dismissed by the Acting Regional Director on 29 March 1985. Testimony regarding the warning was, however, adduced at the hearing in the instant case. For instance, employee Frederick Powers credibly testified that during the winter of 1985 he discovered a black, looseleaf notebook bearing on its cover the name "Richard Flagg," who was then the Port Carbon facility superintendent. The notebook contained the following:

> Q. Could it have been caused by bad water?

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel excepts to the judge's failure to include a visitatorial clause in the recommended Order. A visitatorial clause authorizes the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Board's Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

[3] 275 NLRB 1236 (1985) and 277 NLRB 988 (1985).

A. Yes.

Q. Can we prove that the bad coppering was Downey's fault?

A. Depending on the investigator's knowledge.

Q. Can I fake my way through this?

A. Yes.

Because the General Counsel was not contesting the legitimacy of the dismissal of the earlier charge, the judge stated that he was bound to find that the warnings would have been issued in any event. He found, however, that this newly discovered evidence suggested that the Respondent not only purposefully attempted to blame Downey for the bad dye lots, but also schemed to prove that the bad dye lots resulted from Downey's error rather than from "bad water." Our dissenting colleague conveniently ignores this highly probative evidence regarding the Respondent's motive in placing Downey on probation.

On 2 October 1985 Downey was discharged assertedly for an error he made on 26 September 1985 when he opened a roll of cloth on a rack with 26 other rolls and ordered all 27 to be dyed the same color (blue). Unknown to Downey, the other 26 rolls were to have been dyed a different color (red). As the dissent points out, and the judge admitted, Downey's error resulted from his failure to follow work instructions. What the dissent does not point out, however, is that the work instructions that required Downey to check each and every roll of cloth were given to him only a week before this incident. As found by the judge, Downey's legitimate understanding of opening procedure, based on training and past practice, was that he was responsible for matching only one roll with an order.

Our dissenting colleague fails to mention other relevant facts. Although the Respondent may have discharged Downey "according to the terms of his probation," Downey's discharge was not consistent with the Respondent's usual disciplinary system. As found by the judge, the Respondent's official practice was to issue an oral warning (written and placed in the employee's file), then a written warning, then a final warning, followed by discharge for any further violation. The judge noted that the system was not strictly followed: one employee received six notations for bad work, followed by five warnings, all but one of which were for bad work, before he was discharged. Prior to Downey's discharge, however, Downey had received only a warning for excessive absenteeism and a warning for his alleged dyeing mistakes in January 1985. Thus, the judge found, and we agree, that there is evidence of disparate treatment in the leniency accorded to other employees, as compared to the harshness of the discipline meted out to Downey.

There is further evidence of disparate treatment. The dissent fails to acknowledge that Downey's error, characterized by the dissent as "major," proved to be correctable with no economic loss to the Respondent, unlike other employee errors made around the same time. Downey's mistake was caught in time for the Respondent to switch the order numbers, use the lot mistakenly dyed blue, and have another lot dyed red for the same customer. Thus, no rework of Downey's job was required, and the error did not cost the Respondent any money. In this respect, Downey's error contrasted with the two other incidents of employee mistakes made in dyeing and finishing fabric in the summer of 1985 mentioned in the dissent, which not only necessitated reworking at the Respondent's expense but involved seven and eight times as much material as Downey was accused of incorrectly designating. In both instances employees were "counselled" (with no writing memorializing an oral warning) rather than disciplined. Regarding the more serious incident of the two, the judge found further evidence of disparate treatment in the fact that employees as culpable as Downey were identified but not disciplined. The dissent's reliance on the fact that those employees were not on probation, like Downey, is inaccurate and misleading inasmuch as it fails to confront the fundamental issue in disparate treatment cases such as this: why employees responsible for a mistake far more significant than the one Downey made were not disciplined at all by the Respondent.

In finding evidence of the Respondent's pretextual firing of Downey, the judge also noted statements made by Horton at the time of Downey's discharge: that Downey was a good worker and that it was a shame he had to be terminated, that Horton would give Downey a good reference, and that "it was just too bad that [Downey] didn't obey the philosophies and policies of the company." The judge found that Horton's praise of Downey as a good worker and promise to give him a good reference was inconsistent with the Respondent's defense that Downey was fired as a result of bad work. We agree with the judge's finding that Horton's praise of Downey's work is inconsistent with the Respondent's defense based on Downey's work performance. In so doing, however, we find it unnecessary to rely on Horton's reference to company "philosophies and policies," a phrase that we find in this context to be ambiguous at best.

We note, finally, that the General Counsel did not rely solely on prior cases involving this Respondent in adducing evidence of antiunion animus.

As found by the judge, there is evidence of antiunion animus in Horton's singling out Downey as part of his extemporaneous statements in opposition to unionization; the newly discovered evidence indicating that the Respondent improperly "framed" Downey for poor dyeing that was not his fault; and the punishment meted out to Downey, admittedly administered in accordance with the terms of his probation, but indicative of disparate treatment when employees involved in a more serious error received no punishment at all. The clear preponderance of the evidence in this case establishes that the Respondent was looking to seize on an opportunity it had not had before to discharge Downey because he was a union partisan.

We find, therefore, that the General Counsel has met the burden under *Wright Line*[4] of showing that a motivating factor for the Respondent's discharge of Downey was Downey's union activity. Further, the Respondent has not shown that it would have discharged Downey even in the absence of his union activity. Thus, we adopt the judge's finding that Downey's error was utilized by the Respondent as a pretext for his discharge; that Downey would have been treated similarly to the other employees responsible for processing mistakes if he had not been an active Teamsters supporter; and that the real reason behind his discharge was his union activity.

Accordingly, on the basis of all the foregoing, we adopt the judge's finding that the Respondent discharged Downey in violation of Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pottsville Bleaching and Dyeing Company, Port Carbon, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN DOTSON, dissenting.

Contrary to my colleagues I would reverse the judge's finding that the Respondent's discharge of Ronald Downey violated Section 8(a)(3) and (1) and would dismiss the complaint.

The Respondent is engaged in the bleaching and dyeing of tubular fabrics and has been the object of several union organizing drives over the years. Since at least 1979 the Respondent has been aware that Ronald Downey was an active union supporter.

On 14 January 1985 Respondent put Downey on 1-year probation for producing "40% bad work" on his dye machines from 2–8 January 1985. The conditions of the probation, as stated in Downey's warning letter, were as follows:

> Should any action on your part during this period of probation cause the issuance of a written warning *for any reason*, you shall be terminated from Pottsville Bleach and Dye immediately and irrevocably. Or, if, during the term of your probation and as a result of Company analysis, your job performance should produce an excess of seven percent (7%) rework in any one (1) week period, you shall be terminated immediately and irrevocably. Since you admitted during the January 11 meeting that you totally understand circumstances surrounding conditions of employment for an employee on a Final Warning and probationary period, you shall be held accountable during this entire period.

Downey's probation was the subject of an unfair labor practice charge filed by the Union but dismissed by the Acting Regional Director 29 March 1985 and is not contested by the General Counsel here.

On 26 September 1985 Downey made an error that resulted in 26 rolls of cloth being dyed the wrong color and, according to the terms of his probation, was discharged. The judge found the error was caused by Downey's admitted failure to follow work instructions, and "without more, there appears to be cause for Respondent's discharge of him, notwithstanding his union activities." The judge went on to find, however, that at the time of the discharge Plant Manager Horton praised Downey as a good worker, said it was a shame he had to be terminated, that he would get a good reference, and that "it was just too bad that [Downey] didn't obey the philosophies and policies of the company."

The judge found this praise indicated that Downey's error "*may* have been a mere pretext for his discharge" (emphasis added), and noted that the Respondent's treatment of Downey was much harsher than that of other employees involved in errors requiring the reworking of significant orders. Although the judge mentioned the fact that Downey, unlike the other employees, was on probation with notice that *any* further problem would subject him to discharge, he nevertheless concluded that the Respondent would not have disciplined him in the absence of his union activities, citing Horton's statement to Downey regarding his fail-

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

ure to follow the Respondent's "philosophies and policies."

It is axiomatic that an employer's discharge of an employee violates Section 8(a)(3) and (1) only when the discharge is motivated by the employee's protected union activities.[1] Pursuant to Section 10(c) of the Act, the General Counsel has the burden of proving that the discharge was unlawfully motivated. Under the procedural framework set forth by the Board in *Wright Line*,[2] the General Counsel must first establish that an employee's protected activity was a motivating factor in the employer's decision to discharge him.

In my view, the General Counsel has failed to meet that burden. Thus, the only evidence of union animus set forth by the General Counsel arose out of prior cases involving this employer, and an unfair labor practice charge that was dismissed once by the Region and again on appeal to the office of the General Counsel. The General Counsel attempted to introduce "newly discovered" evidence as background material relating to the charge but concedes that the lawfulness of the probation is not at issue.[3]

It is undisputed that the Respondent was aware of Downey's union activities for at least 6 years prior to his discharge. Thus, Downey was an open and active union supporter who served as steward in 1979–1980, observed in Board-conducted elections in 1980 and 1982, solicited authorization cards in 1982, and was active in Teamsters campaigns in 1984 and 1985. During this period of time, when Downey was, by his own admission, the "leading union activist" at the facility, the Respondent had ample opportunity to discharge him. In June 1984 he was put on probation for excessive absenteeism, a warning that was never alleged to be pretextual. While on probation he committed an error necessitating the rework of nine lots but, rather than discharging him, the Respondent issued him a new final warning. This was the probation that became the subject of the aforesaid unfair labor practice charge. The Respondent testified without contradiction that in January 1985 Downey had the worst redye record of any employee in the memory of the plant management. Clearly, if the Respondent's desired end was to rid itself of Downey it could easily have done so at that time.

Yet the majority gives little weight to Downey's failure to follow work rules despite the fact that the January 1985 probation was found lawful. In denying the appeal of the charge's dismissal the General Counsel relied on the fact that "the Employer traced back its production process in order to determine which employee had administered the various chemicals which had resulted in the bad dye lots." The General Counsel found no evidence of disparate treatment towards Downey in the issuance of the final warning.

The crucial, uncontroverted fact in this case is that during the period of this second probation Downey again made a major error, resulting in 26 rolls of cloth being dyed the wrong color. My colleagues find disparate treatment in the Respondent's discharging Downey pursuant to the terms of his probation while failing to discipline other employees who were not on such probation when they committed errors. The two situtations are not comparable.

Finally, the judge relied chiefly on Plant Manager Horton's statement to Downey at the time of his discharge that Downey had not followed "the philosophies and policies" of the Company to support a finding that Downey's discharge was a pretext for the Respondent's true motive of ridding itself of a union supporting troublemaker. The record does not support his conclusion. In July and August 1985 the Respondent embarked on a campaign to resolve employee production problems and enhance company productivity. To that end, in September 1985 the Respondent distributed written procedures to avoid errors. The rules called for employees to check each price number of each roll of material against each piece listed on an order sheet. Although Downey admitted receiving the instructions document, he chose to ignore it and, in the incident that led to his discharge, checked only 1 roll out of 27 against the customer order sheet. As a result, the remaining 26 rolls were dyed the wrong color. Clearly, Downey, who was on probation for careless work, was not an employee who simply "made a mistake," but one who continually disregarded the Company's urgent efforts to improve production. By failing to follow procedures specifically designed to eliminate rework, Downey demonstrated that he had no interest in the Company's concern over wasted worktime and production.

It follows logically that Horton's statement that Downey was not following the Company's philosophies and policies" referred precisely to that: the Respondent's repeated efforts to get Downey to

[1] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 394 (1983).

[2] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), approved by the Supreme Court in *Transportation Management*, supra.

[3] Although I do not agree that union animus was a factor in the Respondent's decision to discharge Downey, it is well established that absent a showing of unlawful motivation, the General Counsel's burden will not be met solely by proof of union animus. Thus, an employer is not barred from disciplining a prounion employee for just cause simply because the employer has exhibited some union animus. See *NLRB v. A & T Mfg. Co.*, 738 F.2d 148, 151–152 (5th Cir. 1984).

follow instructions and avoid costly errors were being frustrated. Downey's admitted negligence ran counter to the Respondent's goals and resulted in his discharge. In my view, the record taken as a whole provides no basis for the majority's finding an unlawful motive for the discharge over the lawful one set forth by the Respondent.[4] As noted above, in establishing an 8(a)(3) violation, the General Counsel must show the protected conduct was a motivating factor in the Respondent's decision to take adverse action. More than "suspicion"[5] is needed. The General Counsel's case falls far short of this requirement. I therefore dissent.

[4] *Mini-Industries*, 255 NLRB 995 (1981).

[5] *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1264–1265 (7th Cir. 1980); *Hardwick Co. v. NLRB*, 263 NLRB 302, 306–307 (1982).

Marvin L. Weinberg, Esq. and *Richard P. Heller, Esq.*, of Philadelphia, Pennsylvania, for the General Counsel.

Barry R. Elson, Esq. (Cohen, Shapiro, Polisher, Shiekman, and Cohen), of Philadelphia, Pennsylvania, for the Respondent.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On 2 October 1985, employee Ronald Downey was terminated by Respondent Pottsville Bleaching and Dyeing Company. The complaint alleges that his termination violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq.[1] Respondent denies that it was, contending that Downey was subject to a final warning letter, dated 14 January 1985, which placed Downey on probation for 1 year and stated: "Should any action on your part during this period of probation cause the issuance of a written warning *for any reason*, you shall be terminated from [Respondent] immediately and irrevocably."

I find, as Respondent admits, that Respondent is a Pennsylvania corporation engaged in the bleaching and dyeing of tubular fabrics at its Port Carbon, Pennsylvania facility.[2] During the year preceding the issuance of the complaint, Respondent received more than $50,000 for services performed on the goods of customers located directly outside Pennsylvania, which goods are shipped from and returned to the customers. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3] I also conclude, as Respondent admits, that the Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

Downey was an active supporter of labor organization in Respondent's Port Carbon facility. In 1979–1980, he was the steward for the independent union which represented the production and maintenance employees. When the Textile Workers Union attempted to organize those employees in 1980, he was an observer in the Board-conducted election. When the Teamsters tried to organize in 1982, Downey solicited union authorization cards, distributed pamphlets, and was an observer at elections held in March and December 1982. He participated in another Teamsters campaign in 1984 by handing out cards and pamphlets and talking with employees, and he was an alternate observer in another election that year. Again, in late 1984 and early 1985, he was active in enlisting support for the Teamsters, although he was disabled with a broken ankle when the election was held in March 1985.[4] After he voted in that election, Downey stopped on his way out to talk to another employee. Richard Horton, Respondent's plant manager of its Port Carbon facility, told Downey to "get the hell out of the plant," but Horton permitted another employee, also on disability leave, to speak to other employees. Furthermore, Downey was a witness in both prior unfair labor practice proceedings.

Thus, there is sufficient evidence to impute to Respondent knowledge of Downey's union support for at least 5 years, but there is even more here. At an employee meeting held in October 1984, Horton stated that he could not afford to have any union problems whatsoever and turned to Downey, saying: "Do you understand that, Ron?"[5] On 14 January 1985, Horton issued a warning letter to Downey that read, in part, as follows:

> It was pointed out and by your own admission, you produced 40-percent bad work on your dye machines during the period from January 2, 1985 through January 8, 1985. The performance is unlike any that can be recalled at Pottsville Bleach and Dye. Others running similar machines producing similar work, or on the same machine, but another shift, did not produce, in the least, the amount of rework you were responsible for during the period in question, or at any time outside of said period. Since you offered no mitigating reasons for your poor performance, the Company had no alternative but to initiate the following conditions for your continued employment:
>
> You are being issued a Final Warning for these incidents of poor quality performance, which immediately places you on a one (1) year probationary period. Your probationary period commences Friday, January 11, 1985 and concludes on Friday, January 10, 1986. It is extremely important, and please be advised that during this probationary

[1] The relevant docket entries are as follows: The unfair labor practice charge was filed by Teamsters Union Local 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) on 12 November 1985; the complaint issued on 27 December 1985; and the hearing was held in Reading, Pennsylvania, on 2–3 April 1986.

[2] Respondent maintains another facility at Schuylkill Haven, Pennsylvania, called its Independence plant.

[3] The Board in two earlier decisions has asserted jurisdiction over Respondent. 275 NLRB 1236 (1985) and 277 NLRB 988 (1985).

[4] The ballots were impounded and had not been opened at the time of the hearing.

[5] This was not denied by Horton. The Board, in 277 NLRB 988, credited this testimony, which included Horton's threat to lock Respondent's doors.

> period, the following conditions shall exist: Should any action on your part during this period of probation cause the issuance of a written warning *for any reason*, you shall be terminated from Pottsville Bleach and Dye immediately and irrevocably. Or, if, during the term of your probation and as a result of Company analysis, your job performance should produce an excess of seven percent (7%) rework in any one (1) week period, you shall be terminated immediately and irrevocably. Since you admitted during the January 11 meeting that you totally understand circumstances surrounding conditions of employment for an employee on a Final Warning and probationary period, you shall be held accountable during this entire period.
>
> This decision was based on a series of self-initiating events of poor quality performance on your part. Termination was not initiated for these incidents because of the ambiguity of the conditions of your current probationary period. Consequently, this decision shall not set precedent, nor shall it prejudice future cases of similar nature.[6]

The Teamsters filed an unfair labor practice charge (Case 4–CA–14808–3) to protest this warning. It was dismissed on 29 March 1985 by the Acting Regional Director, who wrote:

> The investigation disclosed that the Employer issued a written warning to Ronald Downey and extended his probationary status for one year after he produced five bad dye lots in a period of five days. It was noted that Downey was not discharged, and the evidence established that other employees have been disciplined for similar offenses. Under such circumstances, the Board has held that an employee may be lawfully disciplined, even if the employee has also engaged in union activities or testified in a Board proceeding. See *P.G. Beland Paint City, Inc.*, 199 NLRB 927; *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083. Accordingly, I am refusing to issue complaint as to the Section 8(a)(3) and (4) portions of the charge.

The Office of Appeals affirmed this dismissal on 29 April 1985, finding that Respondent "had traced back its production process in order to determine which employee had administrated the various chemicals which had resulted in the bad lots" and that "the evidence failed to establish that [Respondent] engaged in disparate treatment."

The General Counsel does not contest the legitimacy of this dismissal, relying as it does on *Wright Line*,[7] which permits Respondent, despite a showing that its discipline was illegally motivated, to prove that it would have taken the same action against Downey based on lawful considerations. But the General Counsel also introduced evidence, as background for Respondent's motivation in the proceeding, to prove that there was more to the discipline of Downey than was considered by the Region and the Office of Appeals. Employee Frederick Powers testified that in late winter, in January, February, or March 1985, he happened on a black looseleaf folder, bearing the name on the cover "Richard Flagg," the then Port Carbon plant superintendent, in which the following appeared:

> Q. Could it have been caused by bad water?
>
> A. Yes.
>
> Q. Can we prove that the bad coppering was Downey's fault?
>
> A. Depending on the investigator's knowledge.
>
> Q. Can I fake my way through this?
>
> A. Yes.

This newly discovered evidence, of course, implies that Respondent not only purposefully attempted to blame Downey for the bad dye lots but also schemed to prove that the bad dye lots resulted from his error, rather than their being caused by "bad water." Thus, both the reason for the production error and the perpetrator of the error were concocted, demonstrating that Respondent was prepared to use anything at its disposal to rid itself of Downey; and I am asked to extend this to a finding that the reason that Respondent desired to discipline Downey in October 1985 was his union activities.

On the other hand, the General Counsel on numerous occasions during the hearing repeated his position that he was bound by the findings of the Regional Office and was not arguing that the 14 January 1985 probation was tainted. Indeed, I find sufficient support in the record that Downey's work in the week commencing 2 January 1985 was as bad as Respondent claimed, that there were five bad lots constituting 40 percent of the bad lots produced in that period, and that others who prepared other bad lots were given oral warnings.[8] Furthermore, Respondent called Richard Flagg as a witness, and Flagg testified that he maintained no such looseleaf folder and that he never wrote what was imputed to him.

I do not credit his testimony. In weighing the testimony, I find that Flagg had much to gain in supporting his denials and that he was in early 1985 conducting a study of work that was improperly performed in the facility.

---

[6] On 19 June 1984, Respondent issued the following letter to Downey:

> The Company Work Rules state that a Final Warning places an employee immediately on twelve months' probation. It also states that any further violations during the twelve month period of probation will result in immediate discharge. Please keep this warning uppermost in your mind.

There was enclosed a copy of Downey's absenteeism record. Horton testified that he did not discharge Downey for the January 1985 incidents because his counsel advised that the June warning was ambiguous in its reference to Downey's record of absenteeism.

[7] Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[8] Under Respondent's disciplinary system, the first warning is an oral warning, which is, notwithstanding its description, written and placed in the employee's file. The second warning is written. The next warning is a final warning, following which is a discharge for any further violation. This system is not strictly followed. Employee Norman Umphrey received five warnings before he was discharged. All but one were for bad work. In addition, his personnel file contains six notations for bad work for which he was not given written warnings.

Thus, it was not improbable that Flagg would have written what Powers stated. I further find that Powers, supported in part by employee George Chiccini, had little to gain from his testimony. It is true that Powers supported the Teamsters, which might give his testimony less weight; but he was also not friendly with Downey, with whom he had differences of opinion, on one occasion knocking a soda out of Downey's hand. Chiccini, who recalled that there were questions and answers but was unable to recall specifically what, testified he "glanced" over, was positive that he saw the book with Flagg's name on it, and remembered that it mentioned that Downey's "redyes" or "reruns" may have been caused by corroded water lines coming into the plant. Chiccini was not a Teamsters supporter, and both he and Powers believed that they could be in trouble because they looked at the book. With that fear, they, as current employees, would have no reason to fabricate their testimony about the existence of Flagg's book, which might get them in further trouble. The book was not produced, although subpoenaed by the General Counsel. The only explanation for its nonproduction was that it never existed. I credit the employees' testimony that it did exist, find that there was no credible reason that it was not produced pursuant to the subpoena, and credit the testimony of the two employees. *Bannon Mills*, 146 NLRB 611 (1964); *Auto Workers v. NLRB*, 459 F.2d 1329, 1338–1339 (D.C. Cir. 1972).

Notwithstanding the imputation of an illegal motive in the issuance of the 14 January 1985 warning, I am still bound to find that the warning would have been issued in any event. I turn then to the incident for which Downey was discharged. When Downey had recovered from his broken ankle, he was assigned as a dye opener. His duties included obtaining the raw material that was to be dyed. Each order was kept on a separate rack, which contained up to 35 rolls of cloth. The parties were at odds about what Downey was required to do once he received an order, which set forth the numbers of each roll required to fill the order. Inasmuch as the truckers at the Independence facility had separated each order and put the rolls for that order on a separate rack, each roll being marked on the outside with a roll number, Downey testified that his sole responsibilities were to check the rack number, to check one roll on the rack against the order sheet, and then to count the number of the rolls to ensure that the number on the order sheet matched. If that roll was on the sheet, the rest of the order should be on the rack. This testimony was corroborated by employee Daniel Daubert, who worked for 3 weeks as a dye opener in 1978 or 1980. To the contrary, Respondent's witnesses uniformly testified that Downey was to check each roll on the rack and check it off against each roll number on the order to ensure that no rolls were missing and that all rolls of cloth that were to be dyed were included in the order. Obviously, if an incorrect roll were dyed a different color, that roll would have to be redyed, an unnecessary expense for Respondent.

What happened on 26 September 1985 was that Downey checked only one roll on the rack and ascertained that the roll numbered 261770, which he opened, was part of the order number that was to be dyed navy blue. Downey's luck was bad. Out of 27 rolls on the rack, only the roll numbered 261770 was properly on the rack; the other 26 were part of another of the same customer's goods, which were to be dyed red. So, all the rolls were dyed navy blue.

I credit Downey, insofar as I find that he understood that it was his responsibility to match only one roll on the rack with the order. I discredit all testimony to the contrary,[9] noting that Respondent could have called a current employee to testify to the practice but did not do so. Nor did it call Downey's supervisor who, Downey testified, gave him that instruction. However, Downey admitted that, only a week before the incident, he was given instructions that required him to match all the 27 rolls and not select only one. His explanation that he did not realize that the opening procedure had been changed is no excuse; he admittedly did not follow the instructions and, without more, there appears to be cause for Respondent's discharge of him, notwithstanding his union activities. But, when he was discharged, Horton praised him as a good worker and said it was a shame that he had to be terminated, that Horton would give Downey a good reference, and that "it was just too bad that [Downey] didn't obey the philosophies and the policies of the company."

Not only does this praise, which was not denied by Horton, indicate that Downey's error may have been a mere pretext for his discharge, but also the General Counsel argues that Respondent's treatment of Downey was much harsher from the way it treated its other employees who, in the summer of 1985, were involved in two errors that involved the reworking of significant orders. One involved a bleaching, processing, dyeing, and finishing job for Argo of about one to three tractor-trailer loads of cloth, all of which was returned for being dirty and greasy. Employee Nelson Sims said that Horton met with all the finishing department employees on his shift, whom he told that Argo was not pleased and he was not pleased and that the stains should have been found out about before the goods left Respondent's facility. He complained particularly to the rollers and roller helpers; but, despite the fact that the employees got their "butts chewed out," Horton took no disciplinary action.

The second involved a job of dyeing, processing, fleecing, and cutting to order of sweatsuit material for Continental, who returned the goods because of pressure marks put on by the rollers. Sims and two others were summoned to Horton's office, where he told them that he was not happy and "all our jobs" (which, to Sims, meant him and his partner Underwood) were "on the line" for this mistake; but again no discipline was given.

The Continental job involved 8000–10,000 pounds of material; the Argo job, about 7000–8000 pounds. Although Horton testified that only 10 percent of the Argo job had to be reprocessed—and Horton testified that it was "very rare" to have a mistake of that magnitude—

[9] I was particularly unimpressed with Horton's demeanor, finding him at times unresponsive and his testimony inconsistent.

Daubert said that 240–300 rolls of fabric, about three-quarters of the order, had to be processed to remove the stains. Daubert knew firsthand what was actually done, and I credit him. Compared to those jobs was the one Downey erred on, which was less than 1000 pounds. In addition, Downey's job did not involve any rework. Horton consulted with his customer, who permitted Respondent to dye its other lot red, although it was originally intended to be navy blue. Thus, the General Counsel contends that Downey should not have been disciplined at all.

Horton agreed that he did not discipline any of the finishers; but he explained that the stains on the Argo job could not be detected while the fabric was being run through the machines, which run at 60 yards per minute, with steam coming out of the fabric. However, he admitted that there were stains or dirt on the outside of the rolls, that somebody should have noticed them, and that the finishing supervisors and operators were responsible. Yet, he testified that because he could not pinpoint who was to blame, he imposed no discipline, despite the fact he lectured the three shifts of the entire department and "raised the roof" about the quality of the job. He also stated that all the employees were "verbally warned," but he later amended that to "counseled"; and no formal writings memorializing oral warnings were put in any employee's file.

Horton also testified that the Continental job was the fault of no one. The customer had asked to inspect the work at Respondent's Independence facility. There, under brighter lights than at the Port Carbon facility, the customer turned the fabric over and discovered a slight impression on the back. Respondent agreed to refleece the fabric, and Horton explained that the employees would not have been able to see the impression because it was on the back of the fabric, they had not been told to turn the fabric over, and it would not have been seen in the more dimly lit room at Port Carbon. Horton testified that he talked with the employees to make them aware of how the problem arose and to look for the problem, but he did not consider the incident one that should have led to discipline.

That Horton summoned Sims and two other employees to his office, a fact not denied (but not remembered) by Horton, might have seemed threatening to Sims. And it may well be that Horton said something about "all our jobs being on the line," but it appears that Horton in his own way was simply calling to the employees' attention the fact that Respondent relied on good work to continue business with its customers and that they should be aware and look for this particular problem with the rollers. Indeed, Sims testified that he did not consider what Horton said as a warning or a threat that he might be fired. I do not find that the Continental errors, if errors of the employees they be, rather than errors caused by Respondent's machines, represented the type of incident from which disparity may be claimed. Rather, Horton found that the solution for the type of fabric being rolled was to use a different machine, which had rollers that did not make the larger impression that Continental had complained about. Thus, counseling, rather than discipline, was called for and was given.

The errors committed on the Argo job present a more serious claim. Those who shipped the fabric with dirt and grease stains on the outside of the rolls were as culpable as Downey. There were employees who could have been identified and were identified and should have been disciplined. Horton admitted that the fault lay with the finishing supervisors and finishing operators, yet they were not disciplined.

It is true that Downey was on notice that he was subject to a year's probation and that *any* further problem would subject him to discharge. Nonetheless, Downey did not match up all the rolls of fabric with the order. His failure to perform cannot be excused solely because he was also a union activist. But I am not persuaded that Respondent would have disciplined him in the absence of his union activities.[10] I cannot dismiss lightly Horton's final statements to him that it was because he did not obey Respondent's "philosophies and policies" that he was discharged. Those "philosophies and policies," I find, were different from the "written rules" and "instructions" that Downey was accused of violating. None of the rollers or finishers on the Argo job was accused of violating Respondent's "philosophies and policies," which equate with Respondent's anti-Teamsters attitude and Downey's pro-Teamsters sentiments. Furthermore, Horton's praise of Downey as a good worker is inconsistent with the defense that Downey was fired as a result of his bad work.[11] I find disparity here and find that Downey's error, which subsequently proved to be innocuous and harmless, was utilized as a pretext for his discharge. If Downey had not been an active Teamsters supporter, he would have been treated as lightly as were the employees who worked on the Argo fabric and caused Respondent to reprocess that job.[12] I can find no reason for his discharge other than his union activity. I conclude that Respondent violated Section 8(a)(3) of the Act.

The unfair labor practice found above, occurring in connection with Respondent's business, has a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and

[10] The General Counsel also contends that the trucker or warehouseman who placed the rolls of fabric on the rack should have been disciplined but Horton conceded that he was not. On the one hand, Downey was the one to check that the trucker or warehouseman did not make a mistake and he did not do what he was paid to do. On the other hand, the trucker or warehouseman made a mistake, and Horton did not investigate that mistake and obviously made no recommendation of disciplinary action.

[11] *Bill Fox Chevrolet*, 270 NLRB 568, 575 (1984).

[12] Respondent contends that it evidenced no union animus because in the past it promoted certain employees who were known Teamsters adherents. Respondent conveniently forgets that the Board has recently twice found Respondent in violation of the Act in 275 NLRB 1236 and 277 NLRB 988. See also *Jacobo Marti & Sons, Inc.*, 264 NLRB 30 fn. 1 (1982), which relies on earlier findings to demonstrate union animus.

Respondent also contends that, if its reason for taking action against Downey was based on his union activities, it could have terminated him earlier. I find that merely because it waited does not negate its animus. Indeed, Horton thought of dismissing Downey earlier, but found that he could not utilize the first final warning for absenteeism because Respondent's attorney advised that that warning was limited to absenteeism and was thus "ambiguous."

the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having concluded that Respondent unlawfully engaged in an unfair labor practice, I shall recommend that it cease and desist therefrom and take certain affirmative action. Specifically, I shall order Respondent to offer Ronald Downey full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges, and make him whole for or any loss of wages or other rights and benefits he may have suffered as the result of the discriminaton against him in accordance with the formula prescribed in *F. W. Foolworth Co.*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977).[13] I shall also order Respondent to remove from its records any reference to Downey's unlawful discharge and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used against him in any way. The General Counsel has requested that my recommended Order include a visitatorial clause authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure so that it will be able to monitor compliance with the Board's order, if enforced by a court of appeals. I am unpersuaded that existing procedures are inadequate to ensure compliance, especially where the order provides only for the reinstatement and payment of backpay for one employee.

On the foregoing findings of fact and conclusions of law and the entire record in this proceeding,[14] including my observation of the demeanor of the witnesses as they testified, and my consideration of the briefs filed by the General Counsel and Respondent, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended[15]

ORDER

The Respondent, Pottsville Bleaching and Dyeing Company, Port Carbon, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees because they engaged in activities on behalf of Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate reinstatement to Ronald Downey to his former position or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay or any other benefits he may have suffered as a result of the discrimination against him in accordance with the provisions set forth above in the remedy section.

(b) Remove from its files any reference to the unlawful discharge of Ronald Downey and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other documents necessary to analyze and compute the amounts due hereunder.

(d) Post at its Port Carbon, Pennsylvania facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

[13] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[14] Respondent moved to amend the official transcript in certain respects. There being no opposition, the motion is granted and the transcript is amended accordingly.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against our employees because they engaged in activities on behalf of Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer immediate reinstatement to Ronald Downey to his former position or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay or any other benefits he may have suffered as a result of the discrimination against him, with interest.

WE WILL remove from our files any reference to the unlawful discharge of Ronald Downey and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used against him in any way.

POTTSVILLE BLEACHING AND DYEING COMPANY

Betances Health Unit, Inc. *and* Betances Health Unit Staff Association. Case 2–CA–17628

30 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 13 January 1983 Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified, and to adopt the recommended Order, as modified.

1. The amended complaint alleges, inter alia, that the Respondent violated Section 8(a)(3) of the Act by issuing employee Betty Gonzalez a written warning on 8 October 1980 because of her union activities. The judge found that the Respondent issued Gonzalez this warning because she had attended a meeting held on 7 October 1980 at the National Health Service Corps at which the Federal employees assigned to the Respondent were reminded that they were not entitled to engage in strike activity. The judge also found that Gonzalez obtained permission from the Respondent's medical director to go to the meeting and that she had attended in her capacity as a member of the employees' Staff Association in order to counsel or assist the Federal employees. The judge, however, concluded that these Federal employees were not employees within the meaning of the Act and therefore that Gonzalez' activity was not protected concerted activity as she was not acting in concert with individuals defined as "employees" within the meaning of the Act. Accordingly, he dismissed this portion of the amended complaint.

We agree with the judge's dismissal of this complaint allegation. In doing so, however, we rely on the following. The record shows that Gonzalez sought permission to attend the meeting from the Respondent's medical director, Dr. Salomon,[3] who supervised Gonzalez with respect to her medical duties, rather than from Margaret Joyiens, the Respondent's executive secretary, who supervised her regarding administrative and personnel matters. Further, the record shows that Dr. Salomon also told Gonzalez to speak to Joyiens regarding her request to attend the meeting, which Gonzalez did not do. The Respondent issued Gonzalez a written disciplinary warning because, as stated in the warning, she failed to follow procedures for requesting leave. Accordingly, we find that the Respondent did not violate the Act when it issued Gonzalez the warning. We find no evidence that Gonzalez' warning was related to her union activities. Accordingly, we shall dismiss this allegation of the complaint.

2. The amended complaint also alleges that the Respondent violated Section 8(a)(3) of the Act when it discharged, and thereafter refused to reinstate, employee Burns. The record shows that Burns was discharged following the Respondent's decision to close the Health Connection (a clinic affiliated with the Respondent and at which Burns was employed) due to a lack of funding. Noting that the Health Connection had been closed due to legitimate, economic considerations, the judge found that Burn's discharge did not violate the Act. The judge also rejected the General Counsel's contention that the Respondent further violated the Act when it failed and refused to reinstate Burns. In support of this contention, the General Counsel presented testimony from Burns regarding remarks made to her by the Respondent's project director, Ramos. According to Burns on 30 September 1980, she received a letter informing her that the Health Connection program had been suspended due to lack of funding, that her position there had been retrenched, and that she was terminated, effective 2 October 1980. At the time she received the letter, Ramos told her that he felt "betrayed" by the employees' walkout[4] and that if she "didn't participate

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings, except as discussed herein.

[2] Our decisions in *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986), clarified the principles under which the Board may, in exercising its discretion, decline to assert jurisdiction over an employer because of its relationship to an entity exempt from our jurisdiction. Here, however, there were no exceptions to the judge's finding that the Board should assert jurisdiction over the Respondent. Thus we need not pass on the discretionary jurisdictional issue in this case. See, e.g., *Gateway Motor Lodge*, 222 NLRB 851 (1976).

Member Stephens finds, on the present record, that statutory jurisdiction exists, and in view of the Respondent's failure to raise any issue of discretionary jurisdiction, he finds it unnecessary to review this case. See his opinion, concurring and dissenting, in *Res-Care, Inc.*, supra.

[3] The name of the Respondent's medical director appears as Dr. "Solomon" in the judge's decision. The correct spelling as based on the record, including her signature, appears to be "Salomon."

[4] The record shows that on 27 August 1980 the Respondent's employees held a meeting to discuss their concerns over working conditions and that Burns, then on sick leave, attended the meeting over Ramos' strenuous objections. The employees thereafter formed the Staff Association and presented their demands regarding working conditions to the Re-

Continued

with the other workers in . . . what was going on that when they reopened the Health Connection that [she] could come back." The judge found that although Ramos did not specifically deny making this statement, Burns' testimony was "too highly improbable" to be credited in light of evidence that the decision to close the Health Connection was of a permanent nature. Thus, he found no violation.

As demonstrated above, the judge did not base his findings on his observations of the witnesses' demeanor or conduct at the hearing. Rather, he based his findings on his assessment of the inherent improbability that the statement Burns attributed to Ramos was made. The Board has held that, in contrast to evaluating demeanor or the conduct of a witness, the judge is in no better position than the Board to assess inherent probabilities of testimony, and that the Board is not bound by credibility determinations based on such assessments.[5] Here, we find that the fact the Respondent knew the decision to close the Health Connection was permanent does not preclude a finding that Ramos told Burns that if she did not participate in employee union activity, she could be rehired when the Health Connection reopened. We note that Burns' testimony stands uncontradicted in the record and further that Ramos was involved in both employee Zayerz' unlawful discharge, which occurred prior to this incident involving Burns, and in employee Garcia's unlawful discharge, which occurred approximately 8 days after Ramos' comment to Burns. In light of the above, and contrary to the judge, we credit Burns' testimony on this point and further find that the statement violated Section 8(a)(1).[6] As there is no evidence, however, that the Health Connection ever reopened, there can be no unlawful refusal to reinstate Burns to that facility, or to offer her reinstatement there as alleged in the complaint and, accordingly, we dismiss this complaint allegation regarding Burns.

3. Finally, the amended complaint alleges that the Respondent violated Section 8(a)(3) when it discharged employee Pacheco for engaging in a strike on 27 October 1980. The judge, however, found that the strike on 27 October was unprotected because the employee Staff Association, which the judge had found to be a labor organization, had failed to give the Respondent 10 days' notice of its intent to strike as required by Section 8(g) of the Act. He further found that the proximate cause of the strike, i.e., the transfer of the Federal employees, was not an unfair labor practice; that the earlier discharge of employees Gonzalez, Feliciano, and Morales was also not an unfair labor practice; and that the unfair labor practice which he had found here and which occurred prior to the strike, i.e., the discharge of employee Garcia, did not constitute such a "serious or flagrant" unfair labor practice to excuse the Staff Association's failure to tender the requisite notice.

We agree that Pacheco's discharge was lawful but do so for the following reason. We find that the strike was not an unfair labor practice strike and we agree with the judge that the failure to give the 8(g) notice made it an unprotected strike. With regard to the nature of the strike, as the judge noted, the evidence shows that the decision to strike on 27 October was initially prompted by the transfer of Federal employees on 24 October and was possibly reinforced by the discharges of employees Gonzalez, Feliciano, and Morales on the same date. In agreement with the judge, however, we have not found these transfers or discharges to be unlawful. Further, there is no evidence to establish a causal relationship between the unfair labor practices that we have found (i.e., the discharges of Garcia and Zayerz,[7] and the 8(a)(1) statements to Burns) and the employees' decision to go on strike on 27 October. On this basis, we find that the strike was an economic strike for which the employee Staff Association failed to give the proper 8(g) notice and thus the Respondent did not violate the Act when it discharged Pacheco for engaging in the strike.

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 5 and renumber the remaining conclusions of law accordingly.

"5. The statement to Burns that if she did not participate in the Staff Association's activities, she could be rehired when the Health Connection reopened constituted a violation of Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law

spondent on 3 September. On 9 September employee Zayerz was formally notified that he was being terminated. The employees' walkout, in protest of his discharge, took place on 10 September.

[5] *Kelco Roofing*, 268 NLRB 456 (1983).

[6] Although this statement was not alleged as an independent 8(a)(1) allegation, we find it properly before us as it is sufficiently related to the complaint allegation regarding the Respondent's discharge and failure to reinstate or to offer to reinstate Burns. We also find that this matter was fully and fairly litigated at the hearing, particularly where the record shows that the statement was made coincident with Burns' discharge. *Photo-Sonics, Inc.*, 254 NLRB 567 fn. 2 (1981).

[7] The judge inadvertently erred in stating that he had found that only one unfair labor practice (i.e., the discharge of employee Garcia) had occurred before the 27 October strike. The judge had also found the discharge of Zayerz in September to be unlawful.

judge as modified below and orders that the Respondent, Betances Health Unit, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the remaining pargraph.

"(b) Telling employees that if they did not participate in Staff Association activities, they could be rehired when the facility at which they had been previously employed reopened."

2. Substitute the following for paragraph 2(c).

"(c) Remove from its files any reference to the discharges of William Zayerz on 9 September 1980 and of Martin Garcia on 9 October 1980, and notify them in writing that this has been done, and that evidence thereof shall not be used as a basis for personnel actions against them."

3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN DOTSON, dissenting.

I would remand this proceeding for further consideration of whether the Board has jurisdiction over the Respondent. See *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because of their membership or activities on behalf of Betances Health Unit Staff Association or any other labor organization.

WE WILL NOT tell employees that if they do not participate in Staff Association activities they could be rehired when the facility, at which they were previously employed reopened.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Martin Garcia full and immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him and William Zayerz whole for any loss of pay they may have suffered by reason of the discrimination against them, with interest.

WE WILL remove from our files any references to the discharges of William Zayerz on 9 September 1980 and Martin Garcia on 9 October 1980, and notify them, in writing, that this has been done and that evidence thereof shall not be used as a basis for future personnel actions against them.

BETANCES HEALTH UNIT, INC.

David E. Leach III, Esq., for the General Counsel.
Martin Schaum, Esq., of Mineola, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me on 9 days during April and May 1982. The charge in this proceeding was filed on October 31, 1980, and a complaint thereon was issued by the Regional Director for Region 2 on April 30, 1981. Thereafter, an amended complaint was issued on May 20, 1981, and a further amendment was made during the hearing. The issues are:

1. Whether the Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act, or whether jurisdiction should not be asserted because of its relationship with the Federal Government under the U.S. Public Health Service and the National Health Service Corps. Both of the named institutions are divisions of the United States Department of Health and Human Services, formerly part of the U.S. Department of Health, Education, and Welfare.

2. Whether the Betances Health Unit Staff Association, which was formed on August 27, 1980, is a labor organization within the meaning of Section 2(5) of the Act.

3. Whether pursuant to a type of "poll" taken at a meeting on September 3, 1980, the Respondent became aware of the Staff Associations' majority status so as to require it to recognize and bargain with the Association as the exclusive collective-bargaining representative of certain of its employees in separate units of professional and nonprofessional employees.

4. Whether, on September 3, 1980, at the aforesaid meeting, the Respondent gave the impression that the

union and protected concerted activities of its employees were being kept under surveillance.

5. Whether, at the aforesaid meeting of September 3, 1980, the Respondent unlawfully notified its employee William Zayerz that his employment was being terminated because of his activities on behalf of the Staff Association. Also at issue is whether Zayerz was an employee of Respondent or an independent contractor, and whether his subsequent discharge on September 9, 1980, violated Section 8(a)(3) of the Act.

6. Whether about October 1, 1980, the Respondent unlawfully laid off Jini Tannenhouse, Anna Burns, and Dr. Alan Berkman because of their union and protected concerted activities. The General Counsel alternatively alleges that these layoffs were unlawful because they were made without prior notice to and bargaining with the Staff Association. Additionally, there is an issue about whether Dr. Berkman was an employee or an independent contractor.

7. Whether on October 8 and 9, 1980, the Respondent issued a disciplinary warning to Betty Gonzalez and discharged Martin Garcia because of their union and protected concerted activities.

8. Whether about October 22, 1980, the Respondent unlawfully caused the Federal Government to transfer certain Federal employees from the facility of Betances because of their union and protected concerted activities. The employees in question are Dr,. Patricia Solomon, Patricia Gleaton, and Ana Paez. Concerning this allegation, it is noted that the three individuals involved were Federal Government employees who were assigned to work at the Respondent. It also is noted that there is no doubt that regarding Patricia Gleaton and Ana Paez the Respondent sought their transfers because they participated in strikes and walkouts on September 10 and October 1, 1980. With respect to Dr. Solomon, the evidence indicates that the Respondent sought her transfer because it believed that she supported the strike of October 1, 1980. Dr. Solomon, during that period of time, was part of the management of Betances.

9. Whether the discharges of Betty Gonzalez, Nancy Feliciano, and Elva Morales, about October 24 and 25, 1980, violated Section 8(a)(1) and (3) of the Act.

10. Whether the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Deborah Pacheco about November 1, 1980. In this respect, it is not disputed that Pacheco was discharged, at least in part, because she participated in a strike that commenced on October 27, 1980. However, as it is conceded that no 8(g) notices were given, there is an issue about whether her discharge was therefore privileged.

11. Whether the Respondent violated Section 8(a)(1) and (5) of the Act when it temporarily closed its facility from mid-November 1980 to January 26, 1981, without first having given notice to and affording the Staff Association an opportunity to bargain about that decision.

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Betances Health Unit, Inc. is a not-for-profit New York corporation which operates a health clinic on Manhattan's lower east side. The services involved include diagnosis, consultation, and the prescriptions of treatment including medication. Care is administered by various types of health care professionals including physicians, physician's assistants, and nurse practitioners. Basically, the facility is a subsidized group medical office and would qualify as a health-related facility within the meaning of Section 2(14) of the Act.

Annually, the Respondent derives gross revenues in excess of $250,000 and purchases goods and materials valued in excess of $5000 directly from points located ouside the State of New York.

The Respondent's operations originated in 1968 as a health project sponsored by the Judson Memorial Church to handle the health problems of a transient youth population located in Greenwich Village. At that time, the project was completely funded by private grants. By 1970, however, the project's administrators took it over from the church and established a health screening facility. (E.g., it offered tests for the detection of tuberculosis and other diseases). By 1973, a corporation was formed and, thereafter, the Employer changed from a screening facility to a primary care provider that could perform medical treatment as well as diagnosis. In late 1977, Betances applied for a Federal grant under Section 330 of the Public Service Health Act and such a grant was given in 1978. From that point on, about 60 percent of the money revenues received by Betances have come from the Federal Government. The remaining money came either from private grants, direct patient payment, medicare and medicaid reimbursements, or from insurance held by its patients. Additionally, a substantial portion of Betances' medical staff have been employees of the Federal Government who have been assigned, cost free, to Betances. In 1980 the value of such services was in excess of $100,000.[1]

As a recipient of Federal money, a variety of conditions and controls were placed on Betances by the Public Health Service. First, the project director of Betances (in this case Paul Ramos), must be approved by the Government. Second, pursuant to statute, the board of directors must be composed of persons who are representative of the community served. Third, the entire budget for Betances is subject to approval by the Government, which can and has set conditions on the amount of staff to be hired and the types of people to be employed.[2] Regard-

[1] Under the relevant statute, the National Health Service Corps., which employs these individuals, is supposed to be reimbursed for its services. However, it is possible for a facility like Betances to receive a waiver of such payments. In short, Betances has been alloted three to four health care professionals and has not had to pay for their services.

[2] For example, in the grant for the period from July 1, 1981, to May 31, 1982, the following conditions were placed on Betances:

(1) The two outreach workers shall be deleted from the budget.

(2) All vacant positions including the internist position may not be filled without prior Regional office approval.

Continued

ing the budget, Passer, the director of the division of health services delivery (a part of the U.S. Public Health Services), testified that the Government "looks very critically at staff levels when we review an application. If, for example, we see too many people in one category, or if salaries are too high, or [they] left out an important discipline which we feel is necessary, we discuss with [the] project. We ask for explanations as to why they need for example, four medical assistants, and why they need four doctors if productivity is at such a level." He also testified that "if we grant money . . . our job is to moniter through [a] project officer, to see that they are carrying out the program . . . . They provide us with semi-annual reports as to whether they are productive, cost effective . . . we have the right, if we suspect problems, or on request of the granter, to go in and monitor the project on site and try to correct a situation."

In addition to the above, the Federal Government requires, as a condition of a grant, that health projects, after 2 or 3 years of operation, meet certain Federally mandated productivity levels. Basically these are that the facility's physicians are required to average 4200 medical encounters per year and that nonphysician providers (i.e., physician assistants and nurse practitioners), are to average 2100 medical encounters per year. As will be shown below, if the grantee does not come up to these minimum productivity levels, the Government will first reduce the amount of the next year's grant request and may thereafter refuse to grant any money at all. Obviously, in the case of a health unit that is dependent on Federal money for most of its income, the failure to receive a yearly grant would almost certainly be fatal to its existence.

Further, as a result of the somewhat unique situation at Betances, its medical director, Dr. Patricia Solomon, happened to be an employee of the National Health Service Corps. That is, although she had been employed directly by Betances prior to 1978, when Betances became eligible for assignees from that agency, Dr. Solomon became an employee of the National Health Service Corps. As medical director, Dr. Solomon was responsible for all of the medical services provided and supervised the staff that provided such services, whether they were employees of Betances or employees of the Federal Government. Also as medical director, Dr. Solomon was part of Betances' management team that consisted of herself, Paul Ramos, and Wanda Evans. As part of the management group, she assisted in the formulation of the budget, was involved in policy making, and attended regular meetings of management.

Although it appears that it is not usual for a medical director at these types of facilities to be a Government employee, this was the case at Betances. Accordingly, Dr. Solomon, as medical director, was responsible not only to Betances but was also responsible to her superiors in the Federal Government.

(3) No personnel identified in this budget may be used to provide services in any satellite or mobile facility . . . .

(4) The progress of the project will be evaluated for continuation purposes on January 1, 1982 and June 30, 1981. If Betances fails to be in full compliance by December 21, 1981 the project will not be continued.

Notwithstanding the above, there are facts that would mitigate against a conclusion that Betances was totally under the control of the Federal Government. Although the Government reviewed Betances' proposed budgets, it did not as a practical matter tell Betances what salaries or fringe benefits it should pay to its employees, provided that such salaries and benefits fell within broadly acceptable parameters. Second, although the Government appointed a project officer to monitor Betances' activities, the day-to-day operations were left to Respondent's own management. Third, although the Federal Government was vitally concerned with Betances' productivity levels, it nevertheless did not require Betances to take any specific action to deal with this problem and left its solution to Betances' management. (Unfortunately, Betances never did solve the problem and ultimately lost the Federal grants.) Fourth, although Betances' medical director, Dr. Solomon, was also a Federal employee, the evidence indicates that this was a matter of happenstance, and that insofar as she functioned as part of management, that role was, in reality, neither monitored nor supervised by her superiors in the Federal Government. Thus, as a person having two hats, it nevertheless seems that Dr. Solomon did not play her management role while wearing her Federal Government hat. Fifth, although the board of directors were required to be representative of the community, there is no evidence that they acted under the control or influence of the Federal Government. Finally, apart from those employees who were employed by the Federal Government (the NHSC assignees), there is no evidence to suggest that the Federal Government was involved in Betances' labor or personnel relations vis-a-vis its own staff.[3]

Section 2(2) of the Act exempts from Board jurisdiction "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." As a private corporation, the Board would normally assert jurisdiction over a health facility such as Betances assuming that it met the appropriate monetary standards established by the Board. The problem here, however, is whether jurisdiction should be precluded because of Betances' connection with the Federal Government, which by any definition cannot be described as insignificant.[4]

In *National Transportation Service*, 240 NLRB 565 (1979), a Board majority spelled out its test for determining whether jurisdiction should be asserted or denied in cases when the entity in question has ties to an institution that would be exempt under Section 2(2) of the Act. The Board stated:

> We see no need to examine the relationship between an employer and an exempt entity for which it performs services for some abstract "intimate connec-

[3] Although not dispositive, the evidence shows that a number of other health facilities that are Sec. 330 grantees maintain collective-bargaining relationships with labor organizations that represent certain of their employees.

[4] As Betances' connection is with the Federal Government rather than a state government, it cannot be argued that Betances should be considered as a State political subdivision. *Radio Free Europe*, 262 NLRB 549 (1982).

best copy available

> tion" which has no bearing on the employer's ability to bargain effectively with a labor organization as representative of its employees and which requires a meticulous and, in our view, superfluous analysis of the facts in order to ascertain whether in the Board's opinion the employer's service are essential to the purposes of the exempt entity, universally recognized as a government function, statutorily mandated or non-commercial in nature.
>
> Accordingly, we conclude that the "right of control" test provides a more objective, precise, and definitive standard for determining discretionary jurisdictional issues than the "intimate connection" test.

As to the application of the "right of control" test, the Board made it plain that what it was concerned with was "whether the nonexempt employer retains sufficient control over its employees' terms and conditions of employment so as to be capable of effective bargaining with the employees' representative."

A recent case, *Youth Guidance Center*, 263 NLRB 549 (1982), will serve to illustrate the application of the Board's right-of-control test in circumstances very similar to those in the present case. In *Youth Guidance Center*, the employer was a private nonprofit corporation that operated a center that provided outpatient mental health services, including diagnosis, treatment, consultation, and educational services. Among the persons who provided these services were psychologists, psychiatrists, social workers, nurses, and teachers. Approximately one-third of its budget came from the Department of Mental Health of Massachusetts, the remainder coming from patient payments, third-party insurance, medicaid, and small private donations. In operating the clinic the center employed its own employees, but additionally the Commonwealth of Massachusetts assigned various state employees to work at the Center, including certain supervisory and managerial personnel. As the Board concluded that the employer nevertheless "controlled" the labor relations vis-a-vis its own employees, it held that the presence of state employees at the Center in supervisory and managerial roles, was not sufficient to warrant withholding jurisdiction. In this regard the Board stated, inter alia:

> In these circumstances, we conclude that the Association has not ceded control of its employees merely because some supervisors are employees of the Commonwealth inasmuch as these supervisors apply only Association-determined policy to Association employees, and thus are acting in this regard as Supervisors for the Association. Nor is the Association's control of its employees lessened because DMH [Department of Mental Health] makes site visits to the Center, and the Association files periodic reports or quality assurance evaluations to which DMH is entitled as a contracting agency. Consequently, such contracts do not constitute effective participation or day-to-day supervision of the Association's employees.

In view of *National Transportation Service*, supra, and *Youth Guidance Center*, supra, it is my opinion that Betances would meet the Board's right-of-control test for asserting jurisdiction. As there is no dispute about the fact that Betances meets the monetary standards for asserting jurisdiction over similar entities,[5] it therefore is concluded that Betances is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is concluded that Betances is a health-related facility within the meaning of Section 2(14) of the Act.[6]

II. THE LABOR ORGANIZATION INVOLVED

The second issue presented is whether the Betances Health Unit Staff Association (Staff Association) is a labor organization within the meaning of Section 2(5) of the Act. This question is of course a foundation issue regarding the 8(a)(5) allegation. It also is relevant to the issue of the discharge of Deborah Pacheco who was discharged about October 27, 1981, because of her participation in a strike that concededly was not preceded by the notices required by labor organizations pursuant to Section 8(g) of the Act.[7]

To the extent that it may be said that an organization came into existence, this occurred on August 27, 1980. As noted below, on this date certain employees of Betances met at the home of employee William Zayerz. At this meeting, there were nine employees in attendance, plus Federal employees Ana Paez and Patricia Gleaton and former employee Milagros Sanchez. It was established that the employees present decided to call themselves, collectively, the Staff Association and that they elected a grievance committee. Also, a set of demands were discussed for presentation to Betances on September 3.

The evidence shows that the Staff Association presented initial demands to management on September 3 and

---

[5] See *Youth Guidance Center*, supra.

[6] Subsequent to the close of the hearing, I was advised by the General Counsel that on July 7, 1982, Betances was notified by the Public Health Service that no further grants would be made or given after October 31, 1982. I do not know what has since transpired.

[7] If the Staff Association is not a labor organization, it would be a simple matter to conclude that the discharge of Pacheco was violative of Sec. 8(a)(1) of the Act.

However, Sec. 8(g) provides that

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of Section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Sec. 8(d) of the Act provides in pertinent part:

> Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of the Act [Sections 158,159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

presented revised demands on September 11. Among the demands was one calling for recognition of the grievance committee described above.

Subsequent to September 3, the group held a further election to replace certain people who originally were elected to the grievance committee. Also the grievance committee met with the Respondent on September 10 regarding the discharge of William Zayerz. It also engaged in strikes in furtherance of various of its demands.

Apart from the above, the evidence establishes that the Staff Association never had a constitution or bylaws, never kept minutes of its meetings, and never filed any reports with either the Federal or State Departments of Labor. It had no formal membership as such, as no person ever executed any type of document evincing their membership in the organization or their desire to have it represent them for collective-bargaining purposes. Also no dues or initiation fees were paid by any individual, and apart from those people who were elected to the grievance committee, no persons were elected to or occupied any officer positions in the organization. Indeed, no formal structure of any type existed.

Section 2(5) of the Act defines a "labor organization" as follows:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Although not having any formal structure, it seems to me that the Staff Association was nevertheless an organization of a kind. In this regard, the Board has held that "formal structure or organization is not an essential requisite for finding a labor organization." *Columbia Transit Corp.*, 237 NLRB 1196 (1978); *Butler Mfg Co.*, 167 NLRB 308 (1967). It also is evident that employees have participated in this organization. Regarding its purpose, it is clear from the two sets of demands issued to the Employer and its actions since August 27, that the Staff Association has existed for a purpose of representing employees concerning grievances, labor disputes, or conditions of work. That such purposes have not come to fruition would not bar a conclusion that it was a labor organization. *Litton Business Systems*, 199 NLRB 354 (1972). Nor barring such a conclusion is the fact that it never filed documents with the Department of Labor, such filings being relevant only when and if the Staff Association becomes the collective-bargaining representative of Respondent's employees. *Comet Rice Mills*, 195 NLRB 671, 674 (1972).

In view of the above, it is concluded that the Staff Association was a labor organization within the meaning of Section 2(5) of the Act.

III. THE OPERATIVE FACTS

A. *Background*

As noted above, a majority of the Employer's income is derived from the Federal Government. In the spring of 1980, Betances was notified by the Public Health Service that the full amount of its grant application would not be given. The amount granted was $325,000 as compared to $318,500 granted the previous year. However, the amount requested for the period from June 1, 1980, to May 31, 1981, was in excess of $450,000 and it appears that the principal reason for not granting the full amount requested was that the Public Health Service was not satisfied with the productivity of Betances. As noted above, Betances, pursuant to the Federal guidelines, was required to have a minimum of 4200 medical encounters per year per physician and 2100 medical encounters per year per midlevel practitioner. According to Benard Passer, it was his opinion that Betances had serious problems relating to productivity and cost per patient encounter. He testified that the physicians at Betances were less than minimally productive and that to solve the problem, Betances either had to reduce the number of physicians or to increase the number of patients coming to the Center. Arthur Fernandez, the Federal Government's project officer for Betances, testified that during the summer of 1980 there was serious consideration by his superiors for terminating all future grants to Betances because of the productivity situation.

As a result of the bad news, Paul Ramos held a meeting with the staff in May 1980 to discuss the budget situation and the productivity problems. At this meeting the employees were notified of the budget and productivity situation, but were told that it was not anticipated that anyone would be laid off. Also, the employees were urged to canvass the community to get community lobbying for additional money from the Government. In a memorandum to employees dated May 27, 1980, Ramos stated, inter alia:

> Most of you are also aware that Betances submitted an application for funding of our third year program on March 1, 1980. We requested $452,000 from the UHI for the FMP and $251,000 for the medical component. The total operating budget is $703,000. The remainder of the funds are generated by earned income (patient fees, Medicare and Medicaid, etc.) and private grants. I am happy to report that both applications have been approved and funded. The NHSC will continue funding of our four practitioners at the level requested by Betances. What I am *not happy* to report is that while the UHI application was approved (and recommended by an HEW Objective Review Committee for funding at the level requested) the final grant award will be $325,000 which is $127,000 less than what we need to operate Betances. In fact, the funds cannot even pay for the current staffing pattern and other costs such as rent, supplies, equipment, telephone, etc.

This memorandum is not intended to alarm anyone, staff or patients. It is the conviction of us all to fulfill our committment to serve the people with the best medical/social care we can. I am told that the actual level of funding is determined by several considerations including the amount of monies available and the number of programs requested. One other consideration is the productivity of the Unit (number of patients we serve) and its accurate reporting.

The funding problem, though presently serious, is not one that we cannot overcome. However, if a major reorganization of those problem areas does not correct the deficiency, the results are potentially devastating to staff and patients alike. Betances, unlike most other health programs, does not have a deficit (and never has in its 10 year history), has never had a payless pay day and has never laid off staff because of lack of funds. I'm determined not to let this happen now either. I'm sure you share this determination and the notion that tolerance, cooperation and the participation of us all is essential.

It is possible that midway through the program year we can receive a supplemental grant which can relieve the pressure but this is determined by several factors. They include an increase in patient volume, patient fee and Medicaid/Medicare collections, as well as an efficient management information system and its accurate reporting. This is the area that is the most deficient, thus the first order of business is to deal with this problem.

The entire program and its procedures, including medical, clerical and administrative functions must be closely re-examined. This process will take place in several phases and will begin immediately. This will be explained and discussed in detail in a subsequent memo. As far as funding from the private sector is concerned, there is additional good news. Since September, 1979, four private foundations (the Public Welfare Foundation, Booth Ferris Foundation, PBP Foundation and Surdua Foundation) have awarded grants to Betances as the result of proposals submitted to them. Betances has received a total of $63,500 to date. The money will be used toward administrative costs, patient care and especially for the Health Connection, which has historically suffered greater funding hardships than the Practice.

If it's any consolation to us all, it will be interesting to note that our funding problem is minor compared to that of most health programs, like community health centers and other UHI's that are also funded by the Feds. One center in the Bronx had to lay off over 30 staff workers because of declining patient enrollment and management problems. Still others have such huge deficits that they have had to default on their debts in order to maintain operations, thus losing their credibility in the purchasing community (which is always disastrous to the solvency of an agency). Betances, however, does not have to worry about a present deficit and it enjoys AAA credit rating in the financial community.

It therefore is apparent that notwithstanding Ramo's expression of guarded optimism to his employees in May 1980, it was increasingly evident, in light of Arthur Fernandez' testimony, that Betances stood at the brink of extinction.

In the early part of the summer of 1980, an employee named Milagros Sanchez was discharged at a separate facility of the Employer called the Health Connection.[8] Although the reason for her discharge is not relevant to this case, it does appear to have generated a degree of unease among some of the employees. Also, her discharge resulted in a series of anonymous letters, which, among other things, accused the administration of nepotism and "corrupt" practices. These letters also complained about "arbitrary firings" and the lack of a grievance committee or procedure at Betances. One of the letters was particularly accusatory of Roni Ramos, the wife of Paul Ramos, who worked at the Health Connection as a registered nurse. Ramos chose not to reply to these letters that were issued by "Les Comitte To End Worker Abuse."

Also during the summer of 1980, the management committee consisting of Paul Ramos, Wanda Evans, and Dr. Solomon, held a number of meetings to deal with the budget and productivity problems. According to Wanda Evans, it was the opinion of management, at that time, that the current staffing level could be maintained under the existing grant[9] if no salary increases were given and assuming that other sources of money (i.e., medicare, medicaid, third-party payments, and direct patient payments), met the projected levels set forth in the proposed budget. Thus, according to Evans, it was the consensus to defer making any hard decisions and to hope that Betances' request for a supplemental grant of $127,000 would be approved. According to Dr. Solomon (one of the General Counsel's principal witnesses), there also was discussion during the summer among the management group to the effect that if push came to shove, the Health Connection should be closed, that Zayerz' job was expendable,[10] and that of any practitioners had to be let go, then the ones selected for layoff would be those *not* paid by the Federal Government (i.e., Dr. Berkman and Jini Tanneshouse). Notwithstanding the fact that major decisions were deferred, the evidence does show that certain procedures were tightened up during the summer, especially in an attempt to control excessive absenteeism and tardiness.

[8] The Health Connection was a satellite facility located in a settlement house and was set up to provide certain health and welfare education services for adolescents.

[9] Evans testified that the request for $450,000 was in part to hire additional staff and purchase new equipment.

[10] Zayerz concedes that during the summer of 1980, Ramos suggested that as Zayerz had obtained a Masters of Social Work, he should apply to the National Health Service Corps so that he could be paid by the Government rather than by Betances. Zayerz also conceded that in August 1980, Ramos told him that there soon might not be funds available for his position.

B. *Formation of the Staff Association and its Demands*

On August 27, 1980, the staff decided to hold a meeting to discuss the situation at the Health Connection including the discharge of Milagros Sanchez. It appears that this meeting was also called, in part, to discuss some of the allegations contained in the anonymous letters. Anna Burns was invited to attend because she was employed at the location. (Burns was, however, absent for much of July and August because, as she put it, she had broken a finger on her left hand and she suffered pain after it had been set.) When Burns came to the meeting, Paul Ramos came into the room and strenuously objected to her presence. When the meeting broke up soon thereafter, a number of the employees went to Zayerz' home, where they decided to form a Staff Association and a grievance committee. According to Betty Gonzalez, the individuals who participated in this second meeting were herself, William Zayerz, Nancy Feliciano, Anna Burns, Lisa Garcia, Ann Rosado, Elba Gonzalez, Dr. Alan Berkman, Jini Tannenhouse, and former employee Milagros Sanchez. Ms. Gonzalez testified that in addition to forming the Staff Association, a grievance committee was elected and a set of demands were drafted for presentation to Betances on September 3, 1980.

In connection with the above, it is noted that no employees signed any kind of document evincing their membership in the Staff Association or evincing their intent to have the Staff Association represent them for collective-bargaining purposes.

C. *The Meeting of September 3, 1980*

Normally, general meetings are held in the first week of every month. Except for a few people who were absent on this day (Martin Garcia, Dr. Berkman, and Anna Burns), the entire staff and administration of Betances was present. Also present were Board Members Daniel Gonzalez and Bertrum Beck. During the meeting, either or both Beck or Ramos said that they heard that a set of demands was going to be presented. At this point, Deborah Pacheco read the demands that were as follows:

> We the staff demand that Paul Ramos and all other administrators at Betances begin to treat each and everyone of us with respect, dignity and consideration. The outrageous manner in which Paul Ramos acted towards our co-worker Ann Burns on the afternoon of August 27 was not an isolated incident. On numerous occasions Paul Ramos and/or other administrators have subjected staff to similar verbal abuse and/or intimidation. This and other forms of harrassment must cease now.
>
> We the staff demand that our co-workers: Ann Burns, Milagros Sanchez and Andres Rosado[11] be immediately reinstated, and a public apology be made to each individual and Milagros Sanchez receive back pay retroactive to the day of her unjust firing. We the staff believe that these firings were unjust and without recourse, and were motivated in an effort by Paul Ramos to protect Roni Sherman Ramos, the catalyst which led to this chain of events. We further believe that Roni Sherman Ramos' presence at Betances is a conflict of interest.
>
> We the staff demand that Roni Sherman Ramos no longer be employed at Betances. We the staff believe that Roni Sherman Ramos has been responsible for much of the turmoil and injustice at Betances and that these injustices are a direct result of her presence at Betances.
>
> We the staff demand the recognition of our Grievance Committee. The unjust firings and negative situations that have been created and allowed to flourish by the administration necessitated the staff to act in its own behalf. As such we have elected a committee composed of workers who will act in our behalf as liaison between administration and staff. Betances is a federally funded program and as such all funding information is a matter of public record, yet staff workers never know what the real situation is with the budget. The inconsistencies of the administration regarding hiring practices, raises, starting salaries, evaluations, payroll, personnel and other policies which have caused workers concern must be investigated by the Grievance Committee with the power to rectify all discrepancies.

After the demands were read by Pacheco, Bertrum Beck asked if the staff supported the demands. One of the employees, Grace Butler, said that she did not support them, whereupon Beck said that everyone who supported the demands should stand up. At this point William Zayerz objected and asked if immunity would be granted to those employees who supported the demands. Beck said yes. Zayerz then suggested that instead of indicating support for the demands by standing, those persons who opposed the demands should stand. Beck agreed and the "vote" was taken, in which those employees who were not in favor of the groups of demands stood up. According to Betty Gonzalez, of the people present, 13 stood up and 8 remained seated.[12] No tally was made and the vote was not broken down so as to separate which of the demands the people supported and which they did not. Also, the entire group, as a group, was asked to indicate their support or opposition to the demands and no distinctions were made between professional and nonprofessional employees or between supervisors and employees. Additionally, the Federal Government employees participated in the "vote."

[11] It appears that Anna Burns, as of September 3, 1980, was on suspension. It also appears that Andres Rosado had resigned in August.

[12] According to Gonzalez, the standees were Paul Ramos, Roni Ramos, Wanda Evans, Norita Zayas, Dr. Solomon, Paul Rivers, Margaret Joyiens, Carmen Altus, Grace Butler, Judy Statler, Lisa Garcia, Alloto Reyes, and Dr. Peter Alpert. She testified that those who remained seated were herself, Nancy Feliciano, Ana Paez (a Federal employee), Jini Tannenhouse, Patricia Gleaton (a Federal employee), Andrea Rosado, William Zayerz, Deborah Pacheco, and Elba Morales. As noted above, it appears that Dr. Berkman, Anna Burns, and Martin Garcia were not present.

Also at the meeting on September 3, 1980, Ramos, at some point after Zayerz spoke, told Zayerz that there was no more money for his position and that he therefore would no longer be employed.

D. *Events Between September 4 and 11: the Discharge of William Zaryerz, the Strike of September 10, and the Staff Association's Revised Demands*

Employee Martin Garcia testified that on September 4, Paul Ramos visited his home. He states that Ramos told him that he should watch his step, that Ramos had helped him in the past, and that Garcia should not go against him. Garcia states that he told Ramos that although he liked Ramos, he also liked the employees, and could not see Ramos doing bad things because that would not be right. According to Garcia, Ramos responded by saying, "If that's what you want." (Ramos did not controvert Garcia's testimony.)

On September 5 a group of the employees again met in the building where Zayerz lived and discussed their next step. At this meeting, Garcia was elected to be on the grievance committee. It was also decided that a strike would take place unless Zayerz' termination was retracted.

On September 9 Zayerz was formally notified that he was being let go. According to Zayerz, Ramos told him that there were no funds for his position and that he could not have Zayerz working because he was not loyal to Ramos. Zayerz states that Ramos told him that if Betances received more funds, he was not going to give them to someone who was disloyal. (It is possible, however, that Ramos' statement of disloyalty centered on the demand that Ramos' wife be terminated.) This conversation was not denied by Ramos. At this point, Zayerz was handed a letter by Ramos that read:

> This is to inform you that, effective Wednesday, September 10, 1980, your employment at Betances is terminated. The reason for this unfortunate decision is simply that Betances is no longer in a position to meet your fee as consultant.
>
> This past June we discussed the fact that your field placement from the School of Social Work at Stonybrook was over in May. I then informed you that Betances had been underfunded by the Federal government and, therefore, would not be able to employ you full time. Thus, your tenure could not be guaranteed beyond September 1, 1980. We verbally agreed that you would remain at Betances as a consultant in community relations until the beginning of September. In the interim, you would be completing application to the National Health Service Corps for an assignment here. Had you been accepted into the Corps and placed at Betances, they would have picked up the costs of your full time pay, as in the case of our practitioners. While we had hoped this would happen, unfortunately things did not work out.
>
> I have been in contract with the NHSC and they informed me that they do not have your application on file. Since you stated you in fact have submitted an application, I strongly suggest you follow up on this.
>
> The fact remains, however, that Betances is unable to continue the present arrangement for the reasons given herein.
>
> While your status here has been that of consultant, as such you are not entitled to separation pay. However, in recognition of your past service and committment to the organization, Betances will pay you through September 18, 1980.
>
> While I cannot make any specific committment at this time, if you look into the National Health Service Corps situation, we will give it every consideration when the time comes.

With respect to the contents of the above letter, I have indicated above at footnote 10, that Zayerz has conceded that during the summer, Ramos had told him that there might not be enough money for his position and that Ramos suggested that Zayerz make an application for employment with the National Health Services Corps. He denies, however, that he had been specifically told by Ramos that his employment would end in September.

On the morning of September 10, a group of employees met with Paul Ramos. The employees involved were Dr. Berkman, Ana Paez, Betty Gonzalez, Martin Garcia, and Nancy Feliciano. Dr. Berkman acted as their spokesman. According to Dr. Berkman, when the group asked for the reinstatement of Zayerz, Ramos said that he had been "retrenched" for economic reasons, and that this had been pending for some time. Dr. Berkman states that he reminded Ramos of the latter's assurances in May to the effect that there were not going to be any cutbacks despite the funding level. According to Dr. Berkman, the discussion became heated, whereupon Ramos said that Zayerz had betrayed him, that Ramos had taken Zayerz in when Zayerz needed a job, that Zayerz has been to his home, and that Zayerz was stabbing him in the back. When asked if Zayerz could at least be reinstated until the board of directors met, Ramos said no. At this point, according to Dr. Berkman, he told Ramos that the employees were going to strike and Ramos said that they could not do that. At the conclusion of the meeting, some of the employees went on strike. Included in the strikers were Federal employees Ana Paez and Patricia Gleaton.[13]

During the September 10 walkout, Danny Gonzalez, a member of the board, met with the strikers in an attempt to mediate the problem and get the people back to work. As a result of these meetings, it was agreed that Zayerz would be reinstated pending a meeting of the board of directors to be held on September 15. In consideration thereof, the strikers agreed to return to work. On September 11 all the strikers returned to work, including Zayerz. However, on September 10, Betances had con-

[13] The other persons who participated in the September 10 walkout were Betty Gonzalez, Nancy Feliciano, Elba Morales, Elba Gonzalez, Deborah Pacheco, Jini Tannenhouse, Jose Luces, and Dr. Berkman. Needless to say, employees of the Federal Government are prohibited from engaging in strikes. *Postal Workers v. Postal Service*, 110 LRRM 2704 (9th Cir. 1982). 5 U.S.C. § 7311.

tacted the National Health Services Corps to register a complaint about the participation in the strike by Federal employees Paez and Gleaton.

According to Zayerz, when he returned to work on September 11, he had another conversation with Ramos. He testified that Ramos said, "You can't do this to me and get away with it." Zayerz also states that during this conversation Ramos accused him of being responsible for the anonymous letters previously described. Zayerz denied that this was so.

On September 11 the Staff Association revised its demands preparatory to the board of director's meeting to be held on September 15. The revised demands read as follows:

> We are taking worker-community control and demand the following:
>
> 1. Recognition of our Grievance Committee
> 2. The immediate termination of Roni Ramos from Betances and the Health Connection.
> 3. The reinstatement of the workers Milagros Sanchez and Andres Rosado.[14]
> 4. The immediate removal of Paul Rivers and that job be opened up and posted in the community.
> 5. The breaking up of the Administrative family click.
> 6. Opening up the Board to truly reflect our Community.
>
> Grievance Committee Members:
> Martin Garcia
> Alan Berkman
> Betty Gonzalez
> Ana Paez
> Nancy Feliciano
> Alternates:
> Billy Zayerz
> Debbie Pacheco

E. *Events on September 15: Meeting Between Board of Directors and Employee Group; Letter Denying Request for a Supplemental Grant*

On September 15 the board of directors of Betances, along with Paul Ramos, met with a committee of employees, whose spokesman was Dr. Berkman. At this meeting, Dr. Berkman asked for the reinstatement of Milagros Sanchez and William Zayerz. He also set forth the position of the Staff Association that Roni Ramos should be fired because of her alleged "destructive and divisive" role at the center.[15] At one point during the meeting, Ramos became angry and called Dr. Berkman an obscene name. Ramos was calmed down by Beck. In response to the Staff Association's demands set forth above, Board Member Gonzalez read a written document that stated, inter alia:

> The Board is, of course, cognizant of the recent difficulties at Betances and wants to do everything in its power to resolve those problems which gave rise to the current situation. Failing to radically improve the situation immediately may well result in the loss of Betances to the community. The Board knows it does not have to remind the staff how fragile a structure is one that depends in these times entirely on federal funds with an occasional grant from a foundation. . . .
>
> . . . .
>
> In respect to your demand that the grievance committee be recognized, we are basically sympathetic and will recognize a grievance committee. In order to move in this direction, we, of course, need to know, how the grievance committee is to be selected and whom it represents. We're sure you can appreciate the difference between the function of a grievance committee that might be representative of a portion of the staff and the function of a committee which represents the whole staff. We know you can appreciate the difference between a grievance committee that may be composed of persons who select themselves and a grievance committee selected by the entire staff. In summary, we will recognize a grievance committee that represents all staff excluding Executive Director, Medical Director and Fiscal Officer. The rights and responsibilities of such a committee can only be determined after there is greater clarity concerning the mode of election or selection and discussions between the Committee and the Board.
>
> In respect to the staff demand that the Board be truly reflective of the community, we are also responsive. An examination of the roster of the current Board will demonstrate that practically all of the members are representative of the community. There are only three persons who do not fall within that category and they are all former residents of the community. Our major source of funds sets up specific requirements concerning the composition of the Board and we are in full compliance with those requirements. At the proper time our Nominating Committee will be glad to entertain any suggestions of individuals who might be interested in serving on the Board.
>
> . . . .
>
> The Board regrets that the staff demands single out Ms. Roni S. Ramos as a particular target. The Board is deeply appreciative of the enormous contribution which Ms. Ramos has made to the evolution of Betances through the years, long before it was even possible to employ many of the people who are now working at Betances. The Board would view the loss to Betances of Ms. Ramos' services as a major loss. Therefore, the Board will not accede to the staff's demand that Ms. Ramos be terminated as an employee at Betances.

[14] As noted above, Milagros Sanchez had been discharged early in the summer of 1980. Andres Rosado, who worked at the Health Connection hall, resigned before the Staff Association was formed.

It is of some interest, although perhaps not relevant, that the revised demands track the demands made in the anonymous letters distributed in July and August 1980.

[15] It is not clear from this record whether Roni Ramos was a supervisor as defined in Sec. 2(11) of the Act.

In respect to Mr. Paul Rivers, the Board is unwilling to accede to the staff demand. Mr. Rivers is employed as a consultant in order that he may use his special skills and talents in the interest of Betances . . . . Management is held responsible not only by the Board but by the sources of funds for a certain level of performance. This accountability must be accompanied by certain prerogatives. Amongst these prerogatives is the right to hire for positions without tenure and for limited periods of time individuals who will work as consultants. Any permanent position will be posted for staff and community to apply.

In regard to Milagros Sanchez, the Board understands that management terminated Ms. Sanchez's employment because of questions of work performance. The staff believes that Ms. Sanchez was arbitrarily and unfairly dismissed . . . . Since one of the major tasks required of Ms. Sanchez was clerical skills as defined by the program needs, the Board proposes that if Sanchez wishes there be an objective evaluation of Ms. Sanchez's clerical skills. There are clerical tests readily available and clerical skills can be objectively measured. If Ms. Sanchez's skills are at a level appropriate for the position she held, then the Board would propose a settlement which would be based on the premises that there is not sufficient evidence to support management's contention. If, on the other hand, Ms. Sanchez's skills are found to be below the level required, it would be necessary to conclude that Ms. Sanchez is not able to perform within the job requirements. . . .

. . . .

With respect to Mr. William Zayerz and the clinical staff walkout of September 10, 1980 the Board recognizes that the job action was a direct result of Mr. Zayerz's termination at Betances as a field placement. We have reviewed managements rationale (as stated in the letter of termination) for such termination as well as the operating budget for the current fiscal year. The Board agrees with management that there are insufficient funds to maintain Mr. Zayerz on the payroll beyond September 18, 1980. Thus, Mr. Zayerz's notice of termination still stands.

Staff is expected to be at their jobs on time performing their assigned duties. Any action on the part of any staff which stops or hinders the safe functioning of Betances will be considered by the Board of Directors and management as an automatic resignation on the part of that staff person. Furthermore, it should be understood that any National Health Service Corps designee who participates in any action that stops, prevents or hinders the safe operation of Betances will be immediately reported to the Regional Office for disciplinary action.

Also, on September 15, the Federal Government officially denied Betances' requests for supplemental funds. In a letter to Betances, Arthur Fernandez wrote:

I wish to express my thanks to you and your staff for your kind attention during my visit to Betances, September 4th.

I thought it would be appropriate for me to outline my concerns related to your project so that you may use them as a guide for the next Budget Period.

As you know, your total budget request was for $452,206 and you were awarded only $325,000. As we discussed at Kerhonkson, we had hoped to restore the additional funds, but quite frankly we have trouble justifying additional funds. Consequently, we don't believe that we will be able to restore very much of the $127,000 difference.

Betances' Application, was reviewed by regional office staff and was found to be heavy on personnel. The BCRR for the last reporting period revealed that your productivity was actually low. Physician encounters, for example, were annualized to *2213* and the minimum normal rate is 4200.

This resulted in a high cost per encounter of $44.21. [T]he maximum norm for that is $24.00.

In addition, your administrative cost are running 21% while the norm is 16%.

As you know, these program indicators are the basis for our central office to allocate funds to the regions. The region has established policy to monitor these closely in order to save as much of our funding levels as we can.[16]

F. *The Termination of Dr. Berkman, Anna Burns, and Jini Tannenhouse*

According to Wanda Evans, the September 15 letter from Fernandez promoted a series of managerial meetings to deal with the funding and productivity problems. She credibly testified that in light of the Government's rejection of the supplemental grant, decisions no longer could be deferred. According to Evans, although it had been hoped, during the spring and summer of 1980, that no cutbacks in personnel would be needed, it now became evident that the projected income from medicare, third-party payment, and other sources was not meeting expectations.[17] Evans testified that in view of the above, several decisions were made in mid-September as follows: (1) To close the Health Connection, where Anna Burns worked; (2) to terminate Judy Statler;[18] (3) to not renew a consulting contract with Paul Rivers;[19] and (4) to terminate the services of Dr. Berk-

[16] As noted above, Fernandez testified that during the summer of 1980, there was talk within his agency to cut off all funds to Betances. He testified that he personally opposed such a drastic action. Accordingly, the letter to Betances of September 15 was, in reality, a sort of victory on his behalf to keep Betances funded. Unfortunately, as it turned out, his victory was shortlived.

[17] Evans' testimony regarding the income received by Betances during this period of time was based on records that were present in the hearing room and that were available to the General Counsel.

[18] Judy Statler had been retained to work on private grants. It was hoped that she would generate revenues in excess of her earnings.

[19] Paul Rivers had been retained during the summer of 1980 on a consulting line to do some work in relation to the Health Connection.

man and Jini Tannenhouse. Regarding the decision to terminate Dr. Berkman and Tannenhouse, Evans testified that this was intended to resolve two problems at the same time. First, to save money and, second, to increase productivity. As testified to by Passer, the Federal Government was very concerned by the failure of Betances to meet the Government's minimal productivity requirements. To resolve that problem, Passer stated that it could be accomplished in two ways: one by increasing the number of patients seen by the existing patient providers or, alternatively, by reducing the number of such providers and spreading the existing patient load among the remainder. Concerning the choice of Dr. Berkman and Tannenhouse, the record shows that at this time there were six patient providers, four of whom were employed by the Federal Government and therefore were cost free as far as Betances was concerned. Inasmuch as Betances paid Dr. Berkman and Tannenhouse from its own funds, their selection for termination is hardly surprising. Indeed any other choice would have been incomprehensible. Regarding Anna Burns, the General Counsel seemingly conceded that her layoff was due to economic factors because she worked at the Health Connection where operations were terminated. He, however, claims a violation in that Ramos allegedly conditioned her reemployment on her abandonment of union activities. In this connection, Burns testified that on October 1, Ramos told her that he felt betrayed by the walkout and that if she had not participated in the walkout, she would come back to work when the Health Connection reopened. The Health Connection, however, was never reopened.

On September 26 Judy Statler's services were terminated.[20] Also, by letters dated September 30, Dr. Berkman, Jini Tannenhouse, and Anna Burns were terminated.[21] At the same time, the Health Connection was closed,[22] and Roni Ramos ceased working for the Respondent. In mid-October, River's contract expired and it was not renewed.

G. *The "Sickout" of October 2, Discharge of Martin Garcia, Warning to Betty Gonzalez, and Transfer of Federal Employees*

In face of the layoffs of Dr. Berkman, Jini Tannenhouse, and Anna Burns, members of the Staff Association decided to have a "sickout" on October 2. This sickout, which lasted 1 day, was participated in by Patricia Gleaton and Ana Paez. Dr. Solomon did not appear at work on that date, although it appears that the main reason was because she did not feel well. (She was pregnant at the time.) As in the prior walkout, the Staff Association did not give Respondent any advance notice.

As a result of the sickout and the participation in it by National Health Service Corps assignees, Betances notified the Government of the event and a meeting was arranged on October 7 at 26 Federal Plaza. Betty Gonzalez appeared at the meeting and her presence was objected to by Paul Ramos. She was, however, allowed to remain. (Gonzalez had received permission to take time off to go to this meeting from Dr. Solomon.) The principal purpose of the meeting was to remind the Federal employees that it was against the law for them to engage in strikes or work stoppages. On the following day, Gonzalez was given a warning because of her absence from work on October 7.

On October 9 Martin Garcia was fired. The reason given to him was because of his latenesses and absences. There is, in fact, no doubt that by any normal standard, Garcia's absence and latenesses were excessive.[23] On the other hand, Evans conceded that excessive absences and latenesses were not uncommon at Betances and the record shows that other employees (such as Carmen Altus), had bad records and did not lose their jobs.

At some point in mid-October, Paul Ramos published a community bulletin so as to explain, from his point of view, the recent events at Betances. In part, this read as follows:

> Betances is now facing a very difficult time. There are people who are out to destroy Betances and all it stands for. Most of these people are not from this community. Most of them are in fact privileged individuals who can easily find high paying jobs anywhere they wish. These people say they do not want to hurt Betances. Do not believe them. They already closed down the clinic for one day and threatened to do worse.
>
> Betances is not the first place this has happened. It has happened in other poor communities where organizations like Betances were, or almost were, totally destroyed. The path of destruction is always the same. This is the way they do it. This is the way they are trying to do it at Betances.

[20] Judy Statler was not involved in any way with the other employees in terms of the Staff Association or its demands. The General Counsel does not allege that her termination was violative of the Act.

[21] Regarding Dr. Berkman, he agreed with Ramos that he would stay on for an additional 2 weeks to help Dr. Peter Albert take over his patients. Dr. Alpert, who was also a NHSC assignee, came to Betances during August. Later, Dr. Berkman terminated his arrangement because he objected to certain things said by Ramos in a community bulletin.

[22] The General Counsel does not allege that the decision to close the Health Connection was discriminatorily motivated. Therefore, I can only conclude that he concedes that its closing was caused by economic considerations.

[23] In a decision by an administrative law judge of the New York State Department of Labor, Martin Garcia's claim for unemployment benefits was denied. After an evidentiary hearing the judge stated:

> Claimant was less than an exemplary employee having been on probation two times in 1979 and received two unfavorable evaluations. By July 1980, claimant improved his performance and had recently received a favorable performance rating. Nonetheless, from July 1980, until his termination, claimants punctuality became intolerable. Although warned repeatedly, claimant was late in excess of 20 times during his last three months of employment, including the last two days prior to his termination.
>
> Claimant M. G. [Martin Garcia], had an abominable attendance record. He was warned on numerous occasions. During the last three months of his employment, he was late on more than 20 separate occasions. Claimant's contention that he was late because of a work related injury or other excuses, are not persuasive. An employee is expected to work the schedule of hours set by the employer and not set his own hours of work. The evidence is overwhelming that this claimant did not have compelling reasons for failure to comply with the employer's attendance rules. His termination therefore, resulted from misconduct for which unemployment insurance benefits may not be paid.

A few disgruntled staff members use the rest of the staff to create problems between the staff and the administration. They try to create an atmosphere that will lead to a takeover of the administration by the supporters of this very small clique of workers. Their ultimate goal is to get their hands on the money that the organization has, so they can use it for their own purposes.

Betances had been trying to deal with this problem for months. Betances is responsible to the federal government because that's where it gets the money to operate and Betances is accountable to *YOU*—the community because *YOU* are who we serve. Because of the problems these people have created, the federal government is not going to give Betances the money Betances needs.

Now Betances had to let some workers go because there isn't enough money to pay them and the adolescent program, the Health Connection, has been suspended idefinitely because of lack of funds.

On the Lower East Side we need more money and more services—not less. Betances has dutifully served this community and its people for over ten years. The destruction of our programs, all of our programs, can only happen if we let it.

Don't let this evil outside influence destroy what took a group of dedicated people ten years to build! Show your support—tell your friends!

H. *The Discharges of Gonzalez, Morales, Feliciano, and Pacheco*

According to Deborah Pacheco, about October 17 or 18, she had a conversation with Maintenance Supervisor Eladio Reyes, wherein she stated that she had heard that Betty Gonzalez was going to be fired, and asked if that was true. She testified that he said yes, and asked how she had found out. Reyes was not called as a witness by the Respondent, as it appears that he was not in the country at the time of the trial.

On October 23 another meeting was held at the offices of the National Health Service Corps. At this meeting, Dr. Patricia Solomon, Ana Paez, and Patricia Gleaton were told by the NHSC that they should accept transfers out of Betances or face formal charges against them for participating in the foregoing strikes. The three individuals accepted the ultimatum and thereupon ceased working at Betances.

Also on October 23 or 24, after becoming aware of the transfers, certain of the employees at Betances decided to call a strike on Monday, October 27. However, no 8(g) notices were given.

On October 24 a series of events occurred at the facility that led to the discharges of Betty Gonzalez, Elva Morales, and Nancy Feliciano. First of all, as Dr. Solomon had been transferred, Dr. Peter Alpert was designated as the medical director. Also, on October 24, he was the only practitioner at the facility who was treating patients, and was therefore faced with a large influx of patients who had appointments with the transferred practitioners.[24] In connection with the events of that day, Dr. Alpert testified that in early afternoon, he needed to reach Pacheco so that she could come to the laboratory to draw blood from a patient. He states that he asked the receptionist, Elva Morales, to page Pacheco, whereupon Morales said, "If you want her, get her yourself." Dr. Alpert states that he also asked the other receptionist, Nancy Feliciano, to page Pacheco, and that she too refused. Morales concedes that although it was part of her job to page people when necessary, she refused Dr. Alpert's request. Dr. Alpert wrote a memorandum to Paul Ramos that day regarding Morales. This was as follows:

> This morning I was looking for Debbie and couldn't find her. I asked Elva to please page Debbie and she refused. At first she just sat there, then she said "if you want her, page her yourself, it's not my job." I feel that this type of behavior warrants your attention.

Dr. Alpert testified that later in the afternoon, he asked Betty Gonzalez to prepare a patient he was about to examine and that she refused.[25] He states that she told him that he should prepare the patient himself. Gonzalez concedes that prepping patients was part of her job (in fact her principal function), and that she refused Dr. Alpert's order. Her excuse was that she was too busy at the time, deciding which patients should be seen and which should be sent home.

According to Dr. Alpert, later that afternoon, he heard Betty Gonzalez telling patients that he was responsible for the transfers of Gleaton, Paez, and Solomon and that Alpert was a lousy doctor. He states that when he went back to his office he found an unrolled condom on his desk and that when he showed this to Danny Gonzalez, the three employees, Gonzalez, Morales, and Feliciano, laughed at him. He also states that during that day, former employee Zayerz came into the center and announced that a car outside was on fire. Dr. Alpert states that he went outside to look at his car, saw nothing, and that when he returned, the employees again laughed at him. In this connection, Zayerz testified that this did not happen on October 24, but that a similar incident did occur in September.

Dr. Alpert testified that faced with the above incidents it became clear to him that the three employees were acting in concert to sabotage his authority. He thereupon wrote another memorandum to Paul Ramos and Wanda Evans, and orally advised them that either they be discharged, or that he would leave. The memorandum reads as follows:

> The current turmoil at Betances have made all of us quite anxious and tense. It has been difficult to examine patients properly or render proper care. This afternoon, Elva refused to page Debbie (as I have stated in a previous memo). Later in the day

[24] On October 24 Dr. Solomon was at the facility, but was not seeing patients.

[25] Preparing a patient involves obtaining the patient's chart and taking his or her height, weight, blood pressure, etc.

> while we were all discussing the current state of affairs at Betances, the argument became heated and Elva started calling me a "prick" and a "scum bag." Both Betty and Nancy supported Elva's actions. A few minutes later, I went back to my office and found an envelope on my desk with my name on it. Inside was an unrolled condom. I do not know for certain who put it there, but the handwriting appeared to be Elva's and when confronted with it they all laughed.
>
> This type of behavior is childish and inexcusable. Appropriate disciplinary measure[s] must be taken immediately.

According to Wanda Evans, Dr. Alpert told her and Paul Ramos about the aforesaid incidents. She states that Dr. Alpert said that he was being harassed by Gonzalez, Feliciano, and Morales, that he was "fed up" and could not continue to work that way. She testified that as a consequence of Dr. Alpert's report, she attended a meeting with Paul Ramos and Danny Gonzalez where they discussed what to do about these employees. Evans states that although there was some concern about the repercussions among the remaining staff which might result from discharging the three employees, the unanimous opinion was that they should be fired. In this respect she testified:

> We made Peter Alpert the Medical Director and he needed our support . . . . We could not continue to let people not respect him and not listen to him because we'd have no practice, there is no point in having the clinic if we didn't have some order. He was there for that order and if the people who were under him weren't going to listen to him they had to be fired, there was nothing else to do, so we felt there was no other alternative.

By mailgram dated October 24, Gonzalez was notified of her discharge. The reasons given were (1) excessive absenteeism, (2) gross misconduct, and (3) insubordination. By letter dated October 24, Feliciano was told of her discharge. The reasons given were (1) excessive lateness and absenteeism and (2) gross misconduct. By telegram dated October 24, Morales was notified of her discharge. The reasons given were (1) gross misconduct and (2) insubordination.

As in the case of Martin Garcia, Betty Gonzalez, Nancy Feliciano, and Elva Morales filed unemployment claims and a hearing was held before an administrative law judge of the New York Department of Labor. In those cases, the judge, in denying their claims stated:

> Claimant, N.F. [Nancy Feliciano], worked as a telephone receptionist from September, 1979 through October 24, 1980, earning approximately $8,500 per annum. During the period from June 1980 until her termination on October 24, 1980, claimant had an abominable attendance record. She was absent on seven occasions, four of which were on Mondays or Fridays, and was late on 47 occasions. Although warned, claimant continued to report to work late, including the last two days of her employment. On her last day of employment, claimant sat with her co-employees, B.G. & E.M., and undermined the authority of the medical director by mocking at him and participating in various pranks against him with the aid of a former employee who was socializing with them on the premises without the employer's authorization.
>
> Claimant, B.G. [Betty Gonzalez], worked as a medical assistant from May, 1979 to October 24, 1980, earning approximately $200 per week. Claimant was notified of her termination because of poor attendance, acts of misconduct and insubordination. Claimant had a poor attendance record and had been warned, including having deductions made from her salary. Between August and October claimant remained away from work on seven separate occasions, five of which were before or after weekends. She was also late on five occasions during that period of time. Claimant was also involved in punching another person's timecard and having others punch her timecard when she was out. Claimant's job primarily required that she render medical assistance to the physicians. On the last day of her employment, there were only two physicians employed at the facility because of the reductions ordered by the Federal Government. One of those doctors, who was also the medical director at the time, requested the claimant assist him in "prepping patients." Claimant did not assist the physician in prepping patients on that day because she was disgusted with the facility's management and was upset with the reductions in staff.
>
> Claimant, E.M. [Elva Morales], was employed as a medical receptionist from January, 1978 through October 24, 1980, earning approximately $9,500 per annum. Claimant was terminated because of acts occurring on the final day of her employment. On that day the facility was crowded with patients because only two physicians were on duty. The medical director asked claimant to page the lab technician who was then needed by the doctor. Claimant, who was sitting at her desk, refused the doctor's request stating, "If you want her, do it yourself." Although claimant knew that the lab technician was indisposed in the bathroom at the time, she did not bother to so inform the doctor. Claimant also used various profanities at the doctor.
>
> . . . .
>
> Claimants, N.F., B.G., and E.M., were all terminated as a result of incidents occurring on their last day of employment, October 24, 1980. Whether or not such terminations arose as a result of misconduct in connection with their employment depends on the facts as to each individual. Claimant N.F., had an atrocious attendance record which could have warranted dismissal by the employer prior to this date. The fact that the employer did choose this date does not excuse her prior behavior or create a waiver on the part of the employer. Certainly 47 latenesses over a five-month period warrants action by the employer. Claimant, B.G.'s, employment also

terminated under conditions which would constitute misconduct under the Unemployment Insurance Law. Her poor attendance, her misuse of timecard regulations and her insubordinate conduct in refusing to do her regular work for which she was being paid, justified the employer's action in terminating her services. Further, claimant, E.M.'s, conduct on that last day, also warranted her dismissal for insubordination to the physician medical director of the institution. Regardless of whether these claimants had any legitimate grievances for being distressed by the reduction in staff and budgetary curtailment by the Federal government, it certainly did not warrant such behavior on their final day of employment. By refusing to "prep patients," by refusing to page other medical personnel, by acting in concert with a former male employee, who was present in the facility without authorization and incited them to undermine the medical director's [authority] was certainly anathema with rendering patient care at a medical facility. I have considered claimants' contention that such activity should be protected because of the industrial controversy occurring at that time and that their termination was actually pretextual in order to subvert their union activity. I am not persuaded by such argument. The employer did not contrive claimants' poor attendance nor the events and behavior occurring on their last day of employment. Regardless of one's allegiance to a union, an employee who refuses to perform reasonable functions as directed by the employer, cannot hide behind the veil of union protection. To hold otherwise, would give more favorable protection because of union activity than to employees who did not engage in union activities.

On October 27, the Staff Association, without giving an 8(g) notice, commenced a strike against Betances. Deborah Pacheco participated in this strike and there is no dispute that she was discharged on October 27 because of her participation in the strike. Thus, by letter dated October 30, Pacheco was told:

> We are sorry to inform you that your position as a Laboratory Technician at Betances Health Unit has been terminated effective Monday, October 27, 1980.
>
> Please be advised that this action is due to your absence from work in order to participate in the illegal pickets currently demonstrating in front of the building. Your activities have deterred patients from entering the premises. As a result, the Board of Directors and management of Betances feel your actions constitute your immediate dismissal as an employee of Betances.
>
> As you know, on September 15, 1980, the Board of Directors of Betances responded to the demands of staff, the last paragraph of the response states the following:
>
> "Staff is expected to be at their jobs on time performing their assigned duties. Any action on the part of any staff which stops or hinders the safe functioning of Betances will be considered by the Board of Directors and management as an automatic resignation on the part of that staff person."
>
> Needless to mention we regret that you have taken this position with regards to the pickets but your actions leave us no alternative. We are truly sorry that your relationship with Betances had to end this way.

I. *The Closing of Betances from November 17, 1980, until January 1981*

The record in this case also reveals that the strike that ensued on October 27 was attended by various acts of vandalism. For example, certain patient records were found to be missing, the telephone lines were cut, and paint was put on the building. As a result of the turmoil at the Center, Dr. Alpert left Betances in November.[26] Also, Betances closed down on November 17, 1980, and did not reopen until sometime in January 1981.

In connection with the vandalism, it is noted that the Respondent did not adduce evidence regarding which employees, if any, were responsible.

IV. ANALYSIS

A. *The 8(a)(5) Allegations*

The General Counsel argues that there were at Betances two separate appropriate bargaining units, one consisting of physicians, physician assistants, nurse practitioners, and registered nurses[27] and the other consisting of all service and maintenance employees.[28]

With respect to the 8(a)(5) allegations, the General Counsel relies on the rationale of *Sullivan Electric Co.*, 199 NLRB 809 (1972), and related cases.[29] In *Sullivan Electric Co.*, a union made a demand for recognition in a single unit in which it had obtained executed cards designating the union as the bargaining agent from 13 of the unit's 16 employees. When the employer expressed doubts concerning the union's claimed majority status,

---

[26] He testified that he left after being threatened by Anna Burns' husband.

[27] Consisting of Dr. Alan Berkman and Jini Tannenhouse. The General Counsel states that as Patricia Gleaton, Ana Paez, and Dr. Alpert are Federal Government employees, they would not be included in the unit. He also states that Dr. Solomon would not be included in such a unit because she was a supervisory employee who also was employed by the Federal Government. Concerning Roni Ramos, the General Counsel contends that as she is the wife of Paul Ramos, the administrator, she would not have a community of interest with the unit employees even though she was employed as a registered nurse.

[28] The General Counsel asserts that the nonprofessional unit would include all service and maintenance employees (Martin Garcia), medical assistants (Betty and Alba Gonzalez), medical receptionists (Elva Morales and Nancy Felciano), medical records clerks (Jose Luces), laboratory technicians (Deborah Pacheco), and community health workers (Lisa Garcia, William Zayerz, Andres Rosado, and Anna Burns). The General Counsel would exclude from the nonprofessional unit the bookkeeper (Grace Butler), an administrative assistant (Judy Statler), the upstairs receptionists (Nereida Zayas), and a researcher (Paul Rivers). Also, she takes the position that Margaret Joyiens, and Eladio Reyes were supervisors within the meaning of Sec. 2(11) of the Act.

[29] See also *Adams Book Co.*, 203 NLRB 761 (1973); *Duralee Fabrics*, 246 NLRB 677 (1979).

the authorization cards were offered to the employer. Later, the employer, while distributing paychecks, asked the employees if they had signed union cards and a majority answered in the affirmative. The following day, 13 employees went on strike in support of the union's demand for recognition. In concluding that the employer was obligated to recognize and bargain with the union, the Board (with Member Kennedy dissenting) stated:

> Concededly an employer is not required by the Act to recognize and bargain with a Union wholly upon the strength of its assertion that it represents a majority of the employees involved, notwithstanding that the Union predicates its assertion upon an adequate showing of signed authorization cards. . . .
>
> However, where as in this case, the Respondent rejects the foregoing alternative and unilaterally undertakes to determine the Union's majority or minority status by means of a poll, under conditions of its own choosing, the Respondent cannot thereafter disclaim the results simply because it finds them distasteful.

In my opinion the facts of this case are distinguishable from those in *Sullivan Electric Co.* and the other cases cited by the General Counsel. First, unlike the cited cases, the evidence establishes that no employees ever executed any forms, cards, or other documents whereby they evinced their interests in becoming members of or being represented by the Staff Association. Second, despite the General Counsel's assertion that the Staff Association should be accorded bargaining rights in two separate bargaining units, the Staff Association never made such a demand, but rather sought recognition on behalf of virtually all persons working at Betances, *in one group*, including both professional and nonprofessional employees, plus Federal Government employees. Thus the bargaining units that the General Counsel now seeks to create, after the fact, were never sought by the Staff Association and are therefore substantially inconsistent with its demands.

Third, while the General Counsel asserts that a bargaining obligation should arise out of the poll taken on September 3, in response to the Staff Association's demands, the evidence shows that the Respondent asked the people present at the meeting to indicate their support or nonsupport for *all* of the demands and the poll was not limited to the recognitional demand. As the Staff Association at the same time was making demands that certain employees be reinstated and that others be fired, it is virtually impossible to ascertain whether those persons who indicated their support, by remaining seated, were supporting all the demands, or were supporting some but not all the demands.[30]

Fourth, the fact remains that when the people present at the meeting of September 3 were asked if they supported the demands, a majority of those present indicated their opposition by standing up. As the Staff Association did not indicate that it was seeking recognition in two separate bargaining units (or any particular unit for that matter), the Respondent was entitled to assume, based on the poll as taken, that a majority of the people did not support either the demand for recognition or the other demands. In this respect the "vote" was taken on the entirety of the demands, and no effort was made to segregate the voters by separating the professional from the nonprofessional employees, the regular employees from the Federal Government employees, or the supervisory and managerial employees from the rank-and-file employees. In fact, they all "voted" together and no tally was made.

In conclusion, it seems to me that the facts of this case are so removed from the facts of *Sullivan Electric* and related cases, so as to make the rationale of those cases entirely inapplicable. It therefore is found that the poll taken on September 3 did not impose any obligation on the Respondent to recognize and bargain with the Staff Association. As such I shall recommend the dismissal of all of the 8(a)(5) allegations of the complaint.[31] With respect to the same transaction, I shall also recommend dismissal insofar as the General Counsel's allegation that the Respondent gave the impression of surveillance when it stated at the September 3 meeting that it was aware that certain demands were going to be made. As it clearly was the intention of the Staff Association to make these demands at this very meeting, I cannot see how this single statement of anticipation would violate the Act.

B. *The Discharge of William Zayerz*

It initially is noted that I reject Respondent's contention that Zayerz was in September 1980 an independent contractor. In deciding whether an individual is an employee or an independent contractor, the Board uses a "right to control" test. See, e.g., *NLRB v. United Insurance Co.* 390 U.S. 254, 256 (1968). In *Caribe Hilton Hotel v. NLRB*, 690 F 2d 318, 320 (2d Cir. 1982), the court stated:

> Under the common law test an employer-employee relationship exists if the purported employer controls or has the right to control both the result to be accomplished and the "manner and means" by which the purported employee brings about the result. . . . Factors which may be considered in determining employee status include: whether the purported employee is engaged in a distinct occupation or business; whether the work involved is usually done under the employer's direction or by an unsupervised specialist; the skill involved; who supplies the instrumentalities and place of performance; the length of employment; the method of payment (by

[30] It is entirely possible, for example, that an employee remained seated because he or she supported the demand for reinstatement but not the demand for recognition.

[31] Included in the allegations dismissed are the contentions that the Respondent violated Sec. 8(a)(5) by failing to bargain with the Staff Association before closing the Health Connection and laying off employees Dr. Berkman, Tannenhouse, and Anna Burns. Also dismissed is the allegation that the Respondent failed to bargain when it did not notify or give the Staff Association an opportunity to bargain before temporarily closing the facility in November 1980.

> the time or by the job); whether the work is part of the employer's regular business and/or necessary to it; and the intent of the parties creating the relationship. Restatement (Second) of Agency § 220(2). No single factor is determinative . . . .

In the present case Zayerz originally began working at Betances as a student placement while going to college. In the spring of 1980 he obtained his Masters of Social Work and no longer was a student placement. Nevertheless, he continued to work at Betances doing certain projects under the direction and supervision of Paul Ramos. Although no withholdings for social security or income taxes were made from Zayerz' earnings, and he apparently was paid from a "consulting" line on the budget, this by itself does not establish that Zayerz was an independent contractor. As it is my conclusion, based on the record as a whole, that Betances through Paul Ramos, controlled the results to be accomplished and the manner and means by which Zayerz was to bring about those results, it is found that he was an employee.

As noted above, the Staff Association was created on August 27 at the home of Zayerz. Also, at the meeting on September 3, when Respondent asked those present if they supported the Staff Association's demands, Zayerz raised an objection and asked if immunity would be given to those who supported the demands. At some point after the demands were ready by Deborah Pacheco, Paul Ramos told Zayerz, in front of the assemblage, that funds for his position had just run out. Thus, it was in this context that Zayerz was told that he was being let go. Additionally, on September 9, when Zayerz spoke to Paul Ramos, the latter told him that there were no funds for his position and that he would not have Zayerz working because he was not loyal to Ramos. When members of the Staff Association met with Ramos on September 10 to ask for Zayerz' reinstatement, Ramos, while asserting that Zayerz had been "retrenched" for economic reasons, also said that Zayerz had betrayed him and was "stabbing him in the back."

In juxtaposition to the above, Zayerz conceded that in the summer of 1980, and therefore *before* the Staff Association was formed, he had been told by Ramos that money for his position might not be available and that Zayerz ought to consider applying for a position with the National Health Service Corps as that would eliminate Respondent's cost for his position. The evidence also establishes that when the Federal Government did not grant all the money requested by Betances, there was, in the summer of 1980, an incipient crisis as far as the Respondent was concerned. In this respect, Dr. Solomon conceded that at management meetings held during the summer, it was the consensus opinion that Zayerz' job was expendable in a fiscal crunch.[32]

Although Paul Ramos testified that the management group had made its decision in the summer to terminate Zayerz, the testimony of Wanda Evans indicates to the contrary. In this regard, Evans stated that when the Federal Government in May denied Betances full request for funds, it was the opinion of the management committee during the spring and summer that if projected revenues from other sources met projected levels, it was "hoped" that no cutbacks in personnel would have to be made. She testified, therefore, that decisions regarding personnel were deferred. Evans also testified that during this time it was "hoped" that Betances' request for a supplemental grant might be approved by the Federal Government. According to Evans, the "crunch" came on September 15 when Arthur Fernandez officially notified Betances that the supplemental grant request was not approved. It was at this point, according to Evans, that a hard decision had to be made because other revenues were not coming in as projected. Thus, according to Evans, the decisions to cut back on personnel came after September 15.

In light of the above, it is my opinion that the announcement of Zayerz' discharge on September 3 was not motivated by Respondent's financial situation, but rather was motivated because Ramos was angered at Zayerz' participation in and support of the Staff Association and its demands. As Zayerz' activity in this respect is construed as protected concerted activity within the meaning of Section 7 of the Act, it is my belief that his discharge violated Section 8(a)(1) and (3) of the Act. However, it also is clear to me that Zayerz would nevertheless have been let go for economic reasons either at the same time as Judy Statler, on September 26, 1980, or at the latest, on September 30, when Dr. Berkman, Jini Tannenhouse, and Anna Burns were let go for economic reasons. As the record indicated that Zayerz was paid through September 18, the Company's backpay liability should be, at most, for 12 days. Also, as I conclude that the facts show that Zayerz would have been let go within a short time for legitimate economic reasons, I shall recommend that Respondent not be required to offer him reinstatement.

C. *The Layoffs of Tannenhouse, Dr. Berkman, and Burns*

The record in this case indicates that when the Federal Government, in the spring of 1980, did not grant the entire amount requested by Betances, it was the hope of Betances' management that its operations could continue at current staffing levels without the additional money. Nevertheless, the record also indicates that this was, indeed, only a "hope," based on the expectation that increases in salaries and fringe benefits would be deferred and that projected revenues from sources such as medicare, medicaid, patient, and third-party payment would meet certain expectations.

It also was established that during the spring and summer of 1980 the Federal Government was seriously considering cutting off *all* future grants to Betances because medical productivity was not meeting the minimum level required as a condition of the grants. This was made clear by the testimony of Arthur Fernandez who stated that he had to convince his superiors to continue the grants. Also, in this respect, Passer testified that

[32] In Dr. Solomon's report to the National Health Service Corps, she also stated that Zayerz had "long been out of favor with the project director," and that this dated back a year or so in connection with Zayerz' complaint that Roni Ramos was undermining his efforts at the Health Connection.

the productivity problem was the great concern to the Federal Government and that there were essentially two ways that Betances could solve this problem: (1) by reducing the number of physicians, or (2) by increasing the patient load per physician.

In addition, the evidence establishes that during the same period of time, Betances applied for a supplemental grant and urged the community to lobby the Federal Government for additional funds.

In the face of the above, the management committee of Betances (Paul Ramos, Wanda Evans, and Dr. Patricia Solomon) held a series of meetings during the summer of 1980. As testified to by Evans and Dr. Solomon, it was the consensus to defer any personnel decisions in the hope that additional money would be forthcoming from either the Federal Government or from other sources.[33] Dr. Solomon testified, however, that the management group did decide that if a financial crunch did develop, then the Health Connection should be closed (where Anna Burns and Roni Ramos worked), that Zayerz' job was expendable, and that the patient providers not being paid by the Federal Government (Dr. Berkman and Jini Tannenhouse) would be let go.

On September 15, 1980, Fernandez, on behalf of the Federal Government, notified Betances that its request for supplemental funds was being rejected because of the continued low level of productivity. It was at this point, according to the credible testimony of Evans, that hard decisions had to be made as expected revenues from other sources were not meeting projected levels. She testified that the decisions made at that time included: (1) terminating the Health Connection, (2) terminating the services of Judy Statler, (3) terminating the services of Paul Rivers, and (4) terminating the services of Dr. Berkman and Jini Tannenhouse. Regarding the closure of the Health Connection, which resulted in the terminations of Anna Burns and Roni Ramos, the General Counsel does not allege that this decision was motivated by discriminatory considerations. He therefore concedes that this decision was motivated by economic considerations. With respect to Dr. Berkman[34] and Jini Tannenhouse, Evans credibly testified that their selection for layoff was motivated by two factors. First, she testified that the decision was made so as to save money. Second, she testified that in view of the productivity problem, it made sense to eliminate two of the patient providers and to relegate the existing patient load to the other providers, thereby increasing productivity. As all the other patient providers (Dr. Solomon, Dr. Alpert, and Ana Paez) were employees of the Federal Government, whose salaries were not being paid by Betances, the choice of Dr. Berkman and Jini Tannenhouse was therefore obvious, even though Dr. Berkman was, himself, very productive.

Although there is no question but that Dr. Berkman was at the forefront of the Staff Association and had engendered Paul Ramos' anger because of his activities in that regard, there is little doubt in my mind that the decision to terminate the employment of Dr. Berkman and Jini Tannenhouse was the result of the financial and productivity problems that necessitated this result. I therefore conclude that their terminations were not motivated because of their protected concerted activities or activities on behalf of the Staff Association. Accordingly it is concluded that their discharges were not violative of Section 8(a)(1) and (3) of the Act. Also, as I have already concluded that Betances was not under any obligation to recognize or bargain with the Staff Association, it is concluded that the Respondent did not violate Section 8(a)(5) when it chose to close the Health Connection and terminate the employment of Dr. Berkman, Jini Tannenhouse, and Anna Burns, without first having given the Staff Association an opportunity to bargain about those decisions.

With respect to Anna Burns, there is no doubt that as she worked at the Health Connection, which was closed due to legitimate economic considerations, that her discharge cannot be violative of Section 8(a)(1) and (3) of the Act. The General Counsel postulates, however, that the Respondent violated Section 8(a)(3) when Paul Ramos told her that because of her involvement in the Staff Association's activities, he would not rehire her when the Health Connection reopened. Although this was not specifically denied by Ramos, the evidence indicates that the decision to close the Health Connection was of a permanent nature, and this alleged statement therefore seems too highly improbable to be credited. In fact, the Health Connection was never reopened.

D. *Discharge of Garcia*

As noted by the judge in his unemployment case, Garcia had a record of excessive absenteeism and lateness. Moreover, he had previously been placed on probation. There is, in fact, little dispute about that findings of fact, which is amply supported by this record.

There are, however, other facts that came to my attention which may not have been known to the judge or the State Department of Labor when he denied Garcia for unemployment insurance benefits.[35]

Notwithstanding Garcia's longstanding and chronic problem with absences and lateness, the evidence shows that Ramos overlooked this problem and placed a certain degree of trust in Garcia before September 3, 1980. Thus, Garcia was asked by Ramos, during the summer of 1980, to take care of his house while Ramos was on vacation. Also, Garcia was given the key to open Betances when he arrived in the morning.[36]

After the September 3 meeting in which the Staff Association made its demands, Ramos visited Garcia at his home and warned Garcia to "watch his step." In this regard, he told Garcia that he had helped Garcia in the past and that Garcia should not go against him. Garcia

[33] For example, Judy Statler's services were retained to write up grant proposals. She was retained on the condition that her pay would be exceeded by whatever grants she could generate.

[34] For the same reasons applicable to Zayerz, I find that Dr. Berkman was an employee of Betances, rather than an independent contractor.

[35] The Board has consistently held that decisions by judges in unemployment cases are admissable in unfair labor practices proceedings and are of some probative value. They are not, however, controlling as to their findings of fact or conclusions of law. *Western Publishing Co.*, 263 NLRB 110 (1982).

[36] On September 11, 1980, the key was taken away from Garcia because he failed to arrive on time and other employees were locked out.

responded that, although he liked Ramos, he also liked the other employees. Ramos, in turn, told Garcia, "If that's what you want."

About September 5, Garcia was elected to be on the Staff Association's grievance committee and he was present when that committee met with Ramos on September 10 to ask for the reinstatement of Zayerz. At the conclusion of the meeting, when Ramos refused to change his mind about Zayerz, a 1-day strike commenced and there is little doubt about Ramos' adverse reaction to this and the other strikes that thereafter ensued. (See for example his comments in the community bulletin referred to above.)

Although the reasons given for Garcia's discharge would be plausible in most other circumstances, the evidence shows that lateness and absenteeism at Betances was common, indeed chronic, among Respondent's employees. It also was shown that this was generally dealt with by docking an individual's pay. There clearly were other employees who were often late or absent and Carmen Altus, who was absent and late a substantially similar number of times as Garcia, did not lose her job.

Accordingly, it is concluded that Garcia was not fired because of his admitted excessive absence and latenesses, but rather because of his association with the participation in the activities of the Staff Association. In this respect, I therefore find that his discharge violated Section 8(a)(1) and (3) of the Act.

E. *Transfer of the Federal Employees, Dr. Solomon, Paez, and Gleaton, Warning to Gonzalez on October 8, 1980*

The simple and conclusive answer to whether the Respondent violated the Act when it successfully requested the Federal Government (i.e., the National Health Service Corps) to transfer the Federal assignees out of Betances is that these persons were neither employees of Respondent nor employees within the meaning of the Act.

At the hearing, the General Counsel proposed the analogy that in certain circumstances the Board has held that the discharge of supervisors is violative of the Act, even though such supervisors are not employees as defined in the Act. After the hearing closed, the Board, in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), overruled the line of cases with which the General Counsel was seeking to make his analogy. Therefore, it is recommended that the complaint, insofar as it alleges the illegality of the transfers of Dr. Solomon, Gleaton, and Paez should be dismissed.

With respect to the warning issued to Betty Gonzalez on October 8, 1980, it is apparent that this warning was issued to her because she attended a meeting on October 7 at the National Health Service Corps in which the Federal assignees were reminded that they were not entitled to engage in strikes. It appears, therefore, that she attended this meeting (with the permission of Dr. Solomon) in her role as a member of the Staff Association in order to assist or counsel those persons. Nevertheless, as the Federal employees were not and cannot be construed as employees enjoying the protection of the National Labor Relations Act, Gonzalez' appearance at this meeting cannot be said to have constituted protected concerted activity within the meaning of Section 7 of the Act. This is so because she was not acting in concert with "employees" as defined in the Act. As such, it is concluded that this allegation of the complaint should also be dismissed.

F. *The Discharges of Gonzalez, Feliciano, and Morales*

Although an employer may not discharge employees because of their union or protected concerted activities, the fact that employees engage in such actions does not give them an impregnable shield from otherwise justifiable discipline. Such, I think, is the case herein.

Although there may be some differences about detail, the principal events of October 24, 1980, are not in serious dispute. On that morning Dr. Alpert, who had just been designated as medical director, was the only medical practitioner at the center, and was attempting to cope with patients who were scheduled to see not only himself, but also Dr. Solomon, Patricia Gleaton, and Ana Paez. At some point, he needed to see Debrorah Pacheco, the laboratory technician, and asked the receptionist, Elva Morales, to page Pacheco. Instead of carrying out Dr. Alpert's order, Morales at first ignored him, and then told him to page Pacheco himself. As this was a part of Morales' job, Dr. Alpert was understandably annoyed and wrote a memorandum about this incident to Paul Ramos. Later in the day, Dr. Alpert asked Betty Gonzalez to prepare a patient (her normal job) and she told him to do it himself. Still later, Dr. Alpert found a condom on his desk and when he came out with it, the three employees, Nancy Feliciano, Betty Gonzalez, and Elva Morales, laughed at him. At still another point during the day, Dr. Alpert heard Ms. Gonzalez telling patients that he was a lousy physician who had caused the transfer of the others. In face of these events, Dr. Alpert wrote another memorandum to Paul Ramos and Wanda Evans complaining of the behavior of the three employees and demanding that disciplinary action be taken immediately. He also orally told management that either they should be fired or that he would leave.[37]

There is no question in my mind that the three employees, from Dr. Alpert's and from any objective point of view, were involved in a series of transactions designed to ridicule and undermine Dr. Alpert's authority as medical director. In short, their conduct on October 24 can only be described as highly insubordinate.

Although there is evidence in this record to the effect that the Respondent, before October 24, was thinking of firing Betty Gonzalez because of her role in the Staff Association,[38] the facts show that Gonzalez, by her con-

[37] In this context, an alleged statement to Pacheco by Dr. Alpert, on October 24, that Betances was going to get rid of the troublemakers does not imply that the Company was motivated by the employees' union activities.

[38] See the testimony of Pacheco concerning her conversation with Supervisor Eladio Reyues wherein he allegedly told her, around October 18, that Betty Gonzalez was going to be fired.

duct on October 24, gave the Respondent ample and good cause to discharge her. Indeed, the credible testimony of Wanda Evans was that to the extent that the employees' support for the Staff Association was discussed, it was mentioned not as a reason for discharge, but rather as a reason for not taking such action. Thus, according to Evans, management was concerned that if they did discharge the three employees, this might lead to an adverse reaction by the remaining staff and precipitate another strike. She testified that given the lack of respect shown to Dr. Alpert as medical director there was no alternative but to discharge the three employees. I agree, and shall recommend that these allegations of the complaint be dismissed.

G. *Discharge of Deborah Pacheco*

When the three National Health Service Corps assignees were transferred out of Betances, the employees comprising the Staff Association decided to commence a strike on Monday, October 27, 1980. Such a strike did ensue on that date and Deborah Pacheco participated in that strike. There is no dispute about the fact that she was discharged because of her participation in the strike. The Staff Association did not, however, give the written 10-day notices required by Section 8(g) of the Act. In support of his case, the General Counsel states:

> Although the undersigned strenuously agrees that the Association herein is a labor organization within the meaning of Section 2(5) it is far from a sophisticated labor organization and it possesses no affiliation with such a labor organization. It is a loosely organized band of employees which sought mutual aid and protection. Certainly it is not the type of entity envisioned by Section 8(g). Further, and perhaps more compelling, is the fact that on October 27, everyone in the Association, with the exception of Lisa Garcia, who abandoned her support for it, had been discharged. Pacheco was an employee working alone. Finally, there can be no question that the pervasive and insidious pattern of unfair labor practices committed by Respondent caused the walk out by Pacheco and therefore no notice was required.

I agree with the General Counsel to the extent that if there had never existed a Staff Association, the ensuing strike by the employees would not have required the 8(g) notices.[39] However, it seems to me that the General Counsel is, in effect, seeking to have his cake while eating it. On the one hand he asserts that the Staff Association is a labor organization within the meaning of Section 2(5) of the Act, with which the Respondent has an obligation to bargain, while asserting, on the other hand, that it is not a labor organization within the meaning of Section 8(g) of the Act. I can see no statutory support for this proposition, and the case cited by the General Counsel is inapposite. In *A & D Davenport, Inc.*, 256 NLRB 463 (1981), the Board held that 8(g) notices were not required from an employee group that was unaffiliated with any existing labor organization, was unstructured, and was only presenting grievances. However, the Board also concluded that the group in question was not a "statutorily defined labor organization."

Regarding the contention that the strike of October 27 was caused by the "pervasive and insidious pattern of unfair labor practices" the facts show that the proximate cause of the strike was the transfer of the Federal employees out of Betances that was not an unfair labor practice. Also, to the extent that the decision to strike may have been reinforced by the Company's decision to discharge Betty Gonzalez, Nancy Feliciano, and Elva Morales, I have previously concluded that such discharges were not violative of the Act. The only unlawful action by the Respondent proceeding this strike was the discharge of Martin Garcia on October 9. However, to the extent that the strike may have been called to include a protest over his discharge, this is not considered by me as such a "serious" or "flagrant" unfair labor practice so as to excuse the failure to tender the proper 8(g) notices.[40]

The General Counsel asserts that on October 27 everyone in the Association with the exception of Lisa Garcia had been discharged. I am not sure what is intended by this statement other than to reassert, as previously asserted, that the Employer's conduct was flagrant. Yet, I have concluded above that most of the discharges, with exception of William Zayerz on September 9 and Martin Garcia on October 9, were for good cause shown.

In view of my agreement with the General Counsel that the Staff Association was indeed a labor organization within the meaning of Section 2(5) of the Act, I must also conclude that it was required to give the proper 8(g) notice prior to the strike of October 27. As it did not do so, and as I do not view the Employer's conduct as being of such a serious or flagrant nature so as to nullify the notice requirements, I conclude that the discharge of Pacheco was privileged under Section 8(d) of the Act.

H. *Closing of Betances on November 17, 1980*

It is the General Counsel's theory that the Employer violated Section 8(a)(5) of the Act when it temporarily closed its facility from November 17, 1980, to mid-January 1981 without first having given notice to and offering to bargain about the decision with the Staff Association. As I have concluded above that the Staff Association was not entitled to bargaining rights, and was not therefore the exclusive collective-bargaining representative of Betances' employees, I shall recommend that this allegation be dismissed.

---

[39] In *Walker Methodist Residence*, 227 NLRB 1630 (1977), the Board held that Sec. 8(g) only applies to labor organizations and does not apply to work stoppages engaged in by unorganized employees.

[40] In *Cedercrest, Inc.*, 246 NLRB 870, 876 (1978), the judge, in an opinion adopted by the Board, concluded that "serious" or "flagrant" unfair labor practices which provoke a strike, may abrogate the 8(g) notice requirements. See also *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

CONCLUSIONS OF LAW

1. Betances Health Unit, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health-related facility within the meaning of Section 2(14) of the Act.

2. The Betances Health Unit Staff Association is a labor organization within the meaning of Section 2(5) of the Act.

3. The discharge of William Zayerz constituted a violation of Section 8(a)(1) and (3) of the Act.

4. The discharge of Martin Garcia constituted a violation of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except to the extent herein found, the Respondent has not violated the Act in any other manner.

THE REMEDY

Having found that the Respondent had engaged in certain violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and that it take certain affirmative action to effectuate the policies of the Act.

With respect to Martin Garcia, I shall recommend that he be made whole and that the Employer offer him full and immediate reinstatement to his former position of employment or, if it no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges.

In the case of William Zayerz it is my conclusion that this case essentially involves one of an accelerated discharge. Thus, although I have concluded that his discharge on September 9 was motivated by discriminatory reasons, I have also concluded that because of the Company's financial situation after September 15, he would have been let go either on September 26 or no later than September 30. As Mr. Zayerz was paid through September 18, his loss would only be for 12 days at most. Also, because I have concluded that Zayerz would have lost his job no later than September 30 for legitimate reasons, I shall not order that the Company be required to offer him reinstatement.

In both cases of lost pay, the amounts of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). Additionally, it is recommended that the Respondent remove from its files any reference to the discharge of Martin Garcia and to notify him, in writing, that this had been done, and that evidence thereof shall not be used as a basis for future personnel actions against him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

The Respondent, Betances Health Unit, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their membership in or participation in the activities of the Betances Health Unit Staff Association, or any other labor organization, or because of their protected concerted activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Martin Garcia immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Remove from its files any reference to the discharge of Martin Garcia on October 9, and notify him, in writing that this has been done, and that evidence thereof shall not be used as a basis for future personnel actions against him.

(d) Post at its place of business copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violation not specifically found.

---

[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[42] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Delta Gas, Inc., a subsidiary of Louisiana Energy & Development Corporation *and* Oil, Chemical & Atomic Workers International Union and its Local 4–447. Cases 15–CA–9809 and 15–RC–7190

30 March 1987

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 9 September 1986 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief[1] in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Delta Gas, Inc., A Subsidiary of Louisiana Energy & Development Corporation, Homeplace, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] In her brief the General Counsel requests that the Board modify the judge's recommended Order to include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Order. We have concluded that under the circumstances of this case such a clause is not warranted.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge inadvertently failed to include in his notice a provision ordering the Respondent to remove from its files any reference to the unlawful denial of wage increases to August Mackey, J. C. Ragas, and Mervin Riley and to its discharge of Riley and to notify them that this has been done. We shall therefore issue a new notice to employees which includes this provision.

Member Johansen does not adopt the judge's characterization of the Board's decisions in *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983), and *Garrett Flexible Products*, 270 NLRB 1167 (1984).

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Oil, Chemical & Atomic Workers International Union and its Local 4–447, and it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees including meter readers/servicemen, measurement technicians, welders, construction and repair crewmen and warehouse employees employed by the Employer at its Homeplace and Jonesboro, Louisiana facilities; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you that you have been denied a pay increase because of your union and protected activities.

WE WILL NOT tell you that you will not receive a wage increase because you and the Labor Board have sued the Company.

WE WILL NOT deny you pay increases because you engage in union activities, or give testimony, or engage in other concerted activities protected under the National Labor Relations Act.

WE WILL NOT discharge you because you engage in union activities, give testimony, or engage in other concerted activities protected under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exer-

cise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Mervin Riley to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges.

WE WILL make August Mackey, J. C. Ragas, and Mervin Riley whole for any loss or earnings they may have suffered by reason of our discrimination against them with interest.

WE WILL notify August Mackey, J. C. Ragas, and Mervin Riley that we have removed from our files any references to their failure to receive wage increases and to Riley's discharge.

WE WILL notify them in writing that this has been done and that evidence of our unlawful actions will not be used as a basis for future personnel action against any of these employees.

DELTA GAS, INC., A SUBSIDIARY OF LOUISIANA ENERGY & DEVELOPMENT CORPORATION

Clement J. Kennington, Esq., for the General Counsel.
James E. Bergerson, of Marrero, Louisiana, for the Union.
Frederick S. Kullman, Esq., Sidney F. Lewis, Esq., and *Logan L. Loomis, Esq.*, of New Orleans, Louisiana, for the Employer.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in New Orleans, Louisiana, on 17 and 18 March and 9, 10, and 11 April 1986. The charge in Case 15–CA–9809 was filed by Oil, Chemical & Atomic Workers International Union and its Local 4–447 on 22 October 1985 and amended on 27 and 29 November 1985. In its answer and through stipulation at the hearing, Respondent admitted that at material times it has been an employer, incorporated in Louisiana, with a facility located at Homeplace, Louisiana, where it is engaged in the business of transporting and distributing natural gas; and, during a representative 12-month period, it derived gross revenues in excess of $250,000 and purchased natural gas through its interstate system, from outside the State of Louisiana, valued in excess of $50,000; and that it is an employer within the meaning of Section 2(2), engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (Act). Respondent also admitted that the Charging Party (Union) is a labor organization within the meaning of Section 2(5) of the Act.

In its answer Respondent alleged that it has been denied due process by the General Counsel serving Respondent with amended charges on and 3 days after the day Respondent received the complaint. No evidence was offered at the hearing to further support Respondent's allegation that it was denied due process. I find, on the basis of the information before me, that Respondent was not denied due process.

Respondent also admitted the complaint allegation that Ed Daigle, vice president of engineering and operations, and Lawrence Williams, distribution supervisor, are supervisors of Respondent within the meaning of Section 2(11) of the Act. Respondent denied that Daigle and Williams are its agents. On the basis of the entire record and the provisions of Section 2(13) of the Act, I find that both Daigle and Williams were agents of Respondent at all material times. Daigle, who has his office in New Orleans, is one of Respondent's supervisors with overall authority over its Homeplace operations. Williams is the on-board supervisor at Homeplace with supervisory authority over a majority of the Homeplace work force. Both Daigle and Williams supervise other lower-level supervisors.

The complaint, as amended at the hearing, alleged and Respondent denied that Respondent violated Section 8(a)(1) by threatening employees that they had not received a wage increase because of their union and protected concerted activities; by threatening an employee that it had terminated another employee because of his union and/or protected concerted activities; and by telling its employees that they would not receive a wage increase because of the pending unfair labor practice charges in Case 15–CA–9809; and that Respondent violated Section 8(a)(1), (3), and (4) by refusing to grant wage increases to employees August Mackey, J. C. Ragas, and Mervin Riley since 1 October 1985; and by discharging Mervin Riley on 17 October 1985 because of the employees' union activities and/or protected concerted activities and/or because of the employees' testimony in a prior unfair labor practice hearing.

Additionally in accord with proceedings in Case 15–RC–7190, at issue are six challenged ballots and matters regarding the Employer's (Respondent) objections to conduct affecting the results of an NLRB election conducted on 19 and 20 September 1985. The bargaining unit set forth in the Decision and Direction of Election is as follows:

> All production and maintenance employees including meter readers/servicemen, measurement technicians, welders, construction and repair crewmen and warehouse and employees employed by the Employer at its Homeplace and Jonesboro, Louisiana facilities; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

The tally of ballots shows 13 votes were cast for the Union (Charging Party), 9 votes were cast against the Union, and there were 6 challenged ballots. The challenged ballots are sufficient in number to affect the result of the election. Those challenges were to the ballots of Gerald Ragas, August Mackey, J. C. Ragas, Timothy Williams, Sam Cooper, and Steve Lehew.

The objections to be considered herein relate to the Respondent's Objections 2, 4, and 5 "insofar as they relate to the facts and surrounding circumstances of the

alleged threats directed against employee Douglas Dinet on or about 2 August 1985." (See G.C. Exhs. 1(X) and 1(Z)).[1]

Case 15–RC–7190

The Challenged Ballots

1. Respondent, the Employer, challenged the ballots of Gerald Ragas, August Mackey, and J. C. Ragas alleging that each of those three is a supervisor.

Gerald Ragas: Gerald Ragas testified that since March 1985 he has been over the construction crew which included employees Shaftner Williams, Douglas Dinet, Patrick Dinet, Errol Turner, Dwight Bartholomew, and Mervin Riley. When Ragas assumed his position over the construction crew he was told by Superintendent Lawrence Williams[2] that he had authority to "suspend employees." Ragas receives daily orders from Lawrence Williams and it is Ragas' responsibility to see that the construction crew satisfactorily performs Williams' orders. Ragas admitted that he once directed employee Patrick Williams to either do a specific job or "the next time go home." In an earlier unfair labor practice proceeding, Case 15–CA–9709, Gerald Ragas admitted that Lawrence Williams told him that he was promoted to supervisor (see G.C. Exh. 15).

The Union argues that Ragas never exercised his authority to suspend employees and that Respondent's position is not supported by documentation in its files. The Union also argued that neither Gerald Ragas nor the construction crew viewed Ragas as the boss. Concerning the Union's first point, while Ragas has never suspended anyone, he has threatened use of that authority as evidenced by his testimony regarding Patrick Willimas. Concerning documentation, although some employers maintain office files documenting all promotion, especially promotions to supervisory positions, the Act does not require such documentation. A person may be a supervisor even though there is no documentation supporting his promotion. Finally, concerning how the crew views Ragas, I note that one of General Counsel's witnesses, Dwight Bartholomew, a member of the construction crew, testified that both Lawrence Williams and Gerald Ragas supervise his crew. Even though Bartholomew's testimony was conclusionary, it does tend to undermine the Union's contention that the crew did not consider Ragas as their boss.

Lawrence Williams testified regarding Gerald Ragas' promotion:

> I told him I needed him, I want to give him a promotion to be supervisor over construction and maintenance, and what his duties was, you know, what his duty was as a supervisor. I would hand him—give him the work down, he pass it to the crew. He see that the crew do the work. If the crew didn't do the work, then he reported back to me. And I also give him the authority to get out there, if somebody won't do what he want them to do, bring them to me or either suspend them for X amount of days, as many days as he wanted to. I give him that authority. And he accepted that.

Finally, I note that all counsel stipulated that Gerald Ragas is a supervisor (see Tr. 323).

The evidence shows that Ragas directed work of the construction crew, possessed the authority to suspend employees, and threatened to suspend an employee. I find that he qualifies under the definition of supervisor stated in Section 2(11) of the Act. *Big Rivers Electric Corp.*, 266 NLRB 380 (1983); *Spring Valley Farms*, 272 NLRB 1323 (1984).

Therefore, I recommend that the challenge to the ballot of Gerald Ragas be sustained.

August Mackey: August Mackey testified that he has worked for Respondent for about 18 years. Mackey's employee data sheet shows that he was hired on 4 December 1967 and that since 1 November 1980 Mackey has held the position of "chief service man & plant operator."

Mackey testified that he installs and disconnects gas meters, lights pilot lights, and "things like that." According to Mackey he and one other employee, serviceman helper Patrick Dinet, make up his crew. Mackey testified that when requested to help by another employee, including Claudia Phillips, Mackey would help that employee.

According to Mackey, on two occasions, once by Lawrence Williams and on another occasion by Ed Daigle and Lawrence Williams, he was told that "if somebody do something wrong I can give them a few days off, but I couldn't fire them." Mackey recalled that the first of those two occasions occurred after the representation hearing and prior to the election in Case 15–RC–7190. In a pretrial affidavit given the Regional Office, Mackey testified:

> Williams told me for the first time after the first NLRB hearing in this matter that I am a supervisor, and I can discipline employees, but I can't hire or fire. That was the first I had heard of any such authority. I did not agree with his statement. Since then my duties and responsibilities have not changed.

Mackey admitted that Vice President Ed Daigle told him:

---

[1] Over objection by the General Counsel, Respondent also introduced evidence which it alleged to be objectionable from employee Steve Lehew regarding alleged comments by employee Errol Turner at a "shrimp boil or barbecue" sometime in July 1985. I have reviewed the entire record and I find that Lehew's testimony in that regard is outside the scope of the Board's Order directing a hearing on Respondent's objections. The Board's Order specifically reversed the Regional Director's Supplemental Decision and Order regarding "Employer's Objections 2, 4, and 5 insofar as they relate to the facts and surrounding circumstances of the alleged threats directed against employee Douglas Dinet on or about 2 August 1985."

The testimony at issue clearly involves employees, a date, and a place other than those involved in the incident specified in the Board Order. Therefore I shall not consider that testimony in my determination regarding the objections.

[2] In the complaint as noted above Lawrence Williams is designated supervisor. However, at various places in the record and on occasion in this decision, Williams is referred to as the superintendent.

"We just want to advise you of your powers." So he said, "August, you have the power to discipline. You don't have the power to fire, you don't have the power to hire." And I said, "I didn't know nothing about these powers." He said, "You always did have." And that was that.

Mackey testified he has never actually disciplined an employee. According to Mackey he does not assign work to employees. Mackey said that he gets his assignments on a work order from the office each morning.

Claudia Phillips, a meter reader, testified that on occasion "when we finished reading meters" she performs other duties including helping August Mackey "do service work." When asked if she had a supervisor she reported to, Phillips answered "August."

Under cross-examination by Respondent's counsel, Claudia Phillips testified:

Q. Has [Lawrence Williams] ever told you that August does not have the authority to suspend you?

A. Yes.

Q. When did he tell you that?

A. A very long time ago. When—I can't exactly say. When I was first hired. But it was just—during around that time he did tell me that.

Q. This would be around the end of 1981?

A. Oh, no.

Q. Well, I thought that's when you were hired, is what I—

A. Yes, I was hired in '81, but it was—I was hired in November.

Q. 1981?

A. Yes, I guess it was 81, and maybe, say maybe '83, '84. August is, you know, he's horrible sometimes.

Q. And you were worried about what he could do to your job?

A. Well, he—they used to get a kick out of making me cry, and they just would tease me and stuff. I always used to go to Lawrence, but he told me don't ever worry about August because he can't fire me or give me no time off or nothing like that.

Lawrence Williams testified that August Mackey was already supervisor over service and meter reading, when Williams became superintendent about 5 years ago. Williams recalled explaining August Mackey's duties to Mackey about 3 years ago:

A. Well, like I say, I was—I was being—you know, I had been superintendent for about two years. Okay, I was learning a lot of things that I didn't know about, and I didn't have time—you know, because he was already supervisor. I didn't have a chance to talk to him because I was in a learning process. Okay, after I caught on to what I needed to know, then me and him sat down and talked about it, and I told him what I would like him as a supervisor, and what was his duties.

Q. And what did you tell him?

A. I told him he was in charge of the meter readers and the service work. The meters readers, if they did wrong he was supposed to check them out. If the meter readers do something that need to be talked about, he talked to me. If they do something that offended him, he had, you know, offended him concerning the job, he had a right to suspend them also.

Williams testified that he, along with Ed Daigle, met with Mackey during the representation proceeding because Mackey was "always telling [Williams] that he's not a supervisor."

Ed Daigle recalled from his records that he discussed Mackey's duties with Mackey on 24 October 1985. According to Daigle:

Q. And who attended this meeting?

A. It was Lawrence Williams, August Mackey and myself.

Q. And what was said at this meeting?

A. I started the meeting by explaining to August that Lawrence had asked me to come down, that there seemed to be some question about what his job title and responsibilities were. I explained to him at that time, "August, you are, as you always have been, you are the supervisor for customer service. Your responsibilities are to direct the work of the meter readers and the servicemen, that you have the right to discipline those people, if they should do anything that you feel like they ought to be sent home for, you have the authority to send them home right there on the spot." It was pretty short and sweet, and that was the gist of it.

Q. What did he say, if anything?

A. He responded to me with a big smile and said, "Okay, I just wanted to know how it was," and that was the entire subject of the meeting.

Q. Were these responsibilities you've just described, were these new responsibilities?

A. No, they were not.

Q. Were they the responsibilities that he had as far as you were concerned ever since you had been with Delta Gas?

A. Since—since he was promoted to his position and since before my time at Delta Gas.

Conclusions: The testimony of Phillips, Mackey, Lawrence Williams, and Daigle, all indicate that August Mackey has exercised authority over both the meter reading crew and the service crew for a number of years. I am convinced through examination of the entire record, that Mackey's duties have not changed since his last promotion on 1 November 1980. The record shows that he is responsible for the work of five employees including service employees and meter readers. Moreover, as admitted by Mackey, he has been instructed on two or more occasions that he has the authority to discipline employees including the authority to send an employee home. Additionally, Mackey testified in a pretrial affidavit that he was told by Lawrence Williams that he is a supervisor. As in the case of Gerald Ragas, the record shows that Mackey is a supervisor as defined in Section

2(11) of the Act. I recommend that the challenge to Mackey's ballot be sustained.

J. C. Ragas: Ed Daigle testified that J. C. Ragas currently holds the nonsupervisory position of measurement technician. According to Daigle and records in the files, from 1 October 1984 until 10 October 1985 J. C. Ragas was a senior measurement technician. Daigle testified that during that period, J. C. Ragas had "the authority to discipline or suspend on the spot as the other two supervisors (Gerald Ragas and August Mackey)." Daigle testified that before 25 June 1985 J. C. Ragas directed the work of employee A. J. Duplessis, and after Duplessis moved out of the measurement section, various employees from the construction crew were assigned as J. C. Ragas' helper. On 10 October 1985 Ragas was displaced and demoted from senior measurement technician to measurement technician. Currently, Jim Barron holds the senior measurement technician position. However, Ed Daigle admitted that although he was the one that appointed J. C. Ragas to the position of senior measurement technician, he did not tell Ragas of his supervisory authority and, to his knowledge, no other supervisor explained to Ragas that Ragas was a supervisor.

A. J. Duplessis testified regarding his former position of meter technician assistant and his understanding of the authority of J. C. Ragas:

> Q. So J. C. was there to help train you?
>
> A. Right, J. C. was more or less training me in this line of work.
>
> Q. Did he have any authority to suspend you?
>
> A. No.
>
> Q. Who had that authority?
>
> A. Bobby Cure or Mr. Ed Daigle.
>
> Q. Did he have any authority to reprimand you?
>
> A. No. Not to my knowledge, he didn't. Never did.
>
> Q. Who was responsible for giving you your job assignments?
>
> A. Bobby Cure would make—well, the schedule would come from New Orleans office. We had a schedule to go by. It would come from the New Orleans office, and Bobby would make sure that it was being run by this schedule, or he would assign us jobs or change our positions, the jobs if we have to. If he had to change us from the schedule, well he'll change us, he'll tell us. He would tell J. C. and J. C. would say we had to do this, so we'd get it done.

J. C. Ragas testified that until 11 October 1985 he worked under the supervision of Bobby Cure. Ragas described his job as senior measurement technician:

> A. I test gas flow meters, change charts, sample gas, fight meters in—
>
> Q. I'm sorry, I couldn't hear you.
>
> A. Fight meters in, take specific gravities of gas, inspect orifice plates.
>
> Q. Is that orifice plates?
>
> A. Orifice plates, yes.

Ragas tested meters pursuant to a schedule prepared by his supervisor Bobby Cure. As to his alleged supervisory authority J. C. Ragas testified:

> Q. As a measurement technician, do you have any authority to discipline employees?
>
> A. No, I don't.
>
> Q. Do you have any authority to reprimand employees?
>
> A. No, I don't.
>
> Q. To send them home?
>
> A. No.
>
> Q. Who has that authority?
>
> A. Ed Daigle, I imagine or Robert Cure, I don't think he could discipline anybody, which—well, he did tell me, yeah, he could have disciplined me or sent me home, Robert Cure.
>
> Q. How about Mr. Baron, does he have any of that authority now?
>
> A. No, he never told me.
>
> Q. Who gives you your work orders?
>
> A. I get them from Jimmy Baron.
>
> Q. And before Mr. Baron?
>
> A. I used to get them from Robert Cure.

Ragas testified that only one employee worked under his direction:

> Q. And do have anybody now working with you as a helper?
>
> A. No, I don't.
>
> Q. When was the last time you've had a helper working for you?
>
> A. The last helper I had was A. J. Duplessis.
>
> Q. And when was that?
>
> A. Up until June, the last part of June when they took him out of measurement and put him back in the crew.
>
> Q. Doing what?
>
> A. I think he went back in the gang as a shovelman or whatever.
>
> Q. Shovelman, are you talking about a common laborer?
>
> A. Yes, sir.
>
> Q. Is there any—the type of work you do, is that anywhere related to that at all?
>
> A. No, sir, it's different.
>
> Q. Do you work with a shovel?
>
> A. No.
>
> Q. Do you have any authority to give out work assignments at all?
>
> A. No.

On cross-examination Ragas testified:

> Q. And at that time, the beginning of last year, you had A. J. Duplessis also working in measurement, correct?
>
> A. Yes.
>
> Q. And at that time were you not keeping A. J.'s time sheets for him?
>
> A. You mean keeping his time sheets?

Q. Yes.
A. Yes, sir.
Q. Keeping his time sheets, all right. And weren't you training him on what work to do out at the meters?
A. I was more or less training him, yeah.
Q. More or less? Weren't you the one training him?
A. Well, I was training him when he was working with me. He wasn't working all the time with me.
Q. Because sometimes he would work on some meters and you would work on others?
A. We'd go opposite ways.
Q. He did not know how, for example, to calibrate meters, did he?
A. No, he never got into it.
Q. You were supposed to be training him on that?
A. No, he wasn't there long enough.
Q. If he had stayed there you were the one who would train him on how to calibrate a meter?
A. Yes.
Q. And you were the one who trained him on how to change charts?
A. No.
Q. You didn't train him on anything, is that your testimony here today?
A. I never trained him on changing charts, no.
Q. What did you train him on?
A. I taught him how to catch a sample, how to run a gravity, how to get a dew point, how to change an orifice plate.

Conclusions: Unlike Gerald Ragas and August Mackey, J. C. Ragas was never told that he possessed any supervisory authority. The record proved that J. C. Ragas regularly engaged in routine duties as a measurement technician. He did not exercise independent judgment but followed the directions of his immediate supervisor Bob Cure. Cure had overall supervision of some five employees. After June 1985 J. C. Ragas worked without the assistance of a regular helper. As to his helper, the record showed that neither Ragas nor the helper understood that Ragas had any supervisory authority. Ragas never directed more than one employee, his helper, and the helper looked to Ragas' supervisor, Bob Cure, for all supervisory directions. I found that the record shows that J. C. Ragas was not a supervisor during material times. I recommend that the challenge to his ballot be overruled.

2. The Union challenged the ballot of Timothy Williams, Sam Cooper, and Steven Lehew.

Timothy Williams: Timothy Williams is a son of Homeplace superintendent Lawrence Williams. Lawrence Williams testified that he hired Timothy Williams after consulting with Ed Daigle. Lawrence Williams testified:

A. Okay. Tim is my son. Tim was going to college. Tim hadn't worked in 21 years, and Tim—it was a opportunity for him to get a job, and I had needed the money, because like I say, I had three other children in college, and that was a way for to help Tim out, and that's why I asked Mr. Daigle to help me out and help him out, and so that's why I give him a job. And so far as Tim working for me, Tim was a—it was working relationship. It wasn't a father and son deal. I treated him just like I treat my other employees.

According to Lawrence Williams, Timothy Williams was a full-time employee that received "no special favors." However, according to Lawrence Williams both he and Ed Daigle knew that Timothy Williams planned to quit his job and return to college in January 1986.[3] In that regard Lawrence Williams testified:

Q. And you hired your son, Tim Williams so that he could earn some money to go to college, didn't you?
A. Yeah.
Q. At the time you hired your son you knew he was going back to college.
A. Yeah, I knew he was going back.
Q. So Mr. Daigle was well aware of the fact when you hired Tim that he was only going to be there for the summer?
A. Yeah.
Q. And that he was going back to work in January [sic]?
A. Yeah.
Q. That was understood between you and Mr. Daigle and Timothy, wasn't it?
A. Yeah.
Q. And in fact Tim left and went back to school, didn't he?
A. That's right.
Q. As scheduled?
A. That's right. I told you why I hired him.

Lawrence Williams testified that Timothy Williams could not return to college until January 1986 and that Timothy planned to resign at that time.

The record contains Timothy Williams application for employment. That application shows a date of 6/18/85. At the bottom of the first page of the application Timothy Williams wrote: "I plan to continue my studies and become a Psychologist."

In the upper right-hand corner of Timothy Williams' application for employment the following notation appears: "hired temp. working 6 mos. only."

Respondent's "Employee Data Sheet" on Timothy Williams is also in the record. That document shows that Timothy Williams was hired on 8 August 1985 as a "Temporary Construction Worker" at the rate of $5.50 per hour. According to the testimony of Lawrence Wil-

[3] Daigle denied that he was told Timothy William planned to return to college in January. I credit the testimony of Lawrence Williams over Daigle's denial. Williams' testimony is fully supported by documents in file. Additionally, I was impressed with Williams' demeanor. Lawrence Williams has continued to be employed as Respondent's superintendent. There is no reason why he should be less than truthful regarding the employment of Timothy Williams. Lawrence Williams' testimony illustrated a keen recollection of the events surrounding the hiring of Timothy Williams. I am convinced that his recollection is good and that he testified truthfully.

liams, Timothy Williams worked until 17 January 1986, when he resigned to return to college.

Conclusions: It is obvious from Respondent's records and the credited testimony that Timothy Williams never planned to become a permanent employee. Moreover Respondent was fully aware of Timothy Williams' plans to return to school in January 1986.

Jurisprudence has established that temporary employees, like Timothy Williams, do not share sufficient community of interest with permanent unit employees to justify their inclusion in the bargaining unit. *Comet Corp.*, 261 NLRB 14141, 1438 (1982). Timothy Williams was hired for a definite limited period as shown on documents in his personnel file and he neither expressed a desire nor had a basis to consider that he would be retained or later recalled. *Meier & Frank Co.*, 272 NLRB 464 (1984). I find that Timothy Williams was a temporary employee and I recommend that the challenge to his ballot be sustained.

Sam Cooper: Sam Cooper was hired by Respondent on 10 August 1985 at a pay rate of $9 per hour.[4] Respondent's employee data sheet on Cooper contains a blank space under the column "position."

Cooper testified, "I'm self-employed and I also am employed by Delta Gas." Concerning his job classification with Respondent, Cooper testified:

> Q. Sam, at the time you were hired what was the job classification you were hired into?
>
> A. I guess—I'm not sure, I think it was Meter Technician.
>
> Q. Meter Technician?
>
> A. I'm not—I don't, I'm not sure what it was.

Cooper operates a lease service checking oil and gas wells on a "subcontract" basis for companies not associated with Respondent, including Apache Corporation and Sowell Oil and Gas. Concerning the amount of time Cooper works for Respondent each week, he testified: "It's usually about 20 hours, when I'm not too busy to help."

Cooper testified that when he is too busy with his lease service, he is unable to work for Respondent. According to Cooper, his personal business takes "preference" over his work for Respondent. Cooper worked on a normal schedule for Respondent, "unless something came up that I had an emergency." Then he could not report for work with the Respondent.

Cooper testified that his weekly schedule at Respondent has varied and the hours per day have fluctuated. Cooper recalled that he would sometimes receive a phone call from Respondent on the day before Respondent planned to change its charts and if his other work permitted he would report to Respondent to change charts on that day. As an example, Cooper testified regarding his most recent work. On the week of his testimony, March 17 through 21, Cooper was not scheduled to work for Respondent. On each of the 2 weeks before, Cooper had been scheduled to work for Respondent on each Thursday, but because he got "tied up" with his other business he did not work for Respondent on either of those weeks. Therefore, at the time of the hearing, Cooper had not worked for Respondent during any of the 3 weeks including the week of the hearing.[5]

Conclusions: The record shows that Sam Cooper is a casual employee who works on a sporadic, irregular basis, at his convenience and that his primary occupation is his lease service. I find that the circumstances of his employment are sufficient to sever any community of interest he may have had with the Respondent's regular unit employees. *Mariposa Press*, 273 NLRB 528, 530 fn. 12 (1984).

Steve Lehew: Steve Lehew was hired by Respondent on 18 July 1985 and he started work on 22 July 1985 as a pipeline technician at $9 per hour. Lehew reported to Bob Cure and worked at Respondent's Homeplace facility.

On 1 October 1985 Lehew transferred to Respondent's New Orleans office where his current position is "Gas Control." Concerning his employment out of Homeplace, from 22 July to 30 September 1985, Lehew testified that he did not work with any bargaining unit employees. Instead Lehew performed inspection of the work of an independent contractor in the construction of a 12-inch pipeline connecting Texas Gas Meter Station to Respondent's existing station. Lehew described his job:

> A. I was just inspecting to make sure that when Montero was building the pipe line they built it to our specifications, that there was no faults in the way they wrapped the pipe, protected the pipe, or inspected it. There's a—I was there as a backup.

In a pretrial affidavit Lehew testified that he had no work contact with any bargaining unit employees. At the hearing Lehew changed his testimony to reflect that he occasionally had contact with unit employees, maybe once or twice a week when he carried supplies or other needed items to one of the crews.

Lehew holds an A.S. degree in petroleum engineering.

Conclusions: The Union argues that Lehew should be excluded because he is a technician and has no community of interest with other unit employees.

It is true that Lehew holds a 2-year degree in petroleum engineering. However his job duties during the period before his transfer to New Orleans show that he did not engage in technical activities to a greater extent than several admitted unit employees.

Concerning community of interest, while Lehew had little or no job contacts with other unit employees, he did share common benefits, central job location, and supervision with other unit employees. Moreover, if Lehew is excluded, the position he occupied will be excluded from union representation because it would constitute a one-man unit.

[4] Other starting employees have received wage rates which varied from $3.25 per hour (in 1977) to $5.50 per hour (in 1984). Employees Sam Cooper and Steve Lehew (infra) were each hired in 1985 at pay rates of $9 per hour.

[5] Although the above example involved dates well after the election, there was no showing that Respondent had changed Cooper's job since the election.

I am mindful that Lehew's current position places him outside the scope of the unit. However, at the time of the election he was working out of Homeplace. I find that he should have been included in the unit at the time of the election and therefore, I recommend that the challenge to Lehew's ballot should be overruled.

In view of the above findings I recommend that a revised tally of ballots issue showing two challenge ballots, a number of insufficient to affect the election results.

The Objections

The Board, on 14 January 1986, directed consideration of the "employer's objections 2, 4, and 5 insofar as they relate to the facts and surrounding circumstances of the alleged threats directed against employee Douglas Dinet on or about 2 August 1985."

Douglas Dinet testified about his conversation with employee Mervin Riley on 2 August 1985:

> Q. Can you tell us as best you can remember what exchange if any did you and Mickey Riley have on that afternoon?
>
> A. About back pay.
>
> Q. About what?
>
> A. About back pay.
>
> Q. Can you tell us exactly what words was exchanged, as best you can remember?
>
> A. Let's see he asked me if—he asked me if I wasn't no back pay [sic], I told him. I didn't want to have nothing to do with back pay.
>
> Q. And was this back pay in reference to what, do you know?
>
> A. No, I don't.
>
> Q. Was it involving Union activity?
>
> A. No.
>
> Q. Was it a lawsuit?
>
> A. I guess it was, I don't know.
>
> Q. Did you sign a lawsuit against Delta Gas?
>
> A. No, I didn't sign no lawsuit.
>
> Q. Was that conversation you and Mickey had, did Mickey threaten you about joining the Union?
>
> A. No, he didn't threaten me about joining no Union.
>
> Q. Did Mickey threaten to fight with you that evening?
>
> A. No, he argued with me, but I told him I wasn't even going that route.
>
> Q. And the route was filing a lawsuit?
>
> A. Nope.
>
> Q. What was it about?
>
> A. About back pay and going to see a lawyer and getting some money about my back pay or something like that, and I told him I wasn't going that way, I didn't want to have nothing to do with that.
>
> Q. Okay. Who was the lawyer involved, do you know?
>
> A. Mr. Defley.
>
> Q. Joe Defley?
>
> A. Yes, sir.
>
> Q. And you didn't want to get involved with that?
>
> A. That's right.
>
> Q. And at any time on that afternoon did anybody have to hold Mickey Riley back from attacking you?
>
> A. No, not as I know of.
>
> Q. Did Mickey invite you outside to beat you up?
>
> A. No, sir.
>
> Q. Did Mickey in any way threaten and do you any physical harm?
>
> A. No.
>
> Q. Did at any time did Mickey talk to you about joining the Union or participating in Union activities?
>
> A. No.

Mervin Riley denied that he ever spoke to Douglas Dinet about the Union. Riley testified about a 2 August 1985 conversation he had with Dinet:

> A. Okay, it was around knocking off time, and a guy by the name of Tim—Tim Young, who was being introduced to us. He was a new guy they just had hired to work in the measurement department. And—let's see, we was talking, and Doug was talking, Doug was saying he needed some money for his trailer. So I walked over to Doug, and I told Doug, I said, "You see, if you come with us on the lawsuit you'll have money for your trailer." And Doug started telling me he didn't want to hear that shit. And I told him—and then he kind of got me angry, because I was trying to show him a point where he was right—where I was right and he was wrong. And earlier that day there was some allegations going around talking about tests for this and tests for that, reading this and reading that. And so I was telling Doug that the Company was bringing all these guys in here to take his job. And so he didn't like the idea I was telling him that, and so we started talking, and we started arguing, and I told him if he wanted to come in on the lawsuit he would have this money. He said he didn't want to hear that shit. And that's why I'm in trouble now, and I'm going to lose my job over this lawsuit shit.
>
> Q. Who was going to lose their job over the lawsuit?
>
> A. I was going to lose my job.
>
> Q. He was telling you that you were going to lose your job?
>
> A. Lose my job over that lawsuit shit. "That's why you all going to lose you all's job, over that lawsuit shit." And I was trying to tell him that we wasn't going to lose our job because what we was doing was right, and what they owed us would belong to us. We wasn't doing nothing illegal against the Company.
>
> And so we had a few words, and so I told him, I said, "Go ahead and be a dummy." And he said his old man, he's knows what they doing and stuff like that. So I said, "Well, I'm not going to help you, go ahead and be a dummy all your—you know—life." And so he didn't like the idea I was talking to him

about it, and so we started arguing and raising our voices, and that was it.

Q. Did this discussion have anything to do with Union activities?

A. No.

Q. Was the Union ever discussed in that discussion?

A. No.

Q. Was the word "Union" ever mentioned?

A. No.

Claudia Phillips also testified about the 2 August conversation between Dinet and Riley:

A. Okay, it was right about—it was right before time for us—it right before it was time for us to go home, and something—it started off, Mickey was telling Douglas about going up to Joe Defley's office to sign a papers—to sign papers to join us in the suit to get back pay, and Douglas was saying that he wasn't going up there to sign the paper and we just said, "Well, you already signed one with us, so why don't you want to go and sign another one, sign this one with the lawyer and get some money back, because you have more to lose—you have more money to get back than us because you've been here longer than what we have?" And Douglas kept—you know, you couldn't make Douglas understand, you know, that it was for his benefit. And Mickey called him Stupid and stuff like that, and Douglas you know, he said some stuff back and that was it. Mickey left and Douglas punched his clock and he left.

Finally, Steve Lehew was called by Respondent. Lehew presented a different version of the 2 August incident:

A. Bob Cure walked out with Tim Young, who was hired as a metering technician, to assist J. C. Ragas in his metering calibrations and checking on meter stations. Bob Cure introduced Tim Young to J. C. Ragas, and said, "J. C., this is Tim Young. He's going to be working for Delta Gas as metering assistant. He'll be working with you." And they introduced themselves to each other, Tim Young and J. C. J. C. asked him if he had ever done any metering work beforehand, and Tim said, "No, I just graduated from Vocational—or Votech school, and my first job." And at that point Mickey Riley exploded, I should say, and get real upset and said, "They've gone and hired another Votech student. We're not going to ever get anywhere, we'll never be anything." And he was cursing a lot and yelling, and then he turned to Douglas and said, "And you, you wanted to vote no for the Union. You're stupid. You're too stupid to get a job anywhere else. Why do you want to vote no?" And Douglas just said, "Leave me alone and don't bother me." And he said, "We're never going to get anywhere, we'll never be anything. You're being stupid." And then at that point he kind of—he turned like he was going to—not hit Douglas, but just wanted to get closer to him, and the rest of the crew members separated them. And Mickey continued to yell and make a lot of comments about the white crew being hired and the black crew, and that the votes were trying to be stacked against them, but then he turned to Douglas again and said, "Let's step outside. You're too stupid to do anything, let's step outside. And you're stupid 'cause you want to vote no." And Douglas said "Leave me along [sic]." Mickey lunged at him, and some of the men just separated them, said "Don't fight in here, don't fight in here." Mickey said, "Let's go out front. Let's go out front, let's get out of the warehouse, let's go out front." And Douglas just stood behind everybody and wouldn't approach Mickey and wouldn't answer him or anything. Finally after a few minutes Mickey was mad and he just punched out and left. Douglas waited around a few minutes, and then he punched out and he left.

Conclusions: Respondent argues that the testimony of Steve Lehew should be credited over that of Riley, Dinet, and Phillips.[6]

Respondent concedes in its brief that the record failed to show that Riley was an authorized spokesman for the Union. Nevertheless, Respondent argues that Steve Lehew's testimony reveals conduct by Riley which justifies sustaining its objections and setting aside the election.

On 2 August 1985, both the so called wage and hour or overtime suit and the union campaign were active issues among some, if not all, Respondent's Homeplace employees. On 21 June 1985 some 12 employees including Mervin Riley filed suit against Respondent claiming that they were being deprived of earned overtime pay. In a prior unfair labor practice hearing (Case 15–CA–9709), Mervin Riley was identified as one of three employees that set up the meeting with the lawyer that resulted in the filing of the overtime suit. According to Respondent's vice president, Ed Daigle, only two Homeplace employees did not join as plaintiffs in that suit. One of those two employees was Douglas Dinet.

Regarding the union campaign, the Union filed the 15–RC–7190 petition on 11 July 1985. As of 2 August an election date had not been set. In fact the representation case hearing was not held until 5 August.

Respondent argues in its brief that the union campaign was a hot topic on 2 August. However, in view of the status of the overtime suit and Douglas Dinet's failure to engage in that suit, it appears more likely that any hostility from Riley involved the suit rather than the Union. In that regard I am mindful that Mervin Riley is an al-

[6] Respondent also pointed to testimony by employee Joseph Rhodes as supporting the testimony of Steve Lehew. Rhodes testified regarding a conversation between himself and Douglas Dinet in which Dinet told him "they had threatened to whip his ass if he didn't go along with them." I find that Rhodes testimony contributes nothing to assist in the resolution of this credibility issue. The comments Dinet allegedly made to Rhodes could just as well have involved the wage and hour suit which was the focus of the 2 August confrontation between Dinet and Riley according to Riley, Dinet, and Phillips, as it could have been referring to the union election.

leged 8(a)(3) discriminatee in this case. It would be in Riley's interest to show that he was deeply involved in union activities. However, Riley testified that the only employees that he talked to about the Union were A. J. Duplessis, Errol Turner, and the several white employees hired by Respondent. Riley admitted that he told the white employees that he felt Respondent had hired them to "block the Union" because he felt there was not enough work otherwise to justify their employment. Steve Lehew is white. Riley said nothing about race in his comments to the "white" employees. The record does not show when Riley talked to the white employees nor does it show whether those employees were eligible to vote.

According to Riley he did not speak up in any of the antiunion meetings held by Respondent. However, Riley did speak up about his pay. Riley admitted that he told Vice President Daigle that he should have received a higher pay increase than the $36-a-month increase he did receive in October 1984.

I find that I am unable to discredit the testimony of Dinet, Riley, and Phillips regarding the subject of the Dinet-Riley confrontation on 2 August. I was especially impressed with Claudia Phillips' demeanor and her testimony regarding that incident.

Additionally, I note that Phillips also testified in support of Riley regarding his union activities. Phillips testified that she did not hear Riley talk about the Union.

I am convinced that Steve Lehew was mistaken in his understanding of why Riley was upset with Douglas Dinet on 2 August. Lehew started work for Respondent on 22 July, a month after the "overtime" suit was filed. Lehew was not one of the employees involved in that suit and there is no showing that he was aware of the suit. As shown above Lehew had little or no job contact with other employees. Additionally, I note that of all the witnesses regarding Riley and Dinet, no one recalled any references to race other than Lehew. I do not believe Lehew's testimony.

In view of my findings, the credited evidence fails to support Respondent's contention in its objections. Specifically, the record fails to show that anything was said to employee Douglas Dinet on 2 August 1985 regarding the Union, the union election or Dinet's vote. Therefore, I recommend that Respondent's objections be overruled and the election results certified.

Case 15-CA-99801

The 8(a)(1) allegations

(1) On or about 1 November 1985 Respondent through Lawrence Williams threatened employees that they were denied pay raises because of the Union or protected activities.

August Mackey testified that on 1 November 1985, in the warehouse, he and J. C. Ragas asked Lawrence Williams why they had not received a raise. Raises had been granted to some other employees in October 1985. Lawrence Williams expressed surprise saying he had been told some of the hourly men received a raise. Williams then asked Mackey and Ragas, "You're sure you didn't get one?" Then Williams said: "Well its a bottom line, because you participated in union activities, and you sued the company for back wages."

J. C. Ragas recalled Lawrence Williams' response to he and Mackey's inquiries about why they did not receive raises in October 1985: "Well . . . you know, you all suing those people. . . . You figure people are going to give you all a raise . . . and you all having union activities."

On cross Ragas recalled that Lawrence Williams included a comment about the bottom line, saying "because you all got those people in a law suit, the bottom line is your union activity."

Lawrence Williams recalled that only August Mackey asked why he had not received a raise. Williams said that he replied to Mackey that he did not know why Mackey had not received a raise. Williams admitted saying, "You know as well as I know why you didn't get one, but I don't know why."

According to Williams, Mackey asked if it was because of the Union and Williams replied, "I don't know, your guess is as good as mine."

Conclusion: Both August Mackey and J. C. Ragas impressed me as truthful in their testimony about a 1 November conversation with Lawrence Williams. On the other hand Lawrence Williams appeared equivocal in his version of that conversation especially in regard to whether J. C. Ragas was present. The testimony of Mackey and Ragas were similar although not so similar as to indicate collusion in preparing their testimony. I am convinced that Williams told them that they had not received an October raise because they had sued Respondent and because of the union activities. That comment has the tendency to coerce and restrain employees in regard to protected rights and is violative of Section 8(a)(1).

(2) On 17 October 1985, Respondent, through Lawrence Williams, threatened that it had discharged an employee because of his union and/or protected activities.

J. C. Ragas testified to a conversation with Superintendent Lawrence Williams after Mervin Riley was discharged on 17 October 1985. Ragas placed the conversation in Respondent's warehouse around 11 a.m. Ragas complained to Williams that it was not right for Respondent to discharge Riley because Riley had an auto accident while he was off work. Williams told Ragas: "Well, John, you know when you're suing those people, and the bottom line is they fired the man for his union activities."

Lawrence Williams denied talking to J. C. Ragas late on the morning of 17 October and he denied telling Ragas that Respondent had fired Riley because of the Union.

Conclusion: I found above that Lawrence Williams threatened J. C. Ragas and August Mackey that they had been denied a wage increase because of their involvement in suing Respondent and because of their union activities. In general I find J. C. Ragas was a truthful witness. However, his testimony about the 17 October conversation with Lawrence Williams is bothersome. I am especially concerned with the similarity of Ragas' testimony about his 1 November and 17 October conversa-

tions with Williams. Under cross-examination regarding the 1 November 1985 conversation, Ragas recalled Williams saying: "The reason why you all didn't get a raise . . . because you all got those people in a law suit, and the bottom line is your union activity."

The above testimony is similar to that of August Mackey regarding the same incident. That is to be expected if, as I believe, both Ragas and Mackey were truthful on that occasion. However, it is difficult to believe that Williams' 1 November comment would be almost the same comment he made on 17 October 1985 in regard to the discharge of Mervin Riley. That comment, as recalled by J. C. Ragas was: "Well, John, . . . you know when you're suing those people, and the bottom line is they fired the man for his union activities."

Although J. C. Ragas gave several affidavits to the Region, including one on 5 November, he did not testify about Lawrence Williams telling him the reasons for Riley's discharge, until 11 March 1986. Ragas offered a reasonable explanation of why the 17 October conversation was not included in his 5 November affidavit. However, due to the similarities between what he recalled Lawrence Williams said on 1 November and what Lawrence Williams said on 17 October, a strong possibility exists that those conversations had become confused in Ragas' mind when he testified in the 11 March 1986 affidavit. Under those circumstances, I shall not credit Ragas' version of the 17 October conversation because it was not supported by any other evidence. Lawrence Williams denied that the conversation took place.

(3) On or about 4 March 1986 Respondent, through Ed Daigle, told employees they would not receive a wage increase because of pending unfair labor practice charges.

August Mackey recalled a conversation involving Ed Daigle, J. C. Ragas, Lawrence Williams, and himself in Lawrence Williams' office on 4 March 1986. Daigle came to Homeplace because Mackey and Ragas had asked Lawrence Williams for a pay raise. Williams said he could not grant a raise but he agreed to ask Daigle to come and discuss their requests. According to Mackey, Daigle told him and Ragas that Respondent cannot give them a raise because "We had sued the company for . . . or rather him for an unfair labor practice." Daigle went on, "You people have filed it. The Labor Board, they filed it."

J. C. Ragas recalled the same conversation. Ragas also recalled that Daigle told him and Mackey that they could not receive a raise because they "filed a unfair labor practice charge against us." Daigle continued saying, "It would be up to the judge to decide whether they received a raise."

According to Lawrence Williams' version of the 4 March 1986 conversation, Daigle told Ragas and Mackey that "he cannot talk about no raise at the time because everything was in court."

Williams admitted that he did not recall all that was said between Daigle, Mackey, and J. C. Ragas.

Daigle recalled the 4 March meeting. He testified that Mackey told him they would "like to talk to [him] about some green." Daigle replied: "August, I can't talk to you about that. We've already had our raises back in October. This whole thing is a matter of Unfair Labor Practice Act now, and there is nothing I can discuss with you."

Daigle, Ragas, and Mackey agreed that they discussed the possibility of a crawfish boil after concluding their discussion regarding the pay raise request.

Conclusion: I noticed that three witnesses, Mackey, Ragas, and Lawrence Williams all recalled that Daigle said something about a suit, court, or a judge, in their recollection of the 4 March conversation. According to Daigle he said nothing about court, instead Daigle recalled saying the raise question was a matter of "Unfair Labor Practice Act."

As indicated above, I found August Mackey to be a credible witness. In this instance his testimony finds some support in the testimony of Superintendent Lawrence Williams as well as in the testimony of J. C. Ragas. Therefore, I credit the testimony of August Mackey. Mackey's testimony reveals that he and Ragas could not be considered for a raise because they and the Labor Board sued Respondent.

It is perhaps understandable for an employer to explain that it cannot grant increased benefits while the question is tied up in court. However, that is not what Daigle told Mackey and Ragas. Daigle said they could not get a raise because they (and the Labor Board) had sued Respondent. The so-called overtime or wage and hour suit and the instant unfair labor practice complaint, both constitute protected activities. As shown above almost all the Homeplace employees joined in suing for overtime wages and, of course, charges and complaints under the National Labor Relations Act are protected under the Act. Therefore, Daigle's comments constitute an 8(a)(1) violation regardless of which suit he was referencing in his comments to Ragas and Mackey. (See *Neo-Life Co. of America*, 273 NLRB 72 (1984).)

The 8(a)(1), (3), and (4) allegations

(1) Respondent has, since 1 October 1985, refused to grant pay increases to employees Mackey, J. C. Ragas, and Mervin Riley.

In October 1985, employees of Respondent were considered for a merit increase in pay. Out of some 24 unit employees and two or more hourly paid supervisors at Homeplace, only four unit employees and one hourly paid supervisor received merit increases in October 1985. The General Counsel contends that of those 20 employees[7] that were denied wage increases, 3 were denied increases because of their union activities or because of their involvement in the overtime suit or because they gave testimony in prior unfair labor practice hearings.

The General Counsel correctly points out that Mackey, J. C. Ragas, and Riley were prominent in displaying protective activities. All three wore union buttons, J. C. Ragas permitted the Union to hold employee meetings at his house, Ragas and Mackey spoke in favor of the Union at company meetings, and all three employees testified against Respondent in a prior unfair labor

[7] Several employees, out of the 20 that did not receive raises, were ineligible due to their having worked less than 1 year.

practice hearing. Although Riley testified that he did not speak in favor of the Union at company meetings, Ed Daigle testified that he recalled Riley did speak in favor of the Union. Mackey, J. C. Ragas, and Riley were all plaintiffs in the overtime suit against Respondent. During the unfair labor practice hearing in Case 15–CA–9707, Riley was identified as one of the three employees that set up the initial meeting with an attorney that led to the overtime suit.

The evidence shows that on October 1985, for the first time, Gayland Simmons, president and chairman of the board of Respondent's parent company, granted wage increases on the basis of ratings on performance reviews. The performance reviews for Respondent's employees were prepared by Vice President Ed Daigle. Daigle testified that when he prepared the performance reviews, he did not know what scores would be required for an employee to receive a wage increase. Simmons made that determination on his own. Simmons decided that all employees with more than 1-year seniority, that rated an overall score from three to five, would receive an increase with those rated from four to five receiving a larger increase than those rated three to four. Those rated below three received no pay increases. The same system was used throughout all the affiliated companies including Respondent.

Daigle rated J. C. Ragas 2.52, August Mackey 2.31, and Mervin Riley 2.02. Of the eligible people, only employees Claudia Phillips, Dwight Bartholomew, Joseph Rhodes, and Douglas Dinet and hourly Supervisor Gerald Ragas were rated 3 or over by Daigle. Those five received pay increases.

The General Counsel does not argue that Respondent altered its pay review procedure in order to illegally discriminate against its employees. The record shows that Gayland Simmons applied his three-and-over analysis to performance reviews from all companies of LEDCO, the parent company. Moreover, there was no showing that any performance reviews were changed by Simmons. Therefore, it appears that my analysis should be limited to a consideration of whether J. C. Ragas, Mackey, and Riley were discriminatorily denied a rating of three or more because of their protective activities.

Initially, in view of my findings above that August Mackey is a supervisor, I must find that all his union and concerted activities are unprotected in view of Board law (see *Parker-Robb Chevrolet*, 262 NLRB 402 (1982)). Therefore, even though I shall consider Mackey in my analysis to the extent his treatment may involve J. C. Ragas and Riley, I recommend that the 8(a)(1) and (3) allegations going to Mackey be dismissed. I shall consider whether Mackey was deprived of a wage increase because of his testimony in prior NLRB proceedings (see *Parker-Robb Chevrolet*, supra). Mackey's prior testimony in unfair labor practice Case 15–CA–9709 was received in evidence. The record shows that Mackey's material testimony was limited to one company meeting in which, according to the testimony, Ed Daigle said, "It looked like A. J. was trying to bring the union in there, and he said if it come to that he won't have no union there, he'd run everybody off and hire a new crew.

In view of the above evidence and especially in view of the fact that Mackey's testimony involved a disputed allegation regarding Ed Daigle, the supervisor that prepared Mackey's performance reviews, I shall consider the evidence concerning the 8(a)(1) and (4) allegations regarding August Mackey.

Conclusions: The General Counsel argued that there are a number of items which support a prima facie case. I have considered several items which I consider critical including, (1) as shown above, on 1 November Superintendent Lawrence Williams admitted to Mackey and J. C. Ragas that they were denied raises because of their union activity and the overtime suit; (2) J. C. Ragas, and Riley were shown to have been heavily involved in union and other protected activities; (3) Daigle did not consult with on the site supervision before rating the Homeplace employees; (4) Respondent's employees in Jonesboro, Louisiana, where there was no union activity, were both[8] granted raises; and (5) Daigle's alleged basis for downgrading Mackey, Ragas and Riley was not supported by credible evidence.

Lawrence Williams' 1 November comments

As shown above I credited the testimony by August Mackey and J. C. Ragas regarding comments by Lawrence Williams on 1 November. Of the two, August Mackey's testimony was more complete. According to Mackey, Williams expressed surprise that Ragas and Mackey had not received raises. Williams then said they had been denied raises because they sued Respondent and because of their union activities.

Obviously, if Williams' comments are imputed to Respondent, the above evidence constitutes strong support for the General Counsel. However, in recent cases, the Board has demonstrated a reluctance to routinely impute knowledge of a supervisor to a respondent (see *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983); *Garrett Flexible Products*, 270 NLRB 1147, 1148 (1984)). Here, several factors indicate Williams was not speaking from actual knowledge of the basis for the wage increase denials. One such factor is Williams' expression of surprise that Mackey and Ragas had not received raises. If Williams had known before that conversation that Mackey and Ragas had been denied raises because of their protected activities, it is unlikely that he would have been surprised at their comments. Second, Lawrence Williams testified that he was not consulted about the ratings. Third, Williams' comments and later suggestion that Mackey and Ragas talk to Daigle about pay raises, further supports the determination that Williams was never privy to the reasons for denying employees wage increases.

Therefore, I am convinced that Lawrence Williams was only voicing his opinion in his 1 November conversation with Mackey and Ragas. While his comments constitute an 8(a)(1) violation, they should not be taken as showing the true reason why Respondent denied wage increases to Mackey and Ragas.

[8] Only two Jonesboro employees had the necessary seniority to qualify for consideration of a wage increase.

Mackey, Ragas, and Riley's Protected Activity

As shown above, with the possible exception of employee A. J. Duplessis,[9] J. C. Ragas and Mervin Riley were the most prominent of the employees involved in union and protected activities.

Moreover, two of the employees that received pay increases, Dinet and Rhodes, were the only two eligible hourly paid employees that did not join as plaintiffs in the overtime suit against Respondent.

Daigle did not consult with Lawrence Williams

According to Respondent's letter of position to the Region, Ed Daigle evaluated the Homeplace employees with the assistance of Lawrence Williams.[10] However, Lawrence Williams credibly testified that he was not consulted and did not participate in the October 1985 employee evaluations. Williams testified that in 1984 the usual practice involved his consulting with Daigle regarding employee work performance:

> The evaluation-on-the-job performance, how they was working with other people and different things like-like normal evaluation, that's what I usually tell [Daigle].

Lawrence Williams' failure to participate in the evaluations is significant because Ed Daigle was not stationed in Homeplace. Daigle, whose office is in New Orleans, is over employees in Houston and Bryan, Texas, Jonesboro and New Orleans, Louisiana, and various locations throughout the States of Texas and Louisiana, in addition to Homeplace. Daigle did not have an opportunity to routinely observe all the Homeplace employees. Daigle testified that he would visit Homeplace

> per month probably two times a month for a period of five or six hours. There could be months that I won't make it at all, there could be other months when I'd be down there more often.

Daigle stated that he usually spent his time in the office at Homeplace, but he testified that he did occasionally visit the jobsites: "Not often, oh, maybe every third trip out I'll go to a particular jobsite if something's going on."

According to Daigle he never went to the jobsites with the meter readers.

Therefore, it is apparent that Daigle only observed some of the hourly Homeplace employees during their work. According to his testimony he would go to a jobsite every third trip. At the rate of two visits per month that translates into Daigle seeing a few of the Homeplace employees at work every 6 weeks. Some of the employees, e.g., the meter readers, were never observed working by Daigle.

The Jonesboro employees all received wages increases. The bargaining unit employees were stationed at Homeplace and Jonesboro, Louisiana. According to record testimony, Daigle rated all four employees at Jonesboro. Two of those employees had worked less than 1 year and were ineligible for a raise. Of the two eligible employees, both were rated three or above and received a wage increase.

Daigle rated J. C. Ragas, Riley, and Mackey low even though the low ratings were not supported by evidence. In the areas where J. C. Ragas, Mackey, and Riley received low ratings, there was a dearth of documentation supporting specific actions or inactions by the employees. Ed Daigle admitted that Respondent has a general practice of documenting poor performance.

Regarding J. C. Ragas, Daigle rated him *2* (one below average) in five subcategories and *3* in six subcategories. Ragas was not rated above average (i.e., 4) in any subcategory,[11] nor was Ragas rated excellent or poor (5 and 1) in any subcategory. Although Daigle complained that J. C. Ragas was not seeing after meters as he should, was not keeping schedules as he should, and was absent without explanation, Daigle was unable to testify about a single specific instance where Ragas engaged in any of those shortcomings. Daigle admitted there were no records showing the occurrence of any of those complaints. Regarding Ragas' below average rating under safety consciousness, Daigle testified to two incidents, one when Ragas "blew some material into his eyes," and the other when Ragas slipped on a ladder. The General Counsel argues that J. C. Ragas was innocent in both instances. In the former, Ragas testified without contradiction, that a faulty gasket ruptured blowing trash into his eye and in the latter, Ragas was carrying tools up a ladder when he slipped.

Moreover, as to Daigle's contention that Ragas missed appointments, J. C. Ragas testified, again without conflict, that some appointments were missed but those occurrences resulted from conflicting assignments from his Supervisor Bob Cure. Cure did not testify.

Daigle claimed that J. C. Ragas failed to turn in calibration schedules on five occasions after Daigle specifically requested the schedules. J. C. Ragas testified that after he made a schedule, that schedule was changed by Daigle and Bob Cure. Ragas then asked if Bob Cure could make the schedules because Ragas did not have the authority to follow the schedule if he had conflicting assignments. According to Ragas, Daigle did not ask about the schedules after that incident. Again, Daigle admitted that he had no records which supported his allegation and he did not rebut J. C. Ragas' testimony.

Regarding acceptance of supervision, Daigle testified that J. C. Ragas oftentimes circumvented Supervisor Bob Cure and talked directly with Daigle. When asked if that was not permitted, Daigle responded that on some occasions Ragas was permitted to deal directly with Daigle.

[9] Duplessis was hired on 16 January 1985 and lacked the seniority necessary to warrant consideration for an October 1985 pay increase.

[10] J. C. Ragas worked under the supervision of Bob Cure rather than Lawrence Williams. Cure did not testify.

[11] As noted below, Daigle also rated J. C. Ragas and other employees on another form, the employee progress report, on the same dates (8 October 1985, in the case of Ragas) that he rated employees on their performance review. On that form, after consultation with J. C. Ragas, Daigle rated Ragas above average in six subcategories, excellent (equivalent to *5* on the performance review) in two subcategories, average in six subcategories and below average (the equivalent of *2* on the performance review) in only 1 out of a total of 15 subcategories.

Daigle was unable to furnish records supporting this allegation and Daigle was unable to recall specific incidents when Ragas had circumvented the chain of command. Ragas admitted talking with Daigle about once a week, but he testified those conversations followed instructions from Daigle to contact him anytime Ragas had problems.

Concerning Mervin Riley, Daigle rated him *1* (two below average) in four subcategories, *2* in six subcategories and *3* in two subcategories. Riley was not rated above a *3* in any subcategory.[12] Daigle was asked about the low performance review ratings given Riley. Concerning being deficient in his understanding of his job, Daigle testified that Riley "just never showed to me any individual initiative whatsoever." Daigle could not point to any incidents when Riley demonstrated lack of initiative other than on 21 June 1985, Riley had "heated words" with Daigle's assistant wherein Riley complained that Riley "was a machine operator and that's what he ought to be paid for." (See Tr. 166.) Daigle recalled generally that Riley wanted to be a machine operator but did not want to perform duties other than operate a machine. Daigle stated that he downgraded Riley on safety consciousness and skills of work because Riley would swing the trenching machine boom very, very wildly. Daigle did not warn Riley but, according to Daigle, he sent word through Supervisor Gerald Ragas that he did not like the reckless way Riley was operating the machine. As to the subcategory "effectiveness in working with fellow employees," Daigle testified that "[q]uite often [Riley] would get quite angry with the other employees, lose his temper and almost fight." Daigle said he could not recall a specific incident of Riley getting quite angry.

Riley's immediate supervisor, Gerald Ragas, worked with Riley on a daily basis. Ragas' testimony was quite different from Daigle's. Gerald Ragas testified that he never had problems with Riley operating the backhoe trencher improperly; he never had to correct Riley from swinging the "bucket" improperly; that Riley was a good worker; that Riley never refused to take orders; that he never saw Riley trying to fight other employees, and that he never had occasion to reprimand Riley.

Mervin Riley testified that no one ever criticized his work, that neither Lawrence Williams nor Gerald Ragas told him he was operating the backhoe trencher improperly; that he never refused any assignments and that he never tried to start a fight on the job.

Lawrence Williams testified that on one occasion, "about two years ago," Gerald Ragas complained to him that Riley "didn't want to listen to him." Subsequently, Williams recalled an occasion before Elton Turner died,[13] when Riley complained that he was not receiving operator's pay.

I am convinced, from the testimony of Supervisors Gerald Ragas and Lawrence Williams, that Ed Daigle was not truthful in his testimony that Riley operated the backhoe trencher recklessly. Ragas' testimony was in direct conflict with Daigle's testimony that Daigle sent word through Ragas that he did not like the way Riley operated the machine. Additionally, I do not credit Daigle's testimony that Riley would almost fight other employees. Daigle's testimony that Riley complained about his pay is supported by the testimony of Lawrence Williams. I credit Daigle and Williams in that regard.

In regard to the performance review of August Mackey, Daigle rated him *2* in eight subcategories and *3* in three subcategories. Mackey received no ratings of *5*, *4*, or *1*. However, as mentioned below, Mackey received two "a" (the equivalent of 5) ratings, three "b" (4) ratings, nine "c" (3) ratings; one "d" (2) rating and no "e" (1) rating on his progress report. Daigle responded that Mackey's ratings of 2 on his performance review resulted from the facts that Mackey "just didn't do very much [work]," he showed lack of initiative by declining promotion to supervisor, he would not accept additional responsibilities, his assigned vehicle was not properly maintained, he did not display "very many" academic skills, and he stirred up trouble by talking poorly about the Company and calling it a "white man's company." Daigle admitted that none of Mackey's alleged deficiencies had been documented, and Daigle never talked to Mackey about any of those alleged problems. Daigle did not recall specific instances illustrating Mackey's deficiencies except for an instance at a shrimp boil. On that occasion, according to Daigle, Mackey said he could create overtime situations by having his "brothers to go out and run over some meters." Mackey denied that he made that statement to Daigle.

Superintendent Lawrence Williams testified that Mackey is a "good" employee. Williams testified that he complained about Mackey to Ed Daigle on only one occasion. That occasion was when Mackey refused to accept that he was a supervisor. In view of the entire record and my findings herein regarding credibility, I credit the testimony of Lawrence Williams. I also credit Mackey's denial that he ever said he would have his brother run over meters.

In view of my findings above, I am convinced that the General Counsel has proven a prima facie case. I make that finding despite my determination that Lawrence Williams did not know the reason behind Respondent's actions when he told Mackey and J. C. Ragas they were denied a wage increase because of their suit and union activities. The other factors mentioned above convince me that Respondent considered J. C. Ragas' and Riley's protected activities in the rating process. I am convinced Respondent also considered the prior NLRB testimony of Mackey, Ragas, and Riley.

Second, I shall consider whether the record proves that August Mackey, J. C. Ragas, and Mervin Riley would have been deprived of a wage increase in the absence of their protected activity or prior testimony (see *Wright Line*, 251 NLRB 1083 (1980)).

As to the question of whether Mackey, J. C. Ragas, and Riley would have received a wage increase absent their protected activities or prior testimony, the record is confused.

[12] On Riley's progress report, Daigle rated him in the highest category ("a" which is the equivalent of (5)) in two subcategories; "b" (4) in three subcategories; "c" (3) in eight subcategories; "d" (2) in two subcategories; and "e" (1) in no subcategories.

[13] Ed Daigle testified that Elton Turner died in February or early March 1985.

One area of consideration should involve concern with the employees' evaluations before they engaged in protected activities. However, on that point the record is unclear. Daigle testified that he did not evaluate hourly employees before October 1985. Concerning prior raises, Daigle testified that the last raise, October 1984, was combination of merit and cost of living and that Respondent's records do not show whether a raise granted at that time represented both merit and cost of living or simply cost of living. In view of that confusion, I find that Respondent has failed to show that Mackey, J. C. Ragas, and Mervin Riley performed below average before they engaged in protected activities. In fact, the opposite appears to be true. Daigle admitted that J. C. Ragas received merit raises "pretty consistently" when merit raises were granted. Regarding Mervin Riley, his immediate supervisor, Gerald Ragas, testified that Riley was a good worker. Contrary to the assertions of Daigle, Gerald Ragas testified that Riley did not operate machinery improperly, Riley never refused to take orders or directions, Riley argued but never tried to pick a fight and Ragas never had occasion to give Riley a warning. Concerning Mackey, Superintendent Lawrence Williams testified that he was a good worker.

Another factor to consider in determining whether Mackey, Riley, and J. C. Ragas would have received wage increases absent their protected activities is a consideration of whether Respondent's evaluations of the employees are consistent with other actions of Respondent.

Ed Daigle testified that he prepared two forms on each employee during October 1985, the performance reviews and the employee progress reports. On completion Daigle reviewed those forms with each employee and, in some instances, made changes. The performance reviews included percentage ratings in subcategories under each of the three general categories.[14] The percentage ratings totaled 100 percent. Each subcategory also included a "performance rating" and a "weighted rating." The weighted ratings, which were computed by multiplying the performance rating times the percentage rating for each respective subcategory, were then totaled. That total figure was divided by 100 for the "employment overall performance rating," a figure somewhere between 0 and 5. The average rating, according to the testimony of Chief Executive Officer Gayland Simmons, was 3.0. All 3.0 and above received a wage increase.

The second form, the employee progress report, included five general categories with three subcategories under each of the five general categories. Those general categories for measuring each employee's work, included attendance, personal qualifications, capacity, attitude toward job, and job performance. In comparison, the performance review general categories included job performance, job knowledge, and general attitude.

Because both forms were completed by Ed Daigle in October 1985, a comparison of the two forms should show a consistent pattern especially in comparison with similar general categories.

In the case of August Mackey, his average on the performance review shows an average score of 2.2 under job performance while Mackey's progress report shows an average between c and b under job performance. Because the progress report subcategories are rated from "a" downward to "e," a conversion to numerical ratings would have "e" as 1 and "a" as 5. After conversion to a numerical accounting, Mackey's score is an average of 3.67 under job performance on his progress report. Mackey scored an average 2.0 under general attitude on his performance review while his converted average under "attitude toward job" on his progress report shows an average score of 2.67. Mackey's overall performance review score was 2.31 while his overall converted progress report shows an average score of 3.4.

J. C. Ragas was scored an average 2.4 on job performance and 2.5 on general attitude in his performance review, while his average converted score on his progress report was 3.33 on job performance and 3.0 under attitude toward job. J. C. Ragas received an overall performance review score of 2.52 while his overall converted progress report shows an average score of 3.6.

Mervin Riley was scored an average 2.0 on job performance, 1.0 under general attitude, and 1.0 under work attitude in his performance review, while his average converted score on his progress report showed that he scored 3.33 on job performance and 2.67 on attitude toward job. Riley received an overall performance review score of 2.02 while his overall converted progress report shows an average score of 3.33.

The only other employee performance review and progress report in the record are those of three employees that received wage increases, Gerald Ragas, Claudia Phillips, and Dwight Bartholomew.

On his performance review Gerald Ragas received an average score of 3.6 under the job performance and 4.0 under general attitude while his converted average scores on his progress report were 3.7 under job performance and 3.67 under attitudes toward job. Gerald Ragas received an overall performance review score of 3.59 while his overall converted progress report shows an average score of 3.93.

On her performance review, Claudia Phillips received an average score of 3.0 under job performance and 3.5 under general attitude. Phillips was rated 3.0 under work attitude. Her converted average score on her progress report reflects 3.33 under job performance and 3.67 under attitude toward job. Phillips received an overall performance review score of 3.15 while her converted progress report shows an average score of 3.53.

Dwight Bartholomew's performance review average under job performance was 2.8, under general attitude 4.0, and work attitude 3.0. Bartholomew's progress report's converted scores were 3.3 under job performance and 3.33 under attitude toward job. His overall performance review average was 3.12 and his converted overall progress report averaged 3.73.

The above figures reveal a general inconsistency between Daigle's ratings on the performance reviews and

[14] Four categories were listed but Daigle usually gave no rating in the category "other." Daigle did on occasion rate under the "other" category and employees Riley, Phillips, and Bartholomew received ratings in that category.

his ratings on the progress reports. It appears that Daigle consistently rated employees higher on their progress reports than he did on the performance reviews. However, there is a more pronounced inconsistency shown when the progress report scores on Riley, J. C. Ragas, and Mackey are compared with progress reports and performance reviews of Bartholomew, Phillips, and Gerald Ragas.

In comparison J. C. Ragas' progress report showed an overall converted score 1.08 points above his performance review average. Bartholomew, Phillips, and Gerald Ragas scored higher on the progress report by 0.61, 0.38, and 0.34 respectively. Riley scored 1.31 points higher on his progress report while August Mackey was 1.09 points higher on his progress report.

As to comparison scores, J. C. Ragas had a higher progress report average score than Claudia Phillips, 3.6 to 3.53. Gerald Ragas and Dwight Bartholomew had average converted progress report scores of 3.93 and 3.73, while similar scores for Mackey and Riley were 3.4 and 3.33.

Respondent did not explain the above-noted inconsistencies. While I find the inconsistencies are not persuasive in considering whether the General Counsel has proved a violation, I am persuaded that they should be considered in weighing whether Respondent has proved that Mackey, J. C. Ragas, and Riley would have been rated below 3.0 absent their protected activities. Respondent's arguments backed by the testimony of Ed Daigle did not show that August Mackey, J. C. Ragas, and Mervin Riley would have been rated below 3.0 absent the protected activities or testimony. The examples recalled by Daigle to illustrate deficiencies in the work performance of Mackey, Ragas, and Riley were generally not specific. Moreover, Daigle's testimony in that regard was negated through credible explanations from Mackey, Ragas, and Riley. Due to the successful rebuttals of Daigle's testimony, the lack of specificity in his charges, and the absence of any documentation, I am convinced that Respondent was satisfied with the work performance of August Mackey, J. C. Ragas, and Mervin Riley until after they engaged in protected activities and gave testimony. Those factors and the inconsistencies in Daigle's ratings, demonstrate that Mackey, J. C. Ragas, and Riley would have received an average (i.e., 3.0) or better rating, absent their testimony or protected activities.[15]

(2) Respondent discharged Mervin Riley: On 17 October 1985, Ed Daigle told Mervin Riley that he was discharging Riley because Riley "had access to Company vehicles and drove daily, knowing [Riley] had an invalid license."

While off work on Saturday, 5 October, Riley was ticketed for driving with an expired license. Riley had been rear ended while driving his own automobile. Ed Daigle learned of Riley's traffic ticket from his assistant Ed Raber. Daigle then requested his insurance agent to run a check on Riley's driver's license. Daigle learned that Riley's license expired on 15 November 1984 and that Riley had received an earlier traffic citation in January 1985.

The General Counsel argues that Riley was discharged because of his protected activities and the fact that his license had expired was only a pretext.

Conclusion: I shall examine whether the General Counsel proved, prima facie, that Respondent discharged Riley because of his protected activities and, if so, whether the record demonstrated that Riley would have been discharged absent his protected activities (see *Wright Line*, supra).

As shown above Mervin Riley was one of the most visible of those employees involved in protected activities. Riley was involved in union activities. He signed a card, attended meetings, and testified in NLRB hearings. During the prior unfair labor practice hearing Riley was identified as one of the three employees that precipitated the overtime suit against Respondent. The record shows that Respondent was aware of Riley's protected activities.

Second, it does appear that Respondent acted hastily in discharging Riley. Daigle first testified that he learned that Riley's license had expired in November 1984 and that Riley had been first ticketed in January 1985. On the basis of that information Daigle phoned Riley when Riley next reported for work, and told Riley of his discharge. Subsequently, when an issue arose during the hearing about the extent of Riley's use of company vehicles in 1984 and 1985, Daigle testified that he directed one employee in Homeplace to check the gasoline tickets to see if Riley drove company trucks after his license expired. According to Daigle he was told "that there was numbers of tickets during this period of time which Mickey Riley had signed for." Daigle admitted that he did nothing else to check into Riley's use of company vehicles.

J. C. Ragas and Mervin Riley credibly testified that gasoline tickets are used to show only which employees filled a particular vehicle with fuel. Employees other than the operator oftentimes filled a vehicle at a gasoline pump at Respondent's Homeplace facility. Additionally, the record including testimony by Ed Daigle, shows that logs are required to be maintained by each vehicle operator. Those logs show that the vehicle allegedly driven by Riley was, until shortly before Riley's discharge, assigned to other employees.

I am convinced that Ed Daigle[16] made no more than a cursory investigation which was designed to show that

[15] In view of the comparisons of the progress report ratings of J. C. Ragas, Riley, Gerald Ragas, Bartholomew, and Phillips, I am convinced that Mackey, J. C. Ragas, and Riley would not have scored over 4.0 absent their protected activities and prior testimony. Therefore, their wage increase backpay entitlement should be the same as the October 1985 increase award to employees that scored from 3.0 to 4.0.

[16] As noted herein, Daigle's testimony frequently conflicted with other supervisors' testimony including that of Superintendent Lawrence Williams and Supervisor Gerald Ragas. Additionally, Daigle's testimony was not consistent with some of Respondent's records. Those inconsistencies have been mentioned herein. For example, Lawrence Williams testified in direct conflict with Daigle regarding what Daigle was told regarding Tim Williams' plans to return to college. Tim Williams' work application submitted to Respondent, also shows that he planned to work only until he could return to college. Daigle's testimony was inconsistent with the records and the testimony of Lawrence Williams.

Riley had operated company vehicles since his license expired in November 1984. In fact, testimony of Supervisor Gerald Ragas and Riley, and Respondent's vehicle operator logs show that Riley was not assigned a company vehicle until shortly before his discharge.[17]

In regard to the length of time Riley operated a truck, Ed Daigle admitted that that fact would have made a difference in his discharge decision.

Moreover, the record, including Daigle's testimony, illustrated that Daigle made no inquiries about why Riley had failed to renew his license. Riley's unrebutted testimony, which I credit, shows that he had little reason to seek renewal of his license until August 1985. Before then Riley's car was broken down and he had little occasion to drive. Riley testified without rebuttal that the license office was closed due to a funeral, when he tried to renew his license in August. After Riley was assigned a vehicle by Respondent, he returned to the license office but was told that the computer was jammed. On 11 October 1985, some 6 days before his discharge, Riley was issued a new chauffeur's license. That license will expire on 19 November 1989.

Third, at the time of his discharge, Riley owned a valid chauffeur's license. Again Ed Daigle's testimony is in conflict with credible evidence. I credit the testimony of Superintendent Lawrence Williams that Riley showed Williams a copy of his valid chauffeur's license during Riley's discharge phone conversation with Daigle and that Williams immediately told Daigle that Riley had a valid license. Obviously, at that point, Respondent had no liability exposure as alleged by Daigle.

Fourth, Daigle admitted the Respondent normally used a progressive disciplinary system. Nevertheless no explanation was offered about why Riley was discharged even though he had never received an oral or written warning. Moreover, the record shows that other employees had accidents in Respondent's vehicles but were not disciplined and, in the mind of Ed Daigle, Dwight Bartholomew operated unit 5 without a proper license. Bartholomew testified that he had a class A driver's license. Daigle admitted that a chauffeur's license is required to operate unit 5.[18] Bartholomew had not been disciplined for his failure to hold a chauffeur's license.

The above facts convinced me that Riley was discharged because of his protected activities and that the basis alleged by Respondent, through Ed Daigle, is pretextual.

I shall consider whether Riley would have been discharged absent his protected activities.

One measure of whether Riley would have been fired in any event is a determination of how Respondent has reacted on similar occasions. Unfortunately, there were no other occasions of Respondent learning that a vehicle operator was holding an expired license. The closest situation to the instant one is the overall question of how Respondent polices its employees' driver's licenses. The record illustrated that Respondent does not regularly inquire into the status of its employees' driver's licenses. In fact, although Ed Daigle admitted that unit 5, the unit assigned to Riley immediately before his discharge, must be operated by someone holding a chauffeur's license, the current operator, Dwight Bartholomew, has never held a chauffeur's license (see above). Mervin Riley held a chauffeur's license at the time of his discharge. The record shows that offenses similar to Riley's failure to timely renew his license are routinely permitted without discipline. Moreover, Respondent failed to follow its progressive discipline policy concerning Riley. I find that the record shows that Riley would not have been discharged absent his protected activities.[19]

I find that Riley was discharged in violation of Section 8(a)(1), (3), and (4) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oil, Chemical & Atomic Workers International Union and its Local 4–447 is a labor organization as defined in Section 2(5) of the Act.

3. All production and maintenance employees including meter readers/servicemen, measurement technicians, welders, construction and repair crewmen and warehouse employees employed by the Employer at its Homeplace and Jonesboro, Louisiana facility; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Respondent, by threatening its employees that they had been denied a pay increase because of their union or protected activities; and by telling its employees they would not receive a wage increase because the employees and the Labor Board had sued Respondent, engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

---

[17] Respondent correctly argued that the record is confused about the period of time during which Riley drove a company vehicle. Nevertheless, I find that the record clearly established that Daigle made no more than a cursory investigation and Daigle was not aware of the extent of Riley's driving duties when he decided to discharge Riley.

[18] Respondent, in its brief, argues that Daigle was mistaken and, in fact, the law does not require the operator of unit 5 to hold a chauffeur's license. Be that as it may, the record shows that Daigle treated Riley in a disparate manner since Daigle thought a chauffeur's license was required.

[19] Daigle also testified that he would not rehire Riley because he discovered court records showing Riley had been charged with disturbing the peace, attempted murder, and simple burglary. The record does not prove that Daigle's discovery should preclude reinstatement of Riley. The record shows that of the above charges, Riley was found guilty of disturbing the peace and sentenced to $25 fine or 10 days in jail; regarding the attempted murder charge Riley pleaded guilty to a lesser charge of aggravated battery and was sentenced to three years in jail; and regarding the simple burglary charge, Riley was found not guilty.

On his job application with Respondent dated 27 December 1982, Riley indicated that he had been convicted of assault. Riley was interviewed and hired by a relative of his, Superintendent Lawrence Williams. At that time Riley was also related to another of Respondent's supervisors, Elton Turner (see Riley's job application). Riley testified that Williams knew of his criminal proceedings. Williams admitted knowing that Riley had been in prison. Therefore I find that Respondent was aware of Riley's one felony conviction at the time he was hired. Riley's application form specifically excludes the necessity of listing "misdemeanors." Therefore, Riley was never asked to list his other conviction, that of disturbing the peace.

I find that Respondent knew of Riley's criminal record when he was hired. Therefore, I recommend that Riley should be entitled to full reinstatement.

5. By refusing to grant wage increases to its employees J. C. Ragas and Mervin Riley, Respondent has engaged in conduct violative of Section 8(a)(1), (3), and (4) of the Act.

6. By refusing to grant a wage increase to its supervisory employee August Mackey, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (4) of the Act.

7. By discharging its employee Mervin Riley on 17 October 1985, Respondent has engaged in conduct violative of Section 8(a)(1), (3), and (4) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (4) of the Act, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has illegally denied wage increases to Mackey, J. C. Ragas, and Riley and has illegally discharged Riley, in violation of Section 8(a)(1), (3), and (4) of the Act, I shall order Respondent to offer Riley immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make August Mackey, J. C. Ragas, and Mervin Riley whole for any loss of earnings they may have suffered as a result of the discrimination against them. Backpay and interest shall be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[20]

Recommendations

In view of my findings above regarding objections and challenges to ballots in Case 15–RC–7190, I recommend that a revised tally of ballots issue showing 13 votes were cast for the Union, 9 votes were cast against the Union, and there were 2 challenged ballots. The challenged ballots are insufficient in number to affect the results of the election.

In view of the determination about the challenged ballots being insufficient in number to affect the results of the election, and my finding that Respondent's objections should be overruled, I recommend that the Union be certified as exclusive bargaining agent for the employees in the unit described as follows:

> All production and maintenance employees including meter readers/servicemen, measurement technicians, welders, construction and repair crewmen and warehouse employees employed by the Employer at its Home Place and Jonesboro, Louisiana facilities; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

[20] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Delta Gas, Inc., a subsidiary of Louisiana Energy & Development Corporation, Homeplace, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act in violation of Section 8(a)(1) of the Act by threatening its employees that they were denied a pay increase because of their union and protected activities, and by telling its employees they will not receive a wage increase because the employees and the Labor Board have sued the Company.

(b) Denying wage increases, discharging, and refusing to reinstate employees because of their union activities, protected activities, or because they gave testimony under the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Mervin Riley to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and make August Mackey, J. C. Ragas, and Mervin Riley whole for any losses they may have suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Remove from August Mackey's, J. C. Ragas', and Mervin Riley's personnel files any reference to its denial of wage increases to them and to its discharge of Riley, and notify Mackey, Ragas, and Riley in writing that this has been done and that evidence of its unlawful actions will not be used as a basis for future personnel action against any of the three employees.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Homeplace, Louisiana facility copies of the attached notice marked "Appendix."[22] Copies of the

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

A. J. Ross Logistics, Inc. *and* **Miguel Santiago.** Case 22–CA–14209

30 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 10 November 1986 Administrative Law Judge Edwin H. Bennett issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, A. J. Ross Logistics, Inc., Keasbey, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the judge's conduct at the hearing, interpretation of the evidence, and his credibility findings showed bias and prejudice against the Respondent. On examination of the judge's decision and the entire record, we are satisfied that the contentions of the Respondent in this regard are without merit.

The Respondent's request to reopen the record is denied as lacking in merit.

Gary A. Carlson, Esq., for the General Counsel.
Thomas F.X. Foley, Esq. (Foley, Shelly & Neiman), for the Respondent.

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge. On 14 January 1986 an unfair labor practice charge was filed by Miguel Santiago against A. J. Ross Logistics, Inc. (Respondent or Company). On 27 February 1986 a complaint and notice of hearing was issued alleging, inter alia, that Respondent had discharged Santiago and Anselmo Larquin in January 1986 because of their activities on behalf of United Steelworkers of America, District No. 9 (Union), thereby violating Section 8(a)(3) of the Act. Additionally, the complaint alleged several instances of independent violations of Section 8(a)(1) of the Act. Respondent denies that it violated the Act in any respect. The hearing on these charges was conducted in Newark, New Jersey, on 14 May 1986.[1]

On the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is located on a site of approximately 40 acres in Keasbey, New Jersey, where it is engaged in the fabrication, storage, sale, and distribution of structual steel components for use in the construction industry, including the fabrication and sale of rebars, which are steel bars used for reinforcing concrete. It has revenues of several million dollars a year, of which amount, in excess of $50,000 is derived from the sale of its products directly to places located outside the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent began in business in 1975 and has grown steadily under the direction and control of its President and Chairman of the Board, Thomas Petrizzo. Petrizzo, who characterized himself as a "hands-on" executive, plays an active role in the day-to-day operations and management of the Company. Respondent's prospectus states: "The business of the Company is greatly dependent on the active participation of" Petrizzo. He works long hours six days a week, at times arriving as early as 4 a.m., and is thoroughly familiar with every phase of the business. He personally has guaranteed $6 million worth of Company indebtedness and manifests his concern for the Company by overseeing its operations, performing manual labor, and regularly consulting with all the managers.

He tours the facility almost daily at which time he talks to the employees and observes work performance. He is particularly concerned with having "positive attitudes" among his employees and employs a secret intelligence system in order to detect "negative attitudes." Although he declined to specify all of the methods he employs to achieve this objective, his testimony left no doubt that he is constantly aware not only of the production operations but of employees concerns and attitudes towards the job.

Petrizzo's chief assistant is Ronnie Ferrer, who has been with the Company since its inception having held a variety of positions. For the past 3 years he has been a vice president whose duties place him in charge of the entire production facility. He is responsible for all receiv-

[1] All dates hereinafter are in 1986 unless otherwise stated.

ing of new products and shipment of finished goods, as well as maintenance of the equipment and evaluation of the production process. Additionally, he plays a key role as the liason between Petrizzo and the Spanish speaking employees who constitute approximately 50 percent of the total work force of about 200 employees. Ferrer frequently accompanies Petrizzo on his daily tours of the facility and serves as a Spanish translator for him.

A major component of Respondent's operations is the rebar division located in a 40,000 square foot building with an adjacent lunchroom. That operation contains two automatic machines for fabricating steel bars used to reinforce concrete. The division operates on two, 8-hour shifts daily, employing from 20–30 employees per shift. The actual fabrication of the bars is done by computerized machinery operated by highly skilled employees. In addition, there are general laborers who are used to remove the bars, bundle them, tag them, and load them on the trucks. The two alleged discriminatees were employed in this unskilled labor category on the day shift. The rebar division is headed by a vice president, Hugh Brady, and the supervisor on the day shift is Larry Greenough, both of whom admittedly are supervisors within the meaning of the Act.

B. *The Union Activity*

Dissatisfaction surfaced among the employees in January, apparently as a result of the failure to receive expected raises the previous Christmas. Brady acknowledged that this disappointment could have contributed to the development of negative attitudes among the employees. In any event, Santiago felt that he was not being treated fairly and contacted a representative of the Union, a choice he decided on because the Union had represented employees where Santiago previously had worked in 1984. As a result, a union representative, Morton, met with Santiago, and his wife Gloria, at their home on the evening of 9 January. Morton gave him about 200 authorization cards for distribution among his coworkers to solicit their support for the Union.

The credited testimony of Santiago and Larquin establishes that on 10 January they arrived at the plant at approximately 6 a.m., about 45 minutes prior to their normal starting time. Larquin generally traveled with Santiago to and from work in Santiago's automobile which usually was driven by Gloria Santiago. The two men were socially friendly, a fact known to Ferrer and Petrizzo. Both employees stationed themselves in a locker room area used both by rebar and yard employees. With Larquin acting as lookout, Santiago distributed cards to about 20 to 25 employees and received approximately 15 signed cards in return.

About 4 p.m., that same day, following his discharge as described more fully below, Santiago and Larquin, who joined him on completion of his shift, distributed union cards to employees arriving for the second shift. They continued this union solicitation outside the plant until about 5 p.m., during which time they distributed approximately 20 to 30 additional cards, with several employees signing them on the spot. The foregoing account constitutes the only significant union activity prior to the two discharges in question and is based on the credited testimony of the two employees.

C. *The Discharge of Santiago*

Santiago was hired by Ferrer in April 1984. He initially was employed as a security guard until June 1984 when he was transferred to work in the yard as an assistant to the hi-lo operator. In January 1985 he was transferred to the rebar department where he performed general labor work until his discharge on 10 January. His duties in that department included such various tasks as sweeping, throwing rods on the line, and loading cut rods on to the truck. His immediate supervisor was Greenough who in turn reported to Brady. In May 1985 he received a raise to $6.50 an hour which remained his rate of pay until his discharge.

Although Ferrer asserted that Santiago had problems as a security guard (sleeping on the job) he conceded that he was an average employee. Both Ferrer and Petrizzo sought to portray Santiago as a less than adequate rebar employee as well but could describe only a single incident to support their testimony. In July 1985 Santiago, Larquin, and two other employees were fired by Brady for refusing to work overtime on a particular Saturday. Within days of that discharge, however, and at the request of Santiago and Larquin, Ferrer interceded with Petrizzo on their behalf and the employees were reinstated. No other disciplinary action of any kind was ever taken against Santiago for any other reason throughout the period of his employment. Nor is there any evidence that he was warned in any manner concerning his work performance. Furthermore, Santiago was assigned crane operation on Saturdays when the two regular operators normally did not work, despite the fact that Petrizzo described crane operation as a dangerous job. Other duties performed by Santiago, such as flipping bars and loading trucks, also were described as dangerous and it is clear that Respondent assigned these various tasks to Santiago throughout his employment in the rebar department. Finally, although Respondent elicited testimony from many of its witnesses purporting to demonstrate that Santiago was a particularly slow, incompetent, or dangerous worker, the alleged reason for his discharge was not related to his job performance.

As noted above, Santiago arrived early for work on Friday, 10 January and together with Larquin distributed union authorization cards to employees. Following this activity he clocked in and began his regular work at 7 a.m. About 10 a.m., Greenough called him aside and told him that he had heard there was an attempt to unionize the plant and that because he was a friend of his he did not want him to have problems. Santiago denied knowledge of any union activity. Nevertheless, Greenough told him to talk to Petrizzo because "he's a good guy and don't try to get a union because that's not going to get you anything." Santiago returned to work and although Greenough proceeded to transfer him from job to job, Santiago credibly testified that he was under constant observation by Brady. Greenough, who still is employed as a supervisor, did not testify, and therefore Santiago's testimony in this regard is credited and uncontroverted.

Santiago was discharged before the regular end of his shift and before the end of the regular workweek which runs from Monday through Saturday with payday the following Thursday.

According to Santiago's credited testimony, he was sweeping the floor following the unloading of a truck when Petrizzo and Brady approached him about 3 p.m. Petrizzo told Santiago that he did not like him anymore and when Santiago asked why Petrizzo said he did not like the way he was working and that he was fired. These few words were spoken in English and were understood by Santiago. Santiago did not reply and immediately left the building followed by Petrizzo and Brady. Petrizzo told a security guard that he did not want to see Santiago at the plant again.

Brady testified that since he had become vice president in charge of the rebar department in May 1985, and prior to Santiago's discharge, approximately seven employees had been fired. In each instance, Brady made the decision to discharge the employee and communicated that action to the employee. In not a single case did Brady consult with Petrizzo in advance although in some of the cases he notified Petrizzo subsequently. All of these discharges were for poor work performance of one type or another. The discharge of Santiago was unique in the manner in which it was made by Petrizzo and in the fact that neither Brady nor Ferrer had been informed of Santiago's impending discharge. Neither of these corporate officers, who normally would have at least been involved in, or advised of, such personnel action, had so much as a suspicion that Petrizzo was contemplating such step.

Although no reason was communicated to Santiago at the time of discharge, Respondent asserts that it had good and compelling justification for the sudden discharge of Santiago. Petrizzo testified that his reason for firing Santiago in the manner described was that for several weeks Santiago had worked at a noticeably slower pace and, more importantly, had been soliciting his fellow employees to join him in this slowdown campaign. However, Petrizzo conceded that although he knew of Santiago's slowdown tactics, he never warned Santiago to cease such activity, nor had he told any of his supervisors about his observations or instructed them to take measures to deter Santiago from this most serious conduct. Petrizzo was insistent that the reason for firing Santiago was the "slowdown" campaign he had been urging on other employees. However, Petrizzo's testimony is not supported by any independent evidence from other workers who were the recipients of Santiago's alleged slowdown activities nor is he supported by any of the supervisory staff or indeed by Respondent's formal response to the complaint.

Thus, Petrizzo's testimonial contentions are inconsistent with Respondent's opening statement asserting that both Santiago and Larquin were fired for their refusal to perform specifically assigned work. Their discharges in January, it was alleged, were motivated by the same type of conduct that resulted in their discharges in July 1985, at which time, it will be recalled, they were fired, although later reinstated, for their concerted refusal to perform overtime work. This alleged nonperformance of duties as the reason for Santiago's discharge is repeated in Respondent's brief, i.e., that he was fired because Petrizzo observed him not working. Brady's testimony, while supportive of the formal position, is at odds with Petrizzo's testimony. According to Brady, he and Petrizzo had been observing Santiago loafing for several minutes prompting a comment to this effect by Petrizzo. It was at that very moment that Petrizzo summoned Santiago and fired him. It was Brady's belief that although he had not been informed of the reasons of the discharge, Santiago's loafing was the immediate cause therefor. Ferrer, who was the liaison between Petrizzo and the Spanish-speaking employees, and who can be described as Petrizzo's right hand man in the overall operations of Respondent, first learned of Santiago's discharge later that afternoon from an employee and not from Petrizzo or Brady. There is no explanation in the record for Ferrer's ignorance of Petrizzo's intent to discharge an employee who for several weeks allegedly had been instigating a slowdown.

D. *The Discharge of Larquin*

Larquin had been hired by Ferrer in February 1985 and had worked the entire period of his employment in the rebar department, tying and ticketing cut rods. At the time of his discharge he was earning $6 an hour, a rate of pay that he started to receive in May 1985. He was described by Brady as a good worker, essentially no different than any other worker in the rebar department. He had never been warned or disciplined for poor work performance, except for the disciplinary action in July 1985 noted above, involving the concerted refusal to work overtime.

On Saturday, 11 January, the day after Santiago's discharge, about noon time, while Larquin was performing his assigned duties, he was approached by Petrizzo and Ferrer. Petrizzo called him over and told him, in English, that he was fired. At Larquin's request, Ferrer confirmed the discharge in Spanish. Neither official gave Larquin any reason. Nevertheless, as was the case with Santiago, Respondent, during the trial of this matter, offered several reasons for his discharge.

As noted, Respondent's position at the opening of the hearing was that Larquin and Santiago were fired essentially for the same reasons that motivated their discharges in July 1985, that is, that they refused to perform assigned work. Respondent's brief, however, asserts that Larquin was fired for "gesturing and screaming in Spanish at the other workers," and for continuing such threatening conduct despite efforts by Petrizzo to stop him. Notwithstanding these two reasons, Respondent's witnesses did not entirely agree and they testified at variance to both.

The crucial testimony, and the most contradictory, was given by Petrizzo who made the decision to discharge Larquin without any consultation whatsoever with Ferrer or Brady and who actually communicated the discharge notice. He testified repeatedly and unequivocally that he fired Larquin for the same reason that he fired Santiago, namely that Larquin, for a prolonged period of time, had been urging employees to

engage in a work slowdown. Further, although he claimed to have observed that conduct personally, he did not explain his failure to warn Larquin or to take measures to have him cease these slowdown tactics. His testimony regarding Larquin mirrors his testimony concerning Santiago. In addition, Petrizzo specifically denied that he had observed Larquin on the day of the discharge creating any sort of disturbance with the other employees or that Larquin's prior work performance, which he considered generally unsatisfactory, motivated his discharge decision.

Ferrer, on the other hand, testified that although he had no advance knowledge from Petrizzo that Larquin would be fired, and although Petrizzo did not communicate a reason to Larquin, he was sure that Larquin was fired because, on that day but not before then, he had been urging a slowdown. Unfortunately for Respondent, Ferrer was equally sure that such conduct was not the cause of the discharge but rather that he was fired because of his misconduct in cursing at other employees. Thus, Ferrer testified, "I think that the reason that he was laid off, it was because of these—the way he—he was cursing at everybody and everybody else and not because of the slowdown," and that this conduct occurred only moments before the discharge. Brady, in whose department Larquin worked and who had determined to fire Larquin and the others in July 1985, testified that he did not learn of the discharge until later and that to the best of his understanding, Larquin was fired for arguing or fighting and that he was not aware that Larquin had ever urged employees to engage in a slowdown.

E. *The Postdischarge Events*

On Monday, 13 January, Larquin, Santiago, and Santiago's wife drove to the plant about 6:30 a.m., to try and persuade Ferrer to again intercede with Petrizzo to have them reinstated. They waited for Ferrer to arrive and spoke with him outside the plant. Gloria Santiago, who knew Ferrer for several years, was the principal spokesperson. There was a brief conversation in which Ferrer was told that the two men wanted to return to work. According to the credited testimony of Gloria Santiago, Ferrer replied that "your husband is the leader of the union, and we can't have a union here because if the union comes in we'll have to close." The conversation ended with Ferrer stating that he would see what he could do about their reinstatement after such request was repeated. The testimony of the three General Counsel's witnesses is in substantial accord regarding this meeting, while Ferrer did not specifically testify about this event.

Several days later, at Ferrer's request, they all met again at a liquor store he owned in Elizabeth, New Jersey. Ferrer asked them what they wanted, to which they replied that they wanted their jobs back. In addition, Santiago and Larquin said they wanted wages lost as a result of their discharges and the wage increase that had been promised around Christmas time. Ferrer commented that they should have spoken to him before they became involved with a union. Furthermore, he told them he could do nothing about getting them any money but he would see what could be done about reinstatement. He also repeated his statement that the Company would close rather than deal with a union in which case, he added, even he would have to collect unemployment. The foregoing account is based on a composite of the credited testimony of the three General Counsel's witnesses. Ferrer did testify about this meeting and denied that there was any mention of a union, that he made any of the threats attributed to him, and that the only subject discussed was reinstatement. I do not accept Ferrer's account of this meeting. The testimonial demeanor of the General Counsel's witnesses throughout was much more favorable. Ferrer's testimony generally was inconsistent and self-contradictory (particularly concerning the reason for the firings), and this second meeting, which he requested (a matter about which he also was evasive), was in keeping with the first meeting, which as noted, he did not specifically deny. I conclude that Ferrer, as well as Petrizzo, were not reliable witnesses and that their testimony concerning the alleged violations of the Act was not candid or complete.

F. *Analysis*

1. The discharges of Santiago and Larquin

It is now firmly established that if the General Counsel has made a prima facie showing that an employer's discharge decision was motivated by protected conduct, the employer has the burden of persuading, by a preponderance of the evidence, that such discharge would have occurred even in the absence of that protected conduct.[2] Whether or not an inference of a discriminatory motive exists, rests on the presence, or absence, of various indicia knowledge of protected conduct, the timing of the discharge in relation to such conduct, animus or hostility towards the protected activities—including the existence of other independent violations of the Act—and the validity of the asserted business justification for the discharge. In this last respect, the General Counsel notes in his brief, citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966): "If [the administrative law judge] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference."

Applying these guidelines to the credited evidence, I find there is a substantial basis for concluding that a prima facie case, and a compelling one at that, has been established with respect to the discharges of Santiago and Larquin. The following recapitulation of the evidentiary highlights shows that on 10 January, Santiago and Larquin engaged in significant protected activity by soliciting union membership from their colleagues at the workplace.[3] This conduct became known to Respondent

[2] See generally *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984), for a discussion of the *Wright Line* analysis in discrimination cases.

[3] Larquin served only as a lookout on the morning of 10 January while Santiago did the actual card distribution. Larquin nailed his own coffin, however, by joining Santiago in direct card distribution that day after

Continued

almost immediately, for within hours Santiago's supervisor, Greenough, cautioned him about participating in such conduct. The involvement of Santiago and Larquin in union activity was a repeat display of a "negative" attitude towards the Company for it clearly showed their dissatisfaction with employment conditions. These two employees previously were linked in a protest regarding compulsory overtime for which they had been fired and, after a joint appeal, ultimately reinstated. Whether or not this earlier conduct implicated rights under the Act is not an issue in this case. However, it does reinforce the conclusion that Respondent considered them as a source of friction between management and employees for which a corrective measure (discharge) was required. In fact, one of Respondent's defenses is that they were fired in 1986 for the same reason for which they had been fired in 1985. Thus, we have the element of company knowledge of protected activity.

Respondent's denial of knowledge is without merit. Not only is there direct evidence of such knowledge in Greenough's statement to Santiago, but it is confirmed by Ferrer's statements on 13 January and a few days later to Larquin, Santiago, and his wife on the occasions outside the plant and at the liquor store when they sought Ferrer's help in securing their reinstatement as he had done in July 1985. Moreover, there is strong circumstantial evidence that Petrizzo learned of the card distribution immediately, in the morning and in the afternoon of 10 January. Petrizzo lauded his "secret service" for ferreting employee "negative" attitudes and when this is combined with the statements of Greenough and Ferrer, and the pretextual excuses given for the discharges (discussed more fully below), the inference of such knowledge by Petrizzo prior to the discharges is inescapable. "The same set of circumstances may be relied on to support both an inference of knowledge and an inference of discrimination." *Coca Cola Bottling Co.*, 237 NLRB 936, 944 (1978).

The other aspects of the prima facie case are that the discharges came immediately (the same day and next) on the heels of the union activity, they were done in the middle of a day and before the end of a pay period; they were effectuated in an unprecedented manner, i.e., by Petrizzo himself; no supervisor was aware of or consulted about the discharges; there is other evidence of animus towards the union activity (see discussion below regarding the independent 8(a)(1) allegations), no reason at all was stated at the time of the discharges; and, finally, the reasons for the discharges advanced in this proceeding are so flimsy and paperthin as to be almost nonexistent.

We turn then to the Respondent's purported justification for firing both men, i.e., that Petrizzo claimed they both had been engaged in fomenting a slowdown campaign for several weeks among the other employees. Yet not a single supervisor or manager was aware of such conduct, not a single employee supported the testimony, and, most significantly, Petrizzo conceded that he allowed and permitted such disruptive conduct to occur without so much as a word of displeasure to anyone. Considering Petrizzo's total involvement in the Company—physically, emotionally, and financially—I find it inconceivable that he maintained total silence in the face of such serious misconduct. On the other hand, if as I conclude, the allegation of "slowdown" is but Petrizzo's euphemism for union activity, it is not surprising, and in keeping with his managerial style, that immediate and forceful action was taken to root out this manifestation of "negative attitudes."

Accordingly, I reject Petrizzo's assertion that he had just cause (incitement of a work slowdown) for firing Santiago and Larquin. I am confirmed in this finding by Respondent's own case, for as described above, various other contradictory and inconsistent reasons were offered for the necessity of firing the two men in such precipitous manner. Thus, Respondent also claims that Santiago was fired for loafing on the day of discharge, that Larquin was fired for loud and disruptive behavior immediately prior to his discharge, and that both were fired for insubordination, i.e., refusing to perform specific assignments. In cases of this kind it has been said that "an unfavorable inference can be drawn from an employer's shifting explanations for its treatment of an employee." *Louisiana Council No. 17, AFSCME*, 250 NLRB 880, 886 (1980) (see fn. 38 and cases cited). The instant case is a classic example of that proposition. Inasmuch as Petrizzo's reasons are without merit and it was he who made the decision, a fortiori the reasons advanced by other Respondent officials are equally fallacious. The insubstantial, unreliable, and pretextual justification for firing Santiago and Larquin does not satisfy Respondent's burden of overcoming the General Counsel's strong prima facie case. According, I conclude that Respondent violated Section 8(a)(3) and (1) in discharging these employees as alleged in the complaint.

2. The independent 8(a)(1) allegations

The complaint alleges that Respondent, through Ferrer during the two postdischarge conversations he had with the Santiagos and Larquin, unlawfully promised a wage increase, threatened the closing of the plant in the event of unionization, and unlawfully solicited grievances.

The credited evidence establishes that on both occasions, Ferrer made statements to the effect that the plant would close if employees obtained union representation. No lengthy discussion is required to conclude that such remarks are coercive and violated Section 8(a)(1) of the Act as alleged.

The credited evidence also establishes that at no time during these meetings did Ferrer so much as suggest that wage increases would be granted if employees cease their support for the Union. In fact the General Counsel's witnesses all testified that Ferrer categorically rejected the demand for reinstatement. The General Counsel does not pursue this allegation in his brief, but whether or not it is abandoned, I conclude there is no evidentiary support for it and therefore find it lacks merit.

---

work, thus sealing his fate for the discharge that followed the next day. If Respondent was not fully aware of Larquin's union involvement in the morning of 10 January, as discussed below, it undoubtedly learned of his union activity that afternoon.

The evidence regarding the allegation of solicitation shows that on 13 January, at the meeting outside the plant, Ferrer was told that the men wanted reinstatement to which he replied that he would see what he could accomplish. However, the conversation was initiated by the discriminatees and Ferrer did not "solicit" or ask their wishes about anything. On the other hand, the meeting at the liquor store began by Ferrer asking the discriminatees what they wanted and again saying that he would see what he could do about their request for reinstatement. The General Counsel argues that by such conduct, Respondent unlawfully solicited grievances.

The vice in such violation lies not in the solicitation itself but rather in the promise—be it inferred or explicit—that the grievance will be corrected without union representation. *Uarco Incorporated*, 216 NLRB 1 (1974). Of course, without a solicitation by the employer to begin with there can be no unlawful solicitation at all (which is not to say that there might not be an unlawful promise). Consequently, there is no factual support to the General Counsel's argument with respect to the meeting on 13 January.

The meeting at the liquor store, however, raises different considerations because at that time Ferrer did ask, i.e., "solicit," their concern or "grievance." Nevertheless, I do not believe that the context in which that question was asked constitutes the type of conduct envisioned by the Board when it refers to the soliciting of grievances in order to remedy them without union representation. Here the "grievance," if it be that, concerned not an ongoing term of employment, e.g., wages, hours, discipline, etc., which would be improved if employees ceased their union support, but rather a discriminatory discharge. Although it might be argued that Respondent might have considered reinstatement if the men abandoned their union interest, thus satisfying the element of corrective action, that inference appears too remote in the circumstances of this case. Considering the high degree of evidence supporting the case for finding that the discharges were discriminatory, Ferrer's question seems more rhetorical than solicitous. Moreover, absent controlling case authority, I am reluctant to conclude that discussions concerning possible reinstatement of illegally discharged employees, albeit that it is conditioned on foregoing union representation, constitutes an unlawful solicitation of grievances within the lexicon of Board law. It would suffice to deal with and remedy that conduct as part of the 8(a)(3) violation and therefore, I will recommend dismissal of this distinct 8(a)(1) allegation.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily discharging and refusing to reinstate its employees Miguele Santiago and Anselmo Larquin because of their activity on behalf of the Union, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. By threatening its employees with the closing of its plants if they seek representation by a union, Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act in any respect other that specifically found.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Having found that Respondent discharged and failed to recall Miguel Santiago and Anselmo Larquin in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to offer them immediate and full reinstatement to their former positions of employment or, if these positions are not available, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

I shall also recommend that Respondent be ordered to make each of them whole for any loss of earnings they may have suffered from the date of their respective discharges to the date each is offered reinstatement. Their loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall include interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

I shall also recommend that Respondent remove from its files any reference to the discharges of Santiago and Larquin and notify them in writing that it has done so, and that evidence of their discharges will not be used as a basis for future, personnel action against either of them. *Sterling Sugars*, 261 NLRB 472 (1982).

The prayer for relief in the complaint requests, as part of the remedy, authorization for discovery proceedings pursuant to the Federal Rules of Civil Procedure in order to secure compliance with any order of the Board. The General Counsel does not contend that there are any special circumstancees necessitating departure from the standard remedy in similar cases and I will not include that requested remedy here. *Northwind Maintenance Co.*, 281 NLRB 317 (1986); *O. L. Willis, Inc.*, 278 NLRB 203 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, A. J. Ross Logistics, Inc., Keasbey, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees in regard to hire or tenure of employment, or any term of condition of employment, because of their activities on behalf of United Steelworkers of America, District No. 9, or any other union.

(b) Threatening employees that the plant will close if they seek to be represented by a union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Miguel Santiago and Anselmo Larquin immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the remedy section of this decision.

(b) Make whole Miguel Santiago and Anselmo Larquin for any loss of pay they may have suffered by reason of Respondent's unlawful discharges in accordance with the remedy section of this decision.

(c) Remove from its files any reference to the discharges of Miguel Santiago and Anselmo Larquin and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against either of them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to the analysis of the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Keasbey, New Jersey, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order, what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and it is hereby, dismissed in all other respects.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, or otherwise discriminate against our employees, because of their activities on behalf of United Steelworkers of America, District No. 9, or any other union.

WE WILL NOT threaten our employees that the plant will close if they seek to be represented by a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

WE WILL offer Miguel Santiago and Anselmo Larquin immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole, with interest, for any loss of earnings they may have suffered because we unlawfully fired them.

WE WILL remove from our files any reference to the discharges of Miguel Santiago and Anselmo Larquin, and we will notify them that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against either of them.

A. J. ROSS LOGISTICS, INC.

Local 11, National Association of Broadcast Employees and Technicians, AFL–CIO *and* National Broadcasting Company, Inc. and Local 23, International Alliance of Theatrical Stage Employees, AFL–CIO. Case 1–CD–782

30 March 1987

DECISION AND ORDER QUASHING NOTICE OF HEARING

BY MEMBERS BABSON, STEPHENS, AND CRACRAFT

The charge in this Section 10(k) proceeding was filed 3 June 1986 by the National Broadcasting Company, Inc. (the Employer or NBC) alleging that Local 11, National Association of Broadcast Employees and Technicians, AFL–CIO (Local 11) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Local 23, International Alliance of Theatrical Stage Employees, AFL–CIO (IATSE). The hearing was held 13 November 1986 before Hearing Officer John T. Downs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

NBC, a Delaware corporation, owns a radio station in Boston, Massachusetts, where it annually has gross revenues in excess of $100,000 and makes purchases in excess of $50,000 directly across state lines. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that both Local 11 and the IATSE are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer has a collective-bargaining agreement with Local 11 whose members travel with NBC-owned and leased equipment for remote broadcasts. NBC contracted with boxing promoter Dave Duma to televise a boxing match from the Providence Civic Center on 18 May 1986. NBC's director of staff labor relations David Heiser testified that on 7 May 1986 he received a copy of a collective-bargaining agreement between the Providence Civic Center Authority (PCC) and IATSE. He testified that Ernie De Rosa, NBC's technical manager of sports, obtained the contract at Heiser's request after De Rosa told him there might be a problem concerning who should perform the loading and unloading of NBC's technical equipment. According to unsworn statements on the record by Local 11's counsel, on 8 May 1986 Heiser received a phone call from PCC representative Robert Casey, who insisted that, pursuant to PCC's contract with IATSE, the work of loading and unloading NBC-owned technical equipment used for the boxing match must be given to IATSE. Local 11 and the Employer stipulated that some time around 8 May 1986 Local 11 Business Representative John Clark contacted Heiser and threatened to withhold all services if his members did not load and unload the equipment. De Rosa testified that the work was assigned to and performed by members of Local 11 on 18 May 1986.

B. *Work in Dispute*

The work in dispute is the loading and unloading of NBC-owned and leased technical equipment and NBC-owned lighting equipment for televised events at the Providence Civic Center.

C. *Contentions of the Parties*

NBC and Local 11 claim that whenever NBC is present at the Providence Civic Center the work in dispute should be awarded to employees represented by Local 11 based on their collective-bargaining agreement, the skills and experience of employees Local 11 represents, industry practice, efficiency of operation, employer preference, and Board precedent. Neither NBC nor Local 11 filed a brief. PCC and IATSE did not appear at the hearing, nor did they file briefs.

D. *Applicability of the Statute*

We find that the record in this case is insufficient to establish a jurisdictional dispute cognizable under Section 10(k) of the Act.

There is little or no evidence that NBC is faced with two or more competing employee groups claiming the work disputed above. No evidence was adduced at the hearing that IATSE contacted NBC or PCC about the work. Neither party present at the hearing alluded to this omission or lack of evidence concerning two employee group claims. At most, the parties have shown that NBC obtained a copy of a PCC-IATSE contract that purports to cover the work in dispute, and that an NBC representative speculated there might be a

problem about what employees should perform the work.[1]

Accordingly, we conclude there is insufficient evidence to support a finding that the Employer is faced with competing employee group claims. We further conclude that there is no jurisdictional dispute within the meaning of Sections 8(b)(4)(D) and 10(k) of the Act. We shall therefore quash the notice of hearing.

[1] Further, even if we were to consider as evidence the unsworn representation of counsel for Local 11 regarding the Heiser-Casey phone conversation, we would still find the record insufficient to support a finding that the Employer is faced with competing employee group claims.

ORDER

The notice of hearing is quashed.

Asociacion Hospital del Maestro, Inc. *and* Juan David Rosario *and* Heibert Rojas Hernandez. Cases 24–CA–5245 and 24–CA–5276

30 March 1987

DECISION AND ORDER

BY MEMBERS BABSON, STEPHENS, AND CRACRAFT

On 27 October 1986 Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Asociacion Hospital del Maestro, Inc., San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The General Counsel seeks a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

[2] We grant the General Counsel's request that the notice marked "Appendix B" be posted in Spanish as well as English.

Raymond E. Morales, Esq., for the General Counsel.
Roberto Vega-Pacheco, Esq. (Cancio, Nadal & Rivera), of San Juan, Puerto Rico, for the Respondent.

DECISION

ROBERT W. LEINER, Administrative Law Judge. This matter was heard on four occasions on and between 26 February and 1 April 1986, in San Juan, Puerto Rico, on the General Counsel's consolidated amended complaint,[1] as further amended at the hearing, alleging, in substance, that Asociacion Hospital Del Maestro, Inc. (Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by promulgating and maintaining an unlawful rule prohibiting employees from wearing union insignia and buttons on their uniforms, threatening employees with discipline if they did not remove insignia from their uniforms, indefinitely suspending employees for wearing insignia on uniforms, conditioning their return to work on the removal of such insignia from the uniforms, and, on 26 November 1985, discharging its employee, Heibert Rojas Hernandez, and thereafter failing and refusing to reinstate him, because of his union activities.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, submit oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to file posthearing briefs which have been carefully considered.[2]

On the entire record, including the briefs, and from my observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

The consolidated amended complaint alleges, Respondent admits, and I find that Asociacion Hospital del Maestro, Inc., a corporation existing under the laws of the Commonwealth of Puerto Rico, has maintained its principal office and place of business in Hato Rey, San Juan, Commonwealth of Puerto Rico, where it has continuously engaged in the operation of a health care institution, an acute hospital, providing medical and related services. During the year ending January 1986, a representative period of its annual operations, Respondent, in the course and conduct of its hospital operations, derived gross revenues in excess of $250,000 and, during the same period, purchased and caused to be shipped and delivered to its aforesaid place of business from points located outside the Commonwealth of Puerto Rico materials and supplies valued in excess of $50,000. Respondent, as it admits, at all material times, has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act.

II. THE UNIONS AS STATUTORY LABOR ORGANIZATIONS

The consolidated amended complaint alleges, Respondent in its amended answer admits, and I find that at all material times Union Local No. 2 de Enfermeras y Enfermeros Auxiliares Practicos Licenciadoes y Escoltos del Hospital del Maestro, affiliated with Confederacion Obrera Puertoriquena (Local 2) is, and has been at all

[1] The underlying unfair labor practice charge filed by Juan David Rosario on 15 October 1985 (Case 24–CA–5245), was served on 16 October 1985. His amended charge was filed and served on 20 November 1985. Complaint and notice of hearing were issued and served on 26 November 1985. The underlying charge in Case 24–CA–5276, filed by Heibert Rojas Hernandez on 29 November 1985, was served on 2 December 1985. The General Counsel's order consolidating cases, the consolidated amended complaint, and notice of hearing were issued and served on 16 January 1986. Respondent's timely answer to the consolidated amended complaint is dated 27 January 1986. Its amended answer is dated 14 February 1986.

[2] Along with her brief, the General Counsel submitted a motion to correct the transcript of evidence in various respects. That motion, dated 22 July 1986, has been unopposed and is granted.

material times, a labor organization within the meaning of Section 2(5) of the Act.[3]

III. THE ALLEGED UNFAIR LABOR PRACTICES[4]

A. *Background*

Respondent's hospital in Hato Rey employs 700 employees in 7 bargaining units each with its own local union. They are designated Locals 1 through 7, Locals 1, 2, 5, and 6 being affiliated with the Confederacion. Local 2 represents a unit of 180 LPNs, nurses aides, and "escorts."[5] All collective-bargaining agreements representing these labor organizations expired in 1985 and there are no collective-bargaining agreements in effect between the Respondent and any of its employees through the time of the hearing.

On 9 September 1985, Juan Rosario, president of Local 2, requested a meeting with Respondent regarding rumors of an impending layoff of the licensed practical nurses (LPNs) and their replacement by registered nurses (RNs). Respondent and representatives of Local 2 met on 9 September and Respondent, by Supervisor Jesse Pou Rivera, told the Local 2 representatives that they had heard only rumors and if there was any decision, the hospital would notify the Union. Within a short time thereafter, however, Respondent decided to terminate all the practical nurses and, in a meeting of 16 September 1985, notified Confederacion President Frank Ruiz that it intended to replace all the practical nurses with registered nurses and that it was willing to negotiate and discuss this decision. Pou told Ruiz that the reasons for this decision included the hospital's desire to upgrade the quality of its services, that fewer registered nurses could provide the same services as the LPNs, and that the use of registered nurses would shorten the hospital stay of patients through the upgrading of services.

While no LPNs were actually laid off until 5 October,[6] commencing on or about 30 September, 90 of the 180 Local 2 unit employees started wearing black ribbons on their uniforms. The black ribbons measured about 4 inches in length and consisted of a folded-over piece of cloth creating two "wings," each of which was about 4 inches long. At or about the same time that the black ribbons appeared, a handbill was distributed at the hospital on the letterhead of Local 1199 of the Hospital Workers Union. It is uncontested that Local 2 was seeking to affiliate with Local 1199 and that sometime in July 1985, Local 1199 filed a petition for certification as statutory representative of the employees represented by Local 2. The handbill protested the threat of discharge of the LPNs and criticized Confederacion President Frank Ruiz for taking a position giving the employer any advantage in ridding itself of the LPNs. The handbill also stated that the purpose of the wearing of black ribbons was to show unity and solidarity among all the members of the unit (G.C. Exh. 7(a)).

The black ribbons were worn commencing on or about Tuesday, 3 October 1985, and were worn for about 7 days thereafter ending on or about 9 October. Commencing on or about Monday, 7 October 1985,

---

[3] Respondent also admitted that the following employees of the hospital were Respondent's supervisors within the meaning of Sec. 2(11) and Respondent's agents within the meaning of Sec. 2(13) of the Act: Jesse Pou Rivera, industrial relations and personnel director; Maria T. Rivera, nursing director; and Juana Maldonado Ortiz, general supervisor. There was also no dispute that Charging Party Juan David Rosario, at all material times, has been president of Local 2; and that Charging Party Heibert Rojas Hernandez, a member of Local 2, a nurses aide and therefore a member of the unit represented by Local 2, a former vice president of Local 2, was discharged on 26 November 1985. Lastly there is no dispute that Frank Ruiz, at all material times was president of Local 2's parent, the Confederacion Obrera Puertoriquena (the Confederacion), also a labor organization.

[4] In its answer, at the hearing, and again in its brief, Respondent pleaded as a defense that the instant alleged unfair labor practices be deferred to arbitration. The parties stipulated that a collective-bargaining agreement between the Confederacion and Local 2 and Respondent expired on 8 April 1985. There is no current agreement. While Respondent desires to proceed to arbitration, the General Counsel, Local 2, and the individual Charging Parties herein oppose. Respondent has stated a willingness to waive all procedural defenses as well as the issues of substantive arbitrability of the controversy and the timeliness of filing the arbitration request. The General Counsel defends principally with the argument that under Board rules, although allegations involving violations of Section 8(a)(1) and (3) are ordinarily deferrable to arbitration, *United Technologies Corp.*, 268 NLRB 557 (1984), they should not be deferred when the interests of the Union which might be expected to represent the employees are adverse to those of the employee, *United Technologies Corp.*, 268 NLRB at 560. In the instant case, there is evidence of "friction" between Local 2 and the Confederacion. This ill feeling was known by Respondent at all material times. Local 2, on this record, has sought to disaffiliate from the Confederacion and has sought to affiliate with another labor organization, Local 1199 of the Hospital Workers Union. Moreover, there was evidence on this record of antagonism on the part of Confederacion President Frank Ruiz against the members of Local 2 whose interest the Confederacion might be called on to defend in an arbitration proceeding. Respondent notes that the expiration of the contract is no defense to its continued vitality as a vehicle permitting arbitration, *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977); *American Sink Top Co.*, 242 NLRB 408 (1979). The deferrability of a discharge allegedly in violation of the Act under *United Technologies*, when the discharge occurs well *after* contract expiration and is not linked with any element of the expired contract, appears to be a matter raising doubts on the applicability of *Nolde Bros.* See *Teamsters Local 238 v. C.R.S.T.*, 795 F.2d 1400 (8th Cir. 1986). Furthermore, the Board appears to be not entirely satisfied with its *American Sink Top* decision. *Southwest Security Equipment Corp.*, 262 NLRB 665 (1982). See also *Emery Air Freight Corp. v. Teamsters Local 295*, 786 F.2d 93 (2d Cir. 1986). (*Nolde* requires, inter alia, that the grievance be raised within a reasonable time after contract expiration). Here, the grievances arose 6 months after contract expiration.

However, in resolving Respondent's deferral defense it is unnecessary to reach or decide the *Nolde Bros.* issue or the General Counsel's argument of union hostility. For whatever reason, the parties have failed to submit in evidence the expired contract, or even its terms, if any, relating to arbitration, including the binding nature thereof, or what issues the arbitrator might consider. There is nothing on this record other than a stipulation that a contract binding the parties expired in April 1985. Nor was the contract or its arbitration provisions, if any, introduced in evidence or described in a companion case (Case 24–CA–5293) involving some of the same parties, certain issues in which apparently were submitted to arbitration. Because the Board rule is settled that a precondition to deferral is the existence of a contract which an arbitrator may interpret, *Teamsters Local 287 (Reed & Graham)*, 272 NLRB 348 (1984), and because there is insufficient evidence of the existence, scope, or binding nature of an agreement to arbitrate any dispute, I must necessarily recommend to the Board that Respondent's request for deferral under the doctrine of *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), be denied. See *Arizona Portland Cement Co.*, 281 NLRB 304 fn. 2 (1986).

[5] Local 1 represents warehouse, maintenance, and laundry employees; Local 3 represents clerical workers; Local 4 represents X-ray technicians; Local 5 represents operating room technicians; Local 6 represents practical nurses in the clinics only; and Local 7 represents registered nurses.

[6] More than 20 LPNs were laid off on 15 October, with a further group in excess of 20 laid off on 29 November. Thirty-five registered nurses were hired to replace them.

some of the employees ceased wearing black ribbons and wore only a round union button, while others wore the black ribbon and the union button. Whereas the black ribbon (G.C. Exh. 6) measures about 4 inches long in each wing, the union button (G.C. Exh. 12) is 2-1/2 inches in diameter and is white with black letters and yellow markings showing affiliation with Local 1199 (Union Nacional de Trabajadores de la Salud).

This was not Respondent's first experience when black ribbons were worn by its personnel. In August 1981, eight of its emergency room employees wore black ribbons with the word "protest" on the ribbon. The administrator of the hospital at that time (Jose Antonio Brull) contacted Confederacion President Frank Ruiz and told him that the wearing of the ribbons in the hospital was illegal. Ruiz answered that if the hospital withheld disciplinary action, he would try to get them to remove the ribbons. The ribbons were removed after a few days and the hospital took no action against the employees. The parties did not take the matter to arbitration or seek to further specify in the succeeding collective-bargaining agreement, or otherwise, what prohibitions, if any, on wearing items on uniforms, existed.

Commencing about Wednesday, 9 October 1985, more than 90 unit employees ceased wearing the black ribbons and commenced wearing 6-inch long red ribbons (G.C. Exh. 8), the red ribbons consisting of a single wing approximately 7-1/4 inches long and bearing, in parallel lines along its length, the words "Protesta por Despido" ("protest for discharge"). The employees wore the red ribbons on their uniforms inside the hospital from around 10 October to 15 October. At that time no black ribbons were worn. Some employees wore Local 1199 union buttons with the red ribbons.

Many unit employees are employed in the nursing department (total of 286 employees) under the direction of Nursing Director Maria T. Rivera. In four to six meetings (9 to 14 October) of nursing department personnel,[7] many of whom were wearing union buttons and ribbons in various colors, Nursing Director Rivera told the employees that wearing the ribbons and buttons violated a hospital rule and that they had to remove the ribbons and union buttons from their uniforms or face "severe disciplinary measures" very few employees removed the ribbons. These meetings were a result of 9 and 10 October meetings of hospital supervisors called by Pou. Pou told his supervisors that the red ribbon could not be worn anywhere or at any time in the hospital. There is no dispute that both the black and red ribbons were worn pursuant to Local 2's protest against the replacement of LPNs by registered nurses.

As a result of Pou's meeting with hospital supervisors, Respondent invoked its "uniform code" and instructed its supervisors to direct the employees to remove the ribbons and any other object on the uniform other than employee nametag and the name of the school in which the employee trained. It might be noted that Rivera told the employees under her control in the nursing department, at these four to six meetings, that they would have to remove the black ribbons even before the appearance of the red ribbons (Tr. 443); and that the employees also had to remove the Local 1199 buttons (Tr. 443–444). Rivera testified that a great majority of the employees wearing the ribbons were involved in direct care of patients (Tr. 445). She did not tell any of the employees, whether involved in direct patient care or not, when or where they could wear any of the ribbons or buttons. It is uncontested, for instance, that the unit employees and other employees eat in a cafeteria on hospital grounds which is restricted to the employees of the hospital. No others may eat there.

Pou convened the 9 October meeting of his supervisors because of reports, discussed below, of dissention among employees and harassment of patients with regard to the wearing of the ribbons and buttons. It was on that basis that Pou directed his supervisors to direct the employees to remove ribbons and any other objects from their uniforms.

On 11 October, Respondent issued the following letter (G.C. Exh. 9(a)) to all employees wearing the red ribbon:

> As you are aware, it is this Hospital's policy not to allow its uniformed employees to wear insignias or buttons not pertinent to same, other than the identification, employee name or other articles which are part of your uniform or essential for your work.
>
> The reason for this policy is that the use of this insignia, buttons or objects not pertinent to the uniform interferes with the rendering of the health services assigned to you, causes confusion and insecurity in our patients and provokes friction and discord between visitors and employees.
>
> We hereby urge you to comply with this policy. If you fail to act pursuant to same, we will be forced to take more severe disciplinary action which may include your suspension from work without pay until same is complied with. Expecting your usual cooperation, I remain,
>
> Very truly yours,
> /s/ Jesse Pou Rivera
> Industrial Relations and Personnel Director

On the same morning (11 October) that the letters were distributed, Local 2 President Rosario, wearing a red button, met with Personnel Director Pou and asked why the letters were being distributed. Pou said that they had to remove the ribbons because the wearing of the ribbons was against the hospital's "norms and regulations" (Tr. 84). When Rosario asked Pou for the authority in the hospital manual restricting the use of the red ribbons on the uniforms, Pou did not show him any such rule or regulation but told him that if he did not take off the ribbon he would have to leave. Rosario told him he would not leave without a letter of suspension and Rosario returned to work without consequence. The employees continued to wear the red ribbons through 14 October 1985.

[7] While Supervisor Rivera testified that the meetings started in the week of 3 October, Pou testified that they started around 9 October. I credit Pou's recollection.

B. *Respondent's Dress Code*

At all material times, Respondent has maintained in its nursing department employee manual a dress code (R. Exh. 1(a)). The dress code appears in the manual but is not otherwise distributed to employees at the time of first hire or any other time. The manual is maintained in the nursing department and applies only to nursing department employees:

STANDARDS FOR USE OF UNIFORMS

Purpose

To project adequate and correct image, both to the patients, family members and visitors, as well as to the other fellow employees in the hospital.

Standards

1. The nursing personnel at all levels will use the complete and correct uniform in all shifts.
2. In the newborn, maternity and sterile supplies departments, the nursing staff will arrive at their respective departments with the completely white uniforms as it corresponds to them. Afterward, he or she will change to the proper clothing in these departments.
3. The maternity ward, newborn ward, and sterile supplies personnel will use their completely white uniforms to go down to the dining room as well as to go out to other areas of the Hospital. This personnel will only be allowed to perform pertinent tasks in the light blue flowered robe or the white robe over the light blue clothing used in these departments.
4. It is an indispensable requirement as part of your uniform the use of the Hospital identification pin.

Professional Nurses:

Feminine: White uniform, with 3/4 length sleeve, nursing cap, and school insignia, white stockings and white shoes. You can wear a skirt or white pants following the same indications.

Masculine: White pants, shirt, socks and shoes, as well as school pin.

Escorts:

Feminine: White uniform with short sleeve, brown socks and white shoes.

Masculine: Black pants, blue shirt (preferably Guayabera), do not use sweaters.

Practical Nurses:

Feminine: White short sleeve uniforms, nursing cap and school insignia, white socks and white shoes. She can wear an ensemble of skirt or pants following the same indications.

Masculine: In the case of the male nurse he will use white pants and shirts with the school insignia as well as white shoes and white socks.

Hospital Aids:

Feminine: White short sleeve uniform, brown socks, white shoes.

Masculine: White pants, shirts, socks and shoes.

Respondent does not suggest the existence of any other rule with regard to the use of uniforms. With regard to actual practice in the wearing of insignia, General Counsel's witness Maria L. Badillo testified without contradiction that at all times since her employment as a registered nurse in June 1978 she has worn on her uniform, while dealing with patients, various insignias including a yellow metal flower with leaves 2-1/2 inches by 1 inch; and particularly in the period September 1985 through November 1985 a 1-1/2-inch turkey to celebrate Thanksgiving, a 1-inch snowman, a 2-1/2-inch by 3/4-inch orange cat and ribbon; a 1-1/2-inch round purple union button; a 1-inch white plastic owl; a 1-inch green plastic elephant; a 2-inch enamel bird, a 1-1/2-inch by 2-1/2-inch black bat and a 3- to 4-inch double red ribbon holding a 1-inch figure of a doctor (this pin was distributed by the Hospital itself). General Counsel's witness testified that she has continued to wear these pins, even through the time of the hearing, and that she sees physicians, nurses, and other personnel wear various types of insignia and has not heard that they had been cautioned or disciplined therefor.

C. *Invocation of Respondent's Rule against Wearing of Insignia*

Jesse Pou testified that the reason he held the 9 and 10 October meetings with his supervisors which resulted in Respondent issuing its 11 October letter (G.C. Exh. 9) forbidding employees from wearing the red ribbon (as well as the Local 1199 button) was that he had received reports from Nursing Supervisor Rivera and from other supervisors that patients were inquiring why LPNs were wearing ribbons, and red ribbons in particular; that there was friction among unit employees in the unit with regard to the wearing of ribbons; and that there was friction between LPNs and RNs with regard to the wearing of the ribbons; and that a patient had been discovered with a red ribbon attached to his bedclothes. In addition, he testified that the president of Local 7, a registered nurse, told him that she had been threatened by the LPNs. This president of Local 7 was never produced and the report of such a threat was never supported. In any event, these reports led to the meetings of 9 and 10 October among Respondent's supervisors, attended by Respondent's lawyer, where it was concluded that employee use of the red ribbon, in the light of all the circumstances, had to be curtailed for the best interest of the hospital and that they would have to invoke the dress code (Tr. 611). Pou testified that Respondent notified all supervisors to tell the employees to remove the red ribbons and any other object that was not part of the uniform. Respondent then issued its 11 October letter to employees forbidding the wearing of insignia and buttons (G.C. Exh. 9(a)).

Pou also testified that in a meeting of 11 October with Confederacion President Frank Ruiz, he told Ruiz that

the wearing of the red ribbons violated a hospital rule and that Ruiz agreed.[8] At the time of his conversation with Ruiz, Pou knew of friction between Local 2 and the Confederacion and that Local 2 might affiliate with Local 1199. When Pou asked Ruiz to speak to the unit members and have them remove the red ribbons, as he had done in 1981, Ruiz refused and said that any hospital discipline over wearing the red ribbon was Local 2's problem and not his problem (Tr. 631).

In support of Pou's testimony that the 11 October warning letter to remove the red ribbon was occasioned by reports of employee and patient friction, Respondent produced Supervisor Nilda Camora who testified that commencing with the wearing of red ribbons, patients told her that nurses had told them that the nurses were to be fired and that no one would take care of them. She told the patients that services would improve with registered nurses. These first conversations with patients occurred when the LPNs began wearing red ribbons. Indeed, she found one of the patients wearing a red ribbon. She observed that of the 65 employees under her supervision, 25 to 30 of the employees wore the black ribbon and even some registered nurses work black ribbons; and that perhaps 40 patients or family members approached her in the first 2 weeks of October regarding the ribbons and the layoffs which were going to occur among the LPNs. She reported all of these incidents to her nursing director, Maria T. Rivera.

Nursing Director Rivera testified that her department started to receive calls from patients regarding the use of black ribbons and wanted to know what it was all about. In meetings which followed these reports regarding black ribbons, she told employees that the insignia affected the patients negatively regardless of the reasons that the insignias were being worn and that the hospital did not want to affect patient care. Rivera further testified that the red ribbons were being worn from 1 to 2 days before the 11 October warning letter went out. She admitted that the rules with regard to employee dress were never distributed and appeared only in the manual. She testified that in meetings in early October, she told employees that the wearing of ribbons was against the nursing department standard and told them to remove the ribbons or face severe discipline. Lastly, Rivera testified that the great majority of nursing department employees are involved in patient care, but that the rule prohibiting insignia of any kind applied to employees regardless of where they wore them, even in the cafeteria (which is restricted only to employees) and related to nursing department employees whether or not they were involved in direct patient care.

In support of Jesse Pou's testimony, Respondent adduced testimony from employee Gladys Bermudez, who testified that she refused the request of members of Local 2 to wear the black ribbon or the Local 1199 button and thereafter her fellow employees did not talk to her. She reported her co-employees' conduct to Nursing Director Rivera. Furthermore, on 7 October, she received an anonymous note (R. Exh. 4) that stated that "squealers and brown nosers will be treated the same way as our enemies." She told this to Director Rivera. Rivera reported these facts to Pou prior to Pou's 9 October meeting with supervisors.

D. *Suspension of 96 Unit Employees for Wearing the Red Ribbon*

As above noted, after distribution of the 11 October warning letter (G.C. Exh. 9), and after Local 2 President Rosario and other employees refused to remove the red ribbons, many unit employees reported to work in the period 11 through 14 October wearing red ribbons in spite of having received the 11 October warning letters.

On 14 October, the LPNs, aides, and escorts punched in without ribbons but pinned on the red ribbons once inside the hospital. Pou told his supervisors to tell the employees to remove the ribbons and if they were not removed to give them a "suspension letter" (G.C. Exh. 10(a)). Thereafter, commencing 14 October and ending 16 October, as the employees wearing red ribbons reported for work and/or refused to remove them while at work, each was handed a letter dated 14 October 1985 as follows:

> Dear Sir:
>
> You have refused to comply with the rule of not wearing insignias or buttons not pertinent to the uniform other than the identification, employee name or other articles which are part of your uniform or essential for your work.
>
> In view of your refusal, which constitutes an act of insubordination, you are suspended from work without pay.
>
> Very truly yours,
> M. T. Rivera RN MSN
> Nursing Director

The parties agreed that pursuant to Respondent's letter, Respondent suspended 96 named employees (Appendix A) for wearing the red ribbon, over a 3-day period, 14–16 October. The parties further agreed that the suspensions were for an indefinite period until the employees removed the ribbon. On 17 October, all the employees who had been suspended returned to work at the hospital but did not then or thereafter wear the red ribbons.

E. *Discharge of Heibert K. Rojas Hernandez*

Heibert Rojas Hernandez was discharged on 26 November for wearing a red ribbon in the hospital. He punched in at 3 p.m. for his 3–11 p.m. shift and was told by an employee that Respondent had discharged two employees for chronic absenteeism and was going to terminate the next group of LPNs on 30 November rather than waiting until 15 December. Hernandez was concerned that Respondent's termination procedure in discharging these two employees was inconsistent with the prior method of terminating employees: to have Confederacion President Frank Ruiz meet with Jesse Pou prior to the actual terminations to discuss them. Hernandez telephoned Union President Rosario, discussed the two

[8] Pou's lawyer sent Ruiz a letter memorializing the meeting and Ruiz' agreement (R. Exh. 2(a)).

discharges and the impending early layoffs of the LPNs, and told Rosario he was going to wear a red ribbon to protest these Respondent actions.

Hernandez pinned on the ribbon about 5:30 p.m. At 6 o'clock, he was assisting a registered nurse in giving emergency treatment to a patient. He left the patient area and went to a nurses' counter to request an EKG machine when Supervisor Wanda Maldanado came by and noticed the red ribbon. She told him to remove the ribbon or else he would have "problems." Hernandez told her that he was wearing the ribbon in support of the LPNs.

Personnel Director Pou was notified of this event and paged Supervisor Maldanado by telephone about 6:40 p.m. She told him that she had found Heibert Hernandez wearing a red ribbon, told him to remove it, and that he had refused. Pou told her that he was coming to the hospital. Maldanado testified that at the time she spoke to Hernandez, he was about 10 to 12 feet from the nearest patient's room and that there were no visitors or patients nearby.

When Pou found Hernandez in the hospital, he was wearing a red ribbon and, with another employee, was moving an oxygen tank to the store room. The record is not clear whether there were any patients nearby or this was a patient care area. Pou told Hernandez to remove the red ribbon; Hernandez refused; Pou told him that he was "forcing a situation," but Hernandez refused again. Hernandez told Pou that he was wearing the ribbon in protest of his companions. Pou told him that if he did not remove the ribbon it would be an act of insubordination. They went to the supervisor's office where Pou asked him to remove the ribbon. Hernandez again refused. Pou asked him to punch out and go home. When Hernandez asked for a discharge letter, Pou told him that he would send it later because he had no secretary present at the time. Contrary to Hernandez' testimony, Pou testified that Hernandez did not mention the issue of employees terminated that day for chronic lateness but said that he was wearing the red ribbon because of the layoff of his "companions." It is unnecessary to resolve this conflict. In any event, Heibert Rojas Hernandez left that day and on or immediately after 29 November 1985 received a letter (G.C. Exh. 11(a)) signed by Jesse Pou advising him that his services were terminated for his insubordination on 26 November 1985 because of his wearing of the red ribbon in violation of the rules of the hospital; and that he was discharged because of "the most recent incident of insubordination and [his] past record which reveals a serious absenteeism problem, and other behavior problems ever since [he] started to work for the hospital."

IV. DISCUSSION AND CONCLUSIONS

The facts show that Respondent, in early October 1985, was presented with sufficient circumstances of patient anxiety and employee friction regarding employees' wearing red ribbons (a) to promulgate a rule restricting the wearing of union insignia at certain times and places in the hospital, but (b) violated Section 8(a)(1) of the Act in *promulgating, maintaining,* and *enforcing* an overly broad rule banning the wearing of all union insignia on uniformed personnel everywhere and at all times in the hospital. Such a rule would be invalid in its breadth even if employees' wearing the red ribbons posed a threat to patient care in immediate patient care areas. *Mesa Vista Hospital,* 280 NLRB 298 (1986). Moreover, (c) although there was some evidence of friction among employees occasioned by the wearing or refusing to wear the ribbons, the evidence thereof did not rise to the level of posing a threat to patient care or breaches of discipline so as to ban the red ribbons, as Respondent did, everywhere and at all times in the hospital, *Southwestern Bell Telephone Co.,* 200 NLRB 667 (1972).

The General Counsel, in paragraph 5(a) of the consolidated amended complaint, as further amended at the hearing, alleges that, in violation of Section 8(a)(1) of the Act, Respondent's 11 October 1985 letter to its employees *promulgated* and *maintained* an overly broad rule prohibiting its uniformed employees from wearing insignia and buttons on their uniforms in order to discourage the employees from wearing the red ribbon (bearing the legend "Protest for Discharge") and from engaging in other concerted activities protected by the Act.

A. *Promulgation*

The initial question regarding unlawful "promulgation" is whether Respondent already had a rule in existence which in any way prohibited the wearing of insignia by its employees. Respondent argues that its nursing department "Standards for Use of Uniforms" was and is such a rule (R. Exh. 1). I find, consistent with the General Counsel's argument, that the nursing department's rules for uniforms amount essentially only to a style code and do not amount to any proscription of what may not be worn on the uniform. Certainly the imposition of the affirmative obligation to wear the employee's school insignia and name identification card, without more, does not suggest the negative obligation to wear no other insignia. Moreover, as a matter of actual practice, the uncontradicted and credited evidence is that at all material times, employees, including LPNs, registered nurses, and even physicians, while administering patient care, wore all sorts of idiosyncratic insignia on their working uniforms, including animals, political pins, and similar elements, even red ribbons and union buttons, without evoking any disciplinary action or even verbal admonition from Respondent. The wearing of ribbons, buttons, and pins was fully acceptable conduct.

The only prior evocation of any employer reaction to the wearing of insignia was in 1981 when a group of employees wore black ribbons to protest taking orders from a particular nurse (Tr. 558). The black ribbons contained the word "protest" on them.

While it is true that Respondent's supervisor, in 1981, spoke to Confederacion President Ruiz about disciplining employees for wearing black ribbons (Tr. 561), the matter was mooted because the employees discontinued wearing the ribbon (there were about eight employees who wore the ribbon) (Tr. 562). Respondent's former officer who testified that the wearing of those black ribbons was against hospital rules was able only to point to the Respondent's "Standards For Use of Uniforms" as

the source of his statement that it was against the hospital rules (Tr. 564–565). It was only his interpretation of that document that led him to testify that the hospital rules had been violated by the wearing of the black ribbons (Tr. 566).

In any event, I conclude that, on its face, there is nothing in Respondent's "Standards for Use of Uniforms" that *proscribes* the use of insignia on uniforms. The one instance in which employees ceased wearing ribbons because the supervisor told Ruiz it was against the rules does not establish union acquiescence in that interpretation. To the contrary, as above noted, the practice of wearing all types of insignia, including red ribbons and union buttons, has brought and does not bring, admonition or disciplinary action by Respondent.

Nor can Confederacion President Ruiz' apparent 11 October 1985 agreement (R. Exh. 2) that the employees' wearing of the ribbons and Local 1199 buttons violates hospital rules constitute a waiver of Local 2's and employees' rights to support Local 2 and Local 1199. The record is clear that by October 1985, Ruiz was aware of Local 2's antagonism against the Confederacion and its support of Local 1199. Under such conflicted circumstances, any Ruiz agreement with Respondent could not limit employee support for another labor organization or their disaffection for the Confederacion, *NLRB v. Magnavox of Tennessee Co.*, 415 U.S. 322 (1974). I therefore agree with the General Counsel that Respondent's "Standards for Use of Uniforms" does not constitute a proscription against insignia and that there was no rule or practice in existence, in or about September through November 1985, that proscribed these Local 1199 union buttons or red ribbons. As I have found, the evidence of *practice* was substantially to the contrary (Respondent distributed a 4-inch red ribbon with the attached figure of a doctor on one occasion).

I further conclude, consistent with the General Counsel's argument, that the initiation of a rule proscribing union buttons (never before banned) and insignias commenced with the issuance of Respondent's 11 October letter (G.C. Exh. 9(a)) and that it was in response to and retaliated particularly against the wearing of the red ribbons. Respondent does not contest this latter fact. The red ribbons, protesting LPN layoffs, were a concerted and union activity, and so known to Respondent.

The Supreme Court has held that the display of union insignia on wearing apparel proclaiming union support or support for union activities is a right protected under Section 7 of the National Labor Relations Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). This right to display union insignia and union slogans is part of the employees' right to organize, to engage in activities for mutual aid and protection, and to solicit support among themselves toward that end. *Republic Aviation Corp. v. NLRB*, supra; *Midstate Telephone Corp. v. NLRB*, 706 F.2d 401, 403 (2d Cir. 1983). As the court noted in *Midstate Telephone Corp. v. NLRB* (at 403):

> As a general rule, the balance must tip against rules restricting employees' right to wear union-related insignia or attire, unless the employer demonstrates "'special circumstances' showing that such rule is necessary to maintain production and discipline."

With particular regard to health care facilities, the Board has recently ruled, in *Mesa Vista Hospital*, 280 NLRB 298 (1986), that:

> In health care facilities, rules that contain restrictions of nonworking time solicitation outside immediate patient care areas are presumptively invalid. *NLRB v. Baptist Hospital*, 422 U.S. 773, 781 (1979). The presumption is also applicable to rules restricting the wearing of insignia outside immediate patient care areas. *George J. London Memorial Hospital*, 238 NLRB 704, 708 (1978). . . . An employer may rebut the presumption by demonstrating that the rule is "necessary to avoid disruption of health-care operations or disturbance of patients." [Citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978)]. The Supreme Court has observed that the Board's presumption "does no more than place on the hospital the burden of proving, *with respect to areas to which it applies*, that union solicitation, may adversely affect patients." [Emphasis added.]

In view of my findings above that Respondent had no rules or established practice *restricting* the use of union insignia on uniforms, or indeed any insignia on uniforms, prior to the issuance of its 11 October letter; and because the 11 October letter was specifically designed to prevent the wearing of *union* insignia on uniforms while the employees were any place in the hospital, I find that Respondent's *promulgation*, as a prima facie matter, was designed for the purpose of interfering with and preventing the wearing of union insignia on hospital uniforms and therefore its *promulgation* was presumptively unlawful and a violation of Section 8(a)(1) of the Act. *Rich Plan of Weather Reserve v. NLRB*, 796 F.2d 864 (6th Cir. 1986); *Harry M. Stevens Services*, 277 NLRB 276 (1985); *Woodview Rehabilitation Center*, 265 NLRB 838 (1982).

My observation of Respondent's witnesses and review of the record indicates a genuine fear by Respondent that the wearing of the red ribbons and attached slogans, indeed the wearing of any ribbons and even the Local 1199 union insignia, but especially the red ribbons, would have an adverse affect on patients and patient care. The uncontradicted evidence shows, through Nursing Director Rivera's testimony, that patients told her that they were apprehensive because LPNs reported that they might be fired, thus leaving the patients in a state of apprehension over future care in the hospital. In addition, there is uncontradicted evidence that unit employee Bermudez received an anonymous note accusing her of "brown nosing" and being an "enemy." This was a threat from the employees wearing the ribbons because of employee Bermudez' refusal to wear the ribbon or union button. I conclude that Jesse Pou was, in fact, concerned whether employees wearing the red ribbons might and did cause dissention among employees on the basis of the reports to him of the Bermudez incident, supra; and on the basis of reports from Supervisor Rivera that patient care was being affected because patients told

her of being uneasy concerning their future treatment if the LPNs were fired (as the LPNs reported to the patients).

As the Board noted in *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972), the employer there had a right, as a reasonable precaution against discord and bitterness among employees, to prevent wearing of an otherwise protected union T-shirt bearing an obscene slogan. More important, as the Board noted in *Southwestern Bell Telephone Co.*, 200 NLRB at 671, the employer was under no compulsion to wait until employee and supervisor resentment piled up and physical violence occurred before it could suppress the wearing of the T-shirt as a method to enforce employee discipline. In this regard, it must be noted that employee Bermudez threatened to go "elsewhere" if there was a repetition of the threatening anonymous note to her.

Taking this uncontradicted evidence into account with regard to patient anxiety and this evidence of an employee threat, I nevertheless conclude that Respondent has failed to prove as a defense the presence of special circumstances sufficient to rebut and overcome its promulgating a rule overly broad in its scope. In short, as the Board recently held in *Mesa Vista Hospital*, supra:

> Even if we again assume that the wearing of the union insignia *poses a threat to patient care*, the Respondent cannot rely on this alone as a "special circumstance" to restrict the wearing of union insignia at all times when employees are working. [Emphasis added.]

Under the *Mesa Vista* rule, above, Respondent may not ban the wearing of union insignia at all places and at all times as it has done in its 11 October letter to all unit employees. Read literally, the newly promulgated rule applies to uniform personnel even outside the hospital. Thus, even in the presence of evidence of widespread patient anxiety due to the wearing of the red ribbons, Respondent may not promulgate such an overly broad rule as a response. Nor is the single threat to employee Bermudez nor co-employee ostracizing her of such significance as to permit Respondent to promulgate such an overly broad rule which applies everywhere and at all times. The Bermudez incidents do not suggest the imminence of riot or widespread employee friction so as to bring the facts within the rule of *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972), in which a total ban was permitted to avoid widespread discord and perhaps violence.

B. *Maintenance and Enforcement of the Rule Against Wearing Union Insignia on Uniforms*

1. Maintenance

As above noted, in *Mesa Vista Hospital*, 280 NLRB 298 (1986), the Board has recently held that in health care facilities, rules that contain restrictions of nonworking time solicitation outside immediate patient care areas are presumptively invalid (*NLRB v. Baptist Hospital*, 422 U.S. 773, 781 (1979)); and the presumption is also applicable to rules restricting the wearing of insignia outside immediate patient care areas (*George J. London Memorial Hospital*, 238 NLRB 704, 708 (1978); *St. Vincent's Hospital*, 265 NLRB 38 (1982). The maintenance of an unlawfully broad rule restricting union solicitation is presumptively unlawful regardless of its enforcement. *St. Vincent's Hospital*, 265 NLRB 38, 41–42.

As the present rule shows on its face, and as Respondent's counsel at the hearing conceded, the rule makes no distinction relating to immediate patient care areas, other patient care areas, and nonpatient care areas. In terms of enforcement, it would be enforced even in Respondent's employee cafeteria which is restricted to use only by employees. There was no showing that any patients even used the cafeteria where employees only were permitted; nor does the rule permit employees to wear their ribbons and buttons in any hospital nonwork area. It therefore follows, under the authorities cited in *Mesa Vista Hospital*, supra, Respondent is then obliged to rebut the presumption of invalidity since the rule applies outside immediate patient care areas by showing that the rule is "necessary to avoid disruption of health-care operations or the disturbance of patients" everywhere in the hospital and at all times. Respondent has failed to do so. The mere *maintenance* of the rule therefore violates Section 8(A)(1) of the Act as alleged. *St. Vincent's Hospital*, supra. As discussed above, the evidence does not support the special circumstances defense of Respondent's total ban of insignia.

2. Enforcement of the rule

I agree with General Counsel that when Nursing Director Rivera told employees during department meetings in early October that, because of hospital policy, they would meet severe discipline if they did not remove their black ribbons, union buttons, and red ribbons, Respondent violated Section 8(a)(1) of the Act. This threat is unlawful enforcement of an unlawful rule. The Board has held in *St. Vincent's Hospital*, supra, 265 NLRB at 42, that formal disciplinary action is not a prerequisite to finding that an overly broad rule has been unlawfully enforced. In *St. Vincent's Hospital*, the supervisor merely told an employee to remove a union pin which she was wearing *in a patient care area*. The Board there held that Respondent violated Section 8(a)(1) of the Act where the supervisor told the employee to remove her union pin pursuant to an unlawful rule notwithstanding that there was no supervisor threat and notwithstanding that it was in a patient care area. Here, Director Rivera threatened employees with discipline. I therefore conclude, consistent with the allegation of the compiaint, as amended at the hearing (the newly added subparagraph 6(d)), that Nursing Director Maria T. Rivera, in violation of Section 8(a)(1) of the Act unlawfully threatened employees with severe disciplinary measures if they failed to remove from their uniforms the red and black ribbons and the union button. I further conclude that Jesse Pou's 11 October letter itself, threatening discipline for the wearing of buttons or insignia on uniforms at any

time or at any place,[9] similarly violated Section 8(a)(1) of the Act under the above-cited authorities, as alleged in paragraph 6(a) of the consolidated amended complaint.

a. *Suspension of employees for wearing union insignia*

With regard to the suspension of 96 employees commencing 14 October 1985, the uncontradicted evidence is that they were suspended solely for wearing red ribbons. Respondent did not even adduce evidence that they were wearing red ribbons in patient care areas; but regardless of that fact, under Board rule, absent "special circumstances," as here, the indefinite suspension of the 96 employees for wearing the red ribbons pursuant to an unlawful rule violates Section 8(a)(1) and (3) of the Act as alleged. *St. Vincent's Hospital*, supra, 265 NLRB at 42.

b. *Discharge of Heibert Rojas Hernandez*

Lastly, the November 26 discharge of Heibert Rojas Hernandez indicated that he was discharged for wearing the red ribbon[10] pursuant to Respondent's rule. The discharge, based on the enforcement of the hospital's unlawful rule, appears on the face of Respondent's 29 November 1985 discharge letter to Hernandez (G.C. Exh. 11(a)). There is no mention therein that he was engaged in patient care or was in a patient care area. But assuming that for at least part of the time he was engaged in patient care or certainly in a patient care area (he was wearing the red ribbon within 15 feet of a patient's room while at the nurses' station desk seeking an EKG machine but the precipitating act of "insubordination" occurred when, alone with Pou in a supervisor's office, he refused to remove the red ribbon) his discharge nevertheless violates Section 8(a)(1) and (3) of the Act because the discharge was solely based on enforcement of an unlawful rule. As in the case of the layoff of the 96 employees for wearing the red ribbon, the discharge of Heibert Rojas Hernandez similarly violates the Act, *St. Vincent's Hospital*, supra. I further find, as alleged, violation of Section 8(a)(1) and (3) of the Act in Jesse Pou's conditioning the 96 employees' return to work on their not wearing the red ribbon. This was also pursuant to Respondent's unlawful rule.

Finally, I find that Jesse Pou Rivera unlawfully threatened Heibert Rojas Hernandez with discharge for failing to remove his ribbon from his uniform on or about 26 November as alleged in the complaint in violation of Section 8(a)(1) of the Act.

While it is true that families, as well as patients, need a restful, uncluttered, relaxing, and healthful atmosphere in hospitals, rather than one remindful of the tensions of the market place, *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), the means of achieving this desirable end in hospitals do not include the promulgation, maintenance, and enforcement of prohibitions of employee statutory rights to such a degree that the prohibitions apply even in areas far removed from patient care areas. *Mesa Vista Hospital*, supra. In short, the answer is for Respondent to draft, maintain, and enforce a lawful insignia rule.[11]

CONCLUSIONS OF LAW

1. Asociacion Hospital del Maestro, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) and is a health care institution within the meaning of Section 2(14) of the Act.

2. Union Local No. 2 de Enfermeas y Endermeos Auxiliares Practicos Licenciados y Escoltos del Hospital del Maestro, affiliated with Confederacion Obrera Puertoriquena, Confederacion Obrera Peurtoriquena, and Local 1199, Union Nacional de Trabajadores de la Salud, are, and have been at all material times, labor organizations within the meaning of Section 2(5) of the Act.

3. By promulgating, maintaining, and enforcing a rule prohibiting its employees' wearing union insignia on their uniforms, not limited to immediate patient care areas or other specifically identified areas where the wearing of union insignia would adversely affect patient care, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By threatening employees, pursuant to the rule in paragraph 3, above, with discipline for wearing ribbons or other union insignia on behalf of Local 1199, Local 2, or any other labor organization, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By suspending those 96 employees listed in Appendix A, on or about 14 October 1985, pursuant to the above-described rule, for wearing or failing to remove union insignia, Respondent is engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. By conditioning the recall of the 96 employees listed in Appendix A on their not wearing red ribbons, designating union activity, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

7. By discharging and refusing or failing to recall Heibert Rojas Hernandez, Respondent's employee, commencing about 26 November 1985, because he wore union insignia while at work, Respondent violated Section 8(a)(1) and (3) of the Act by discriminating against such employee thereby discouraging membership in a labor organization.

---

[9] Cases such as *Evergreen Nursing Home*, 198 NLRB 775 (1972), cited in *Mesa Vista*, supra, are not in point. In *Evergreen*, the Board upheld a dress code rule requiring no adornments on white uniforms. In the instant case, as a matter of actual practice, Respondent has long tolerated, and continues to tolerate, all kinds of ribbons and buttons on its uniformed personnel.

[10] To the extent that Respondent's discharge letter to Rojas Hernandez alludes to misconduct other than the "insubordinate" wearing of the red ribbon as a basis for the discharge, such other alleged misconduct is rejected as unproven. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[11] Respondent engaged in the very conduct proscribed in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500–501: in banning insignia without regard to impact on patient care under its assessment of the need to ensure patient care and avoid employee friction, "[it] is not surprising that [the hospital's] assessment of the need for a particular practice might overcompensate its goals, and give too little weight to employee organizational interests." Cf. *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Beth Israel*, supra, the Supreme Court found unlawful the hospital's ban on union solicitation in the hospital cafeteria used by employees, *patients, and visitors.*

8. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent is engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend to the Board that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act. Accordingly, I shall recommend to the Board that Respondent make whole those 96 employees unlawfully suspended commencing about 14 October 1985 for any loss of earnings, including all contract benefits, they may have suffered as a result of their unlawful suspensions with interest to be computed in the manner described in *Florida Steel Corp.*, 231 NLRB 657 (1977); see *Isis Plumbing Co.*, 138 NLRB 716 (1962). Similarly, I shall recommend to the Board that Heibert Rojas Hernandez, discharged because of his wearing the red ribbon, in violation of Section 8(a)(1) and (3) of the Act, be offered immediate reinstatement to his old job, discharging if necessary any replacement, and similarly make him whole for any net loss of earnings he may have suffered because of Respondent's discrimination against him, with interest, pursuant to the above-noted Board rules. Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

On the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Asociacion Hospital del Maestro, Inc., San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, refusing to recall, or otherwise discriminating against employees pursuant to an unlawful rule governing their wearing of union insignia on uniforms or for engaging in other union or concerted activity protected by Section 7 of the Act.

(b) Promulgating, maintaining, or enforcing any rule, regulation, or other prohibition which forbids the wearing of union insignia on employee uniforms, outside immediate patient care areas, or outside other specifically identified areas where the wearing of union insignia would adversely affect patient care.

(c) Threatening employees with discipline, pursuant to an overly broad rule governing the wearing of union insignia, or the wearing of insignia otherwise protected by the provisions of Section 7 of the National Labor Relations Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Heibert Rojas Hernandez immediate and full reinstatement to his former job or, if such job no longer exists, to substantially equivalent employment, without prejudice to his seniority or other rights and privileges, and make him, and those employees listed on Appendix A, whole for any loss of earnings, including contract benefits, they may have suffered by reason of Respondent's discrimination against them in the manner set forth in the remedy section of this decision.

(b) Rescind its 11 October 1985 rule governing the wearing of insignia to the extent that it prohibits employees from wearing union insignia on their uniforms, outside immediate patient care areas, or outside other specifically identified areas where the wearing of union insignia would adversely affect patient care.

(c) Remove from its files any reference to the unlawful suspensions of any of the employees listed in the attached Appendix A and of Heibert Rojas Hernandez, and notify each of them, in writing, that this has been done, and that evidence of the unlawful suspensions or discharge will not be used as a basis for future personnel actions concerning them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its San Juan, Puerto Rico hospital facilities, copies of the attached notice marked "Appendix B."[13] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

Onelia Gely	Maria D. Lozada
Margarita Planell	David Rosario
Carmen M. Rivera Pagan	Heibert Rojas Hernandez
Esperanza Melendez	Raquel Carrion
Zulma I. Colon	Elfrida Martinez
Maria L. Rivera	Luz M. Barreiro
Leonarda Sanchez	Isabel Davila
Brenda Llanos	Victoria Santos

Felicita Perez
Antonia Rolon
Maria Romero
Maria Cortex
Elizabeth Ortiz
Clara Diaz
Ada L. Faura
Carmen G. Pizarro
Milagros Frasqueri
Ana M. Lopez
Ramona Catala
Oneida Nieves
Angeles Cepeda
Vivian Merced
Ana R. Nieves
Carmen I. Rodgiguez
Josefina Aveles
Carlos R. Zayas
Ruben Medina
Maria J. Walker-Mate
Confesor Muriel
Luis A. Vicente
Eulalia Andino
Celia Gomez Hernandez
Milagros Pastrana
Angela Cintron Ortiz
Carmen J. Acevedo
Esperanza Latimer
Migdalia Vega
Zoraida Casado
Luz Z. Raya
Margarita Febres Rivera
Luis Torres
Tomas Garcia
Ermelinda Gonzalez
Martin Morales
Zoraida Collazo
Luis Bonilla
Nereida Delgado
Nicolasa Otero

Carmen P. Hernandez
Margarita Madera
Elsa Hernandez Rivera
Juanita Encarnacion
Ana M. Rivera
Maria Lopez Pacheco
Cruz Cruz Rodriguez
Gloria Esther Matos
Maria T. Trinidad Mojica
Carmen Judith Rosa Garcia
Petra Villegas
Hilda M. Medina
Felicita Ayala Muriel
Milagros Collazo Gonzalez
Andrea Gonzalez
Jacqueline Atiles
Angelita Torres
Norma Pacheco
Dinelia Felix
Gloria I. Delgado
Carlos Vallejo
Luz E. Albaiadejo
Maria Morales
Madeline Ortega Sanchez

Adelaida Diaz Delgado
Sylvia Diaz Delgado
Maria Quinones Fuentes
Gertrudis Pizarro
Jorge A. Torres
Olga Collazo
Julio Lopez
Mercedes Hernandez

Evelyn Freight
Alida G. Vega
Maria de los A. De Jesus
Ramona Catala
Gladys Garcia
Virgen Vega
Julia Sota
Maria Isabel Delgado

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, suspend, or otherwise discriminate against any of our employees, pursuant to an overly broad rule restricting employees' right to wear union insignia, where the wearing thereof is lawful and protected pursuant to the terms of the National Labor Relations Act.

WE WILL NOT promulgate, maintain, or enforce any rule, regulation, or other prohibition which forbids the wearing of union insignia on employee uniforms, outside immediate patient care areas, or outside other specifically identified areas where the wearing of union insignia would adversely affect patient care.

WE WILL NOT threaten employees to cease wearing union insignia on pain of severe discipline pursuant to an overly broad rule governing the wearing of insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL rescind our rule, issued on 11 October 1985, governing the wearing of insignia, to the extent that it prohibits employees from wearing union insignia, outside immediate patient care areas, or outside other specifically identified areas where the wearing of insignia would adversely affect patient care.

WE WILL offer immediate and full reinstatement to our employee Heibert Rojas Hernandez, to his old job or, if that job no longer exists, to substantially equivalent employment, and WE WILL make him and the 96 employees listed in Appendix A whole for any loss of pay they may have suffered as a result of our unlawful discrimination against such employees, plus interest.

WE WILL remove from our files any reference to the unlawful discharge of Heibert Rojas Hernandez or suspensions of any of our employees listed in Appendix A of the decision of the National Labor Relations Board, and notify each of them, in writing, that this has been done, and that evidence of these unlawful acts will not be used as a basis for future personnel actions concerning them.

ASOCIACION HOSPITAL DEL MAESTRO, INC.

The New York Post Corporation, a Wholly Owned Subsidiary of News Group Publications, Inc. *and* Newspaper Guild of New York, Local 3 of the Newspaper Guild, AFL–CIO. Cases 2–CA–17905 and 2–CA–17906

31 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 18 July 1983 Administrative Law Judge Harold B. Lawrence issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs, and the Charging Party filed a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified, and to adopt the recommended Order as modified.

The judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information relevant and necessary to the Union's representation of bargaining unit employees. In addition, the judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by delaying in furnishing information requested by the Union regarding the Respondent's minority personnel and its contract with USSI. In reaching the latter conclusion, the judge relied on amendments made to the complaints at the hearing alleging that the Respondent delayed in providing the Union designated portions of the information requested by it. For the following reasons, we conclude that the judge improperly permitted these amendments to the complaints, and we reject his conclusion that the Respondent violated the Act by delaying in furnishing information to the Union.

The complaints in the instant cases issued on 24 and 30 April 1981 and alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing between December 1980 and February 1981 to provide certain enumerated items of information requested by the Union, including copies of the Respondent's annual reports to the Equal Employment Opportunity Commission (EEOC) and information related to the Respondent's relationship with USSI. In May 1981 the Respondent answered the complaints, denying that it had violated the Act. On 5 June 1981 the Regional Director issued an order consolidating the cases for hearing and setting a hearing date of 26 April 1982. The Regional Director subsequently issued orders postponing the hearing until 14 September 1982.

The hearing was held on 14, 15, 16, 17, and 24 September 1982. On the final day of hearing, counsel for the General Counsel moved to amend the complaint to include an allegation that the Respondent unlawfully delayed furnishing information

[1] In sec. II,B,6 of his decision, the judge erroneously found that the Union's request for information about the personnel employed by User Services Systems, Inc. (USSI) pursuant to USSI's contract with the Respondent was not limited to USSI personnel employed on the Respondent's premises, whereas the Union's request was so limited. This error does not affect our decision. In addition, in sec. II,B,3 of his decision, the judge erroneously found that in response to the Union's request for information regarding writers and photographers holding independent contractor, freelance, or stringer status with the Respondent between 1978 and 1981, the Respondent provided information for only a 2-month period, whereas the record reflects that the Respondent provided information for 1980 and January 1981. We shall modify the judge's recommended Order accordingly.

[2] We agree with the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to provide the Union with statistical and other information relating to the equal employment opportunities of unit employees and promotions from the bargaining unit. We further agree with the judge that similar statistical information relating to nonunit and managerial personnel is relevant for purposes of assessing the Respondent's record of promoting unit personnel to managerial positions. With respect to this nonunit information, however, we find that the Union has not established the relevance of the wage and benefit information requested. Additionally, while we agree with the judge that copies of the reports filed by the Respondent with the Equal Employment Opportunity Commission are presumptively relevant, we find that he erred in excluding them on the grounds that they "would appear" to be duplicative of other information the Respondent is obligated to furnish. Thus, we find that to the extent they are not repetitive of other information the Respondent is obligated to furnish, these reports must be provided to the Union.

In addition, while we agree with the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to provide the Union with information regarding the kind and extent of advertising work performed by subcontractors after November 1979, we note that at the hearing counsel for the General Counsel withdrew those portions of the complaint alleging that the Respondent unlawfully failed to provide the amounts billed to it and the information regarding employees in the Respondent's Creative Services Department, who, but for the subcontracting, would have performed the advertising work. Accordingly, we shall modify the judge's recommended Order to exclude this information and to require only that the Respondent provide a list of all promotion jobs assigned to subcontractors since November 1979 and the hours spent on each job. In this regard, the Respondent need not identify the individual subcontractors, as the Union has not established the relevance of this information.

Although we agree with the judge that the Respondent is obligated to provide information regarding personnel employed by USSI at the Respondent's premises, we shall limit the Union's request to exclude the names and addresses of these individuals, work schedules, and employee manuals. Further, we shall order the Respondent to provide this information only to the extent it has access thereto.

Finally, with regard to the Union's request for information relating to the Respondent's use of independent contractors, freelancers, and stringers, the judge, relying on *Press Democrat Publishing Co.*, 258 NLRB 1355 (1981), determined that the Union was not entitled to information concerning the amounts paid to these individual nonunit writers. In agreeing with the judge, we note that, unlike *Press Democrat*, the Union here arguably does claim to represent the independent contractors, freelancers, and stringers, and this claim provided the impetus for the information requested. We find, however, that the Union has not demonstrated the relevance of the individual financial information requested. We therefore shall adopt the judge's recommended Order in this regard.

to the Union regarding the Respondent's EEOC reports and its relationship to USSI. The judge permitted the amendments over the Respondent's objections. On the basis of the amended complaints, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by its delay until June 1982 in furnishing the Union with a listing of the Respondent's minority employees, their job classifications, and their employment histories and by its delay until September 1982 in furnishing the Union with a copy of the Respondent's contract with USSI.

Under Section 102.17 of the Board's Rules and Regulations, an amendment to a complaint may be granted "upon such terms as may be deemed just." As indicated above, counsel for the General Counsel first moved to amend the complaints on 24 September 1982, the last day of hearing. There is no explanation why counsel for the General Counsel waited until the last minute to add this allegation to the complaints. Further, the amendments were proposed by counsel for the General Counsel at the conclusion of his case-in-chief and were not formally offered and ruled by the judge until immediately before the close of the hearing. Although the record reveals some discussion from which the Respondent may have earlier surmised that amendments to the complaints might be proposed, we do not share the judge's confidence in finding that the Respondent was not prejudiced by the 11th-hour amendments.[3] Under the circumstances, we find that the judge erroneously allowed counsel for the General Counsel to amend the complaints to allege that the Respondent had unlawfully delayed in furnishing information to the Union. Accordingly, we dismiss these allegations of the complaints.

In addition, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to supply the Union with information requested by it regarding the use of sick leave by the Respondent's employees and the names and absentee records of individuals placed on the Respondent's absentee control program. In recommending a remedy for this conduct, the judge made no provision for the protection of employee privacy, notwithstanding the Respondent's contention that the requested information is confidential and the obviously sensitive nature of these individually identified records. *Johns-Manville Sales Corp.*, 252 NLRB 368 (1980); *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982), enfd. sub nom. *Oil Workers Local 6–418 v. NLRB*, 711 F.2d 348, 363 (D.C. Cir. 1983). Accordingly, we shall modify the judge's recommended Order to delete from the individual absentee records, which must be supplied to the Union, information revealing the identity of the employees concerned.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, The New York Post Corporation, a Wholly Owned Subsidiary of News Group Publications, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Newspaper Guild of New York, Local 3 of the Newspaper Guild, AFL–CIO by refusing on request to supply relevant information needed by the Guild to perform its duties as collective-bargaining representative of the employees in the unit consisting of all employees in the Editorial, Business, Advertising, Circulation, Publication, Mechanical and Maintenance Departments, excluding exempt employees and employees already covered by a union contract other than that between the Respondent and Newspaper Guild of New York, Local 3 of The Newspaper Guild, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish, on request and to the extent not already furnished, to Newspaper Guild of New York, Local 3 of The Newspaper Guild, AFL–CIO the following information, updated, if necessary, to the current period:

(1) Information requested by the Guild in a memorandum dated 23 February 1981 consisting of a list of minority personnel by name, job classification, and history of promotional record relating to

[3] Thus this situation differs from that presented in *Clark Equipment Co.*, 278 NLRB 498 (1986), in which we found that the complaint properly included allegations not specifically set forth in the charge. In *Clark Equipment*, the employer, through the complaint, had notice of the allegations brought against it and could therefore meaningfully prepare its defense. Here, however, the allegations of delay, unlike the allegations of refusal to provide information, were not specifically known to the Respondent until the final day of the hearing. Thus, because the Respondent did furnish some of the requested information prior to the hearing, and the complaint did not serve as notice to the Respondent of the additional allegations of delay, the Respondent may have been misled about the nature of the evidence required for its defense. Because the Respondent objected to the amendment and had not previously litigated the factual basis for such a violation, this is not a case in which the General Counsel was merely seeking to amend the pleadings to conform to the proof. Hence nothing in this decision affects the precedential value of those cases in which the Board and courts have found that violations not alleged in either the complaint or a formal amendment of the complaint could properly be found because they had been fully and fairly litigated by the parties. See, e.g., *Alexander's Restaurant v. NLRB*, 586 F.2d 1300, 1304 (9th Cir. 1978); *Multi-Medical Convalescent & Nursing Center*, 225 NLRB 429 and fn. 5 (1976).

both unit and nonunit employees, excluding wage and benefit information for nonunit employees.

(2) Reports submitted by the Respondent to the Equal Employment Opportunity Commission since 1978 to the extent such information is not repetitive of other information the Respondent is required to provide.

(3) Information requested by the Guild on 23 February 1981 consisting of the total number of staffers and the number taking sick leave and the number of days of sick leave taken in the years 1977, 1979, and 1980 and, with respect to those years, a breakdown showing the number of occurrences of illness, the average length of absences, the number of persons affected by and the number of days docked under the terms of article XI, section 1, paragraph 2, of the collective-bargaining agreement, and the names of the individuals placed on the absentee control program and their individual absentee records. With respect to such individual absentee records, the Respondent shall provide such records only after deleting therefrom information identifying the employee concerned. The Respondent, in connection with this request, shall permit photocopying of pertinent records and the making of statistical abstracts therefrom.

(4) Information requested by the Guild consisting of the names and contractual status of writers and photographers holding independent contractor, freelance, or stringer status with the Respondent in 1978 and 1979, excluding individual financial information.

(5) A list of all promotion jobs assigned to advertising agencies since November 1979 and the hours spent on each job, except that the Respondent need not identify the advertising agencies.

(6) Information requested by the Guild on 28 November 1980 consisting of the terms and conditions of the contract under which work was being performed for the Respondent by Stat-Tab and the volume of work performed by Stat-Tab pursuant to its contract with the Respondent.

(7) Information requested by the Guild on 28 November 1980 consisting of the terms and conditions of the Respondent's contract with User Service Systems, Inc. (USSI) and to the extent it has access thereto the following data concerning all USSI personnel, past or present, who worked on the Respondent's premises: their classifications or job titles and job descriptions, a description of duties performed by them, their current and past pay rates, and their fringe benefits, excluding names and addresses, work schedules, and employee manuals.

(b) Post at its office and place of business where notices to employees represented by Newspaper Guild of New York, Local 3 of The Newspaper Guild, AFL–CIO in the bargaining unit hereinabove described are customarily posted by the Respondent copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including, as described above, all places where notices to employees employed in the appropriate bargaining unit are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Newspaper Guild of New York, Local 3 of The Newspaper Guild, AFL–CIO by refusing to supply, on request, relevant information needed by the Guild to represent the employees covered under its contract with us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Guild with the following information:

1. Information requested by the Guild in a memorandum dated 23 February 1981 consisting of a list of minority personnel by name, job classification, and history of promotional record relating to both unit and nonunit employees, excluding wage and benefit information for nonunit employees.

2. Reports submitted to the Equal Employment Opportunity Commission since 1978, if such infor-

mation is not repetitive of other information we must provide.

3. Information requested by the Guild on 23 February 1981 consisting of the total number of staffers and the number taking sick leave and the number of days of sick leave taken in the years 1977, 1979, and 1980 and, with respect to those years, a breakdown showing the number of occurrences of illness, the average length of absences, the number of persons affected by and the number of days docked under the terms of article XI, section 1, paragraph 2, of the collective-bargaining agreement, and the names of the individuals placed on the absentee control program and their individual absentee records. In connection with this request, we will permit the photocopying of pertinent records and the making of statistical abstracts therefrom.

4. Information requested by the Guild consisting of the names and contractual status of anyone holding independent contractor, freelance, or stringer status with us in 1978 and 1979, excluding individual financial information.

5. A list of all promotion jobs assigned to any advertising agencies since November 1979 and the hours spent on each job as reflected by billing statements.

6. Information requested by the Guild on 28 November 1980 consisting of the terms and conditions of the contract under which work was being performed for us by Stat-Tab and the volume of work performed by Stat-Tab pursuant to its contract with us.

7. Information requested by the Guild on 28 November 1980 consisting of the terms and conditions of our contract with User Services Systems, Inc., and the following data concerning all personnel of User Services Systems, Inc., past or present, who worked on our premises: their classifications or job titles and job descriptions, a description of the duties performed by them, their current and past pay rates, and their fringe benefits, but excluding names and addresses, work schedules, and employee manuals.

THE NEW YORK POST CORPORATION, A WHOLLY OWNED SUBSIDIARY OF NEWS GROUP PUBLICATIONS, INC.

Wendell Shepherd and *Waldemar Comas, Esqs.*, for the General Counsel.

Howard Squadron, Jonathan Sulds, and *Ray Beckerman, Esqs. (Squadron, Ellenoff, Plesent & Lehrer)*, of New York, New York, for the Respondent.

Joel Block, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HAROLD B. LAWRENCE, Administrative Law Judge. These consolidated proceedings were tried before me on September 14 to 17 and 24, 1982, at New York, New York. The charges were filed on March 10, 1981, by the Newspaper Guild of New York, Local 3, The Newspaper Guild, AFL–CIO, or "The Guild." The complaints and notices of hearing in Cases 2–CA–17906 and 2–CA–17905 were issued on April 24 and 30, 1981, respectively. The proceedings were consolidated by order dated June 5, 1981.

The complaint alleges that Respondent, publisher of the New York Post, violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to furnish certain information requested by the Guild and, in certain instances, by procrastination in furnishing information. The Respondent contended that no violation of the Act had occurred because in the case of every request either the information was in fact furnished or was already in the Guild's possession, or was not legally required to be furnished.[1]

The parties were afforded full opportunity to be heard; to call, examine and cross-examine witnesses; and to introduce relevant evidence. Posthearing briefs have been filed on behalf of the General Counsel, the Respondent, and the Charging Party.

On the entire record and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

There is no issue concerning jurisdiction. The Respondent, The New York Post Corporation, a wholly owned subsidiary of New Group Publications, Inc., admits that it is now and at all material times has been an

[1] The Respondent was permitted, on motion, to incorporate in its answer certain allegations which it denominated as affirmative defenses, so as to conform the answer to such evidence as may have been introduced during the hearing with respect to the following matters: lack of joint employer status between Respondent and certain companies to whom work had been subcontracted (so as to excuse Respondent's failure to produce information from the files of those companies); confidentiality of information respecting freelancers and employees of certain companies to whom work had been subcontracted; lack of good faith on the part of the Guild in making requests for information; lack of relevancy of information sought; the burdensome nature of the requested-for information; misuse of information by the Guild; lack of delay on the part of the Respondent in furnishing information. To the extent that material evidence was submitted by the Respondent which tended to establish any of these contentions, such evidence is discussed in connection with the informational request to which it is pertinent. Except in certain instances noted below, no substantial evidence was introduced by Respondent which would have tended to establish any of these defenses. The contention that requests were burdensome is disposed of by the suggestion made in *Safeway Stores*, 252 NLRB 1323, 1324 (1980), enfd. 691 F.2d 953 (10th Cir. 1982):

> In short, Respondent's obligation is to provide the information it has available, to compile it, or to give the Union access to the records from which it can reasonably compile the information. And, if the production of the information ordered involved substantial costs, the parties may bargain over the allocation of these costs.

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Guild is now and at all material times has been a labor organization within the meaning of Section 2(5) of the Act. It was stipulated that News Group Publications, Inc., which owns the New York Post Corporation, is a subsidiary of a corporation known as News America, which owns publications and other corporations in Texas and New York and which is itself a subsidiary of News Limited of Australia, which is a subsidiary of News Corporation.

II. THE ALLEGED VIOLATIONS OF SECTION 8(A)(5) AND (1)

A. *Background*

The Respondent has had a collective-bargaining relationship with the Guild since 1935. The last two collective-bargaining agreements were for the periods from March 31, 1978, through March 30, 1981, and March 31, 1981, through March 30, 1984. The bargaining unit is:

> All employees in the Editorial, Business, Advertising, Circulation, Publication, Mechanical and Maintenance Department, excluding exempt employees and employees covered by another job contract.

During the period from November 28, 1980, to February 23, 1981, Joy Cook, the Guild's unit chairperson, addressed a series of requests for information to Leonard Arnold, personnel director and industrial relations manager of the Respondent. These are claimed by the Guild to relate to several broad categories of union activity or interest. Thus requests for information relating to the Respondent's absentee control program and for copies of complaints filed with the Equal Employment Opportunity Commission are claimed to have been made in order to enable the Union to monitor the performance of the existing contracts. The alleged need to ascertain whether union jurisdiction was being violated is claimed to underline a request for data respecting independent contractors, freelancers, and stringers. The claimed need to ascertain whether the jobs of the unit were being eroded and jurisdiction of the Union thereby impaired forms the basis of requests for information regarding three companies doing work for Respondent formerly performed by unit personnel and the nature of the work being performed.

B. *Monitoring Functions*

1. Request for data relating to equality of employment opportunities

Article XX, section 1 of the collective-bargaining agreement prohibits "discriminations in hiring or promotion for reasons of race, creed, color, sex, national origin, political belief, or membership or activity in the Guild." It obligates the Respondent to continue to abide by the principles of nondiscrimination embodied in Federal and state statutes and to observe "the spirit as well as the letter of this provision . . . so that relationships between the parties may develop constructively."

On February 23, 1981, the Guild requested information respecting various Guild-covered employees who are members of minority groups and copies of some reports filed by the Respondent with the Equal Employment Opportunity Commission since 1978, as follows:

> Name, Date of Hire, Date of Birth, Sex, Race, Marital Status, Salary Group, Job Classification, Rate of Pay, Merit Pay and Experience Level for all staffers in Guild jurisdiction, by alphabetical listing. A separate breakdown by wage group showing the number in each group, age, sex and race or national origin.
>
> A breakdown of all persons on posted rates in Groups 1-5B who were hired after June 9, 1978, their names, date of hire, job classification, salary rate, experience level, sex, race and age.
>
> The average salary for Post employees.
>
> The number of Post employees in Guild jurisdiction as of February 1, 1981 with a breakdown by full time, part time, temporary, voucher; by age, sex and race.
>
> Copies of the Post's EEOC reports filed since 1978.

The Respondent provided a listing of minorities in Guild jurisdiction by name and job classification and a history of their promotion records. However, the information was not transmitted to the Guild until June 22, 1982, and was limited to June 1982. None of the other information requested has been furnished. No data has been furnished for the previous years. No information was provided respecting managerial positions.

The Union contends that the statistical breakdown and the prior years' information would have enabled it to ascertain whether a pattern of discrimination existed and, if so, whether conditions in this regard were improving or deteriorating.

Cook's February 23 memorandum advised the Respondent that the information was requested in order to facilitate preparations for contract bargaining and arbitration. Cook testified that she was interested in obtaining the statistical breakdown of the Post's work force because she had been approached by Guild members who wished to invoke the grievance machinery for alleged violations; that their complaints corroborated her personal observations; that she had perceived a decline in minority representation in top pay groups in the reporter category and in the top level responsibilities; that complaints received by her included complaints from black reporters and from the Chairman of the Human Rights Committee at the Post; and that complaints also were received relative to the absence of minorities and women in managerial capacities and to their under-representation in promotions from Guild ranks to managerial positions. None of these persons filed individual complaints respecting their own failure to achieve promotion to management positions; their complaints related to their general perception of the situation at the Post.

The Respondent has taken the position that its failure to comply with the Guild's request is excused because the information which it refused to furnish is available to

the Guild from several other sources, including a roster of employees previously supplied to it as of February 1, 1981, weekly personnel transaction sheets which have been sent to the Guild routinely since 1971, weekly voucher reports (relating to persons hired on a temporary basis) that the Post has furnished since 1979, and weekly reports respecting personnel changes at the Post provided pursuant to the collective-bargaining agreement. Arnold sent Cook a memorandum explaining in some detail the means by which the data sought by the Guild could be extracted from all this material. This would disclose which personnel had been terminated, who were full and who were part-time employees, and whether individuals have received increases due to changes in experience levels. However, he insisted that the EEOC reports themselves could not be made available to the Guild because they contain information with respect to all employees, including those who are not within the Guild's jurisdiction. It is well settled that that fact is an insufficient basis for refusing to furnish the information requested. The yardstick is not whether the persons respecting whom information is sought are in the unit, but whether the information sought is relevant to the duties of the bargaining representative. This is especially so when there is suspicion that the bargaining unit is being eroded.[2]

After an exchange of memoranda on the subject in June 1981, the Guild filed a grievance alleging the existence of an overall pattern of discrimination in the hiring and promotion of women and employees belonging to minority groups.

As formulated in the numerous cases which have considered the problem of the extent and manner in which disclosure ought to be required, the general principles are easily stated: A labor organization representing employees in a bargaining unit is entitled to such information from the employer as may be relevant and reasonably necessary to the proper performance of its duties, whether these involve negotiating a collective-bargaining agreement or administering it in an intelligent fashion. It is sufficient if the desired information is probably or potentially relevant and useful, as judged by a liberal discovery-type standard. The fact that the requested information may relate to employers and employees outside the represented bargaining unit does not, by itself, negate its relevance. Wage and related information pertaining to employees in the bargaining unit is presumptively relevant; with respect to other requested data, relevance must be demonstrated more precisely by reference to the circumstances of the case. In short, a union is entitled to discovery-type disclosure, with relevance being presumed as to unit personnel and required to be demonstrated before disclosure will be directed in other cases.[3] The question to be addressed, in every case in which nonunit personnel are involved, is essentially whether a sufficient showing of relevance has been made. In practical terms, this means that the probable need for the information, in the particular circumstances, will justify the demand.[4]

In the present case the unit chairperson has received complaints from a number of individuals based on their general perception of what they regarded as violations of article XX, section 1 of the collective-bargaining agreement and has testified that she is personally aware of circumstances which she believes may constitute such violation. The existence of a violation can only be verified if the Union has the requested information concerning what minorities are hired, what women are hired, what pay groups they are in, what types of work they are performing, and how many of them are being promoted to higher positions. The information respecting unit employees in these categories is presumptively relevant, and would be deemed so even in the absence of a nondiscrimination clause in the contract.[5] In any event, contrary to Respondent's contention, I find that an excellent showing has been made that the requested data concerning nonunit employees is needed, for without it the existence or nonexistence of a pervasive pattern of discrimination is not likely to be verifiable. Having actually received complaints from a number of sources respecting an overall pattern of discrimination affecting both unit and nonunit employees, and believing that she has observed it herself, the unit chairperson must have this information, respecting both unit and nonunit employees, in order to determine whether a basis exists for filing of grievances, for the purpose of preparing contract language and for the conduct of future negotiations with the object of terminating such discrimination as may be found to exist, for the purpose of proceeding with the correction of violations of the existing agreement, and for the prosecution of any grievances filed. The list furnished by the Respondent setting forth the names of the minority employees at the Post is, by itself, a singularly unhelpful document as it provides no basis for comparison with prior years. The list is not even dated and was assumed by the unit chairperson to be a current list as of the time when it was received.

However, insofar as the actual EEOC reports already filed are concerned, no apparent need for their disclosure has been demonstrated. The statistical data directed to be

[2] *Temple-Eastex, Inc.*, 228 NLRB 203 (1977), enf. denied 579 F.2d 932 (5th Cir. 1978) (on due-process grounds unrelated to the point for which the case is cited); *General Electric Co.*, 199 NLRB 286 (1972) (union had reason to suspect bargaining unit was being eroded); *Curtis-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61 (3d Cir. 1965); *Hollywood Brands*, 142 NLRB 304 (1963), enfd 324 F.2d 956 (5th Cir. 1963), cert. denied 377 U.S. 923 (1964) (information sought respecting nonunit employees at another plant); *AGC of California*, 242 NLRB 891 (1979), enfd. as modified 633 F.2d 766 (9th Cir. 1980) (full membership roster held not relevant and order modified to limit disclosure of roster to portions listing relevant membership classifications).

[3] *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Curtiss-Wright Corp.*, supra, fn. 2; *Westinghouse Electric Corp.*, 239 NLRB 106 (1978), modified and enfd. 648 F.2d 18 (D.C. Cir. 1980).

[4] See, for example, *Safeway Stores*, 252 NLRB 1323 (1980), enfd. 691 F.2d 953 (10th Cir. 1982); *General Motors Corp.*, 243 NLRB 186 (1979), modified and enfd. 648 F.2d 18 (D.C. Cir. 1980), and *Bendix Corp.*, 242 NLRB 1005 (1979).

[5] *Westinghouse Electric Corp.*, 239 NLRB 106 (1978), modified and enfd. sub nom. *Electrical Workers IBEW v. NLRB*, 648 F.2d 18 (D.C. Cir. 1980). (Upheld order for furnishing of compilations of data but modified so as not to require furnishing of copies of all discrimination complaints but merely information regarding the alleged bases of complaints filed, in order to assure confidentiality. In *Safeway*, fn. 1, supra, production was directed of copies of complaints or charges with names deleted.)

made available would appear to meet the needs of the Guild. No necessity for the production of the reports themselves has been established.[6]

I am not dissuaded from the conclusion reached herein by the Respondent's arguments. The fact is that on cross-examination the Guild's unit chairperson conceded that she had not received a formal complaint respecting these matters in her official capacity as a Guild official. She had testified convincingly to receipt of numerous informal complaints regarding discrimination in promotion to managerial positions from the unit and the Guild's duty to investigate those circumstances is clearly within its policing function under the contract. In a memorandum to Cook dated February 27, 1981, Arnold asserted that some of the information requested may be extracted from information already provided to the Guild. There is no evidence in the record that the information sought to be elicited can in fact be extracted from the data previously furnished and there is no evidence to indicate how much difficulty such extraction will entail. Nevertheless it may be observed that if the requirement to furnish information exists at all, then it must be furnished in comprehensible and usable form and in such fashion as commits the Employer to a representation that such are indeed the facts of the case. A response to a request for information which consists of a lengthy explanation of the manner in which such information can be extracted from other records does not constitute compliance. The Guild is not required to undertake a burdensome investigation to extract and distill information from a mass of records when the same data is readily at hand to the Employer.[7] The Respondent's argument that the Guild may legally obtain access to the filed EEOC reports is beside the point and places on the Guild the very burden the law says the Guild is not required to assume. The issue is not whether information is available to the Guild from any particular source but whether the Post is obligated to furnish it. The answer is resoundingly in the affirmative to the extent that the data is in the Post's possession and will not, by its disclosure, trample on anyone's right of privacy.[8] The instant request did not involve data capable of easy distillation from the reports already furnished by the Post in other connections. As for the reports themselves, Cook testified that recourse to the Equal Employment Opportunity Commission for copies would have entailed delay; the Respondent offered no evidence to the contrary.

Accordingly, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act by its failure to furnish a list of minorities in its jurisdiction by name, job classification, and history of promotional record until June 1982, approximately 1 year and 4 months after it had been requested; by failing to furnish the other information requested in the memorandum of February 23, 1981, from Joy Cook to Leonard Arnold; by failure to furnish the information for both unit and nonunit employees; with the exception therefrom of the request for copies of the Post EEOC reports filed since 1978. I find that the Respondent did not violate the Act by refusing to furnish copies of the EEOC reports filed since 1978. An allegation added to the complaint at the hearing alleging violation of the Act by reason of the Respondent's delay in furnishing the reports accordingly also falls.

2. Information respecting sick leave and the absentee control program

On February 23, 1981, the Guild requested information respecting the total number of staffers and the number taking sick leave, and the number of days of sick leave taken in the years 1977, 1979, and 1980;[9] and, with respect to those years, a breakdown showing the number of occurrences of illness, the average length of absences, the number of persons affected by and the number of days docked under the terms of paragraph 2, section 1, article XI of the collective-bargaining agreement. The names of the individuals placed on the absentee control program and their individual absentee records. The Respondent furnished the figures for the number of persons and the number of days docked because of six or more occasions of illness during the period from March 29, 1979, to March 19, 1980, and from March 20, 1980, to February 27, 1981, together with the names of 10 individuals who had been placed on the absentee control program for the year commencing September 1, 1980, and ending August 31, 1981.[10]

The pertinent provision of the collective-bargaining agreement, article XI, section 1, paragraph 2, which was first negotiated at the New York Daily News and then adopted in the New York Post contract of 1978, entails an amendment of the sick leave schedule. Employees who are absent because of illness or accident are not required to make up time lost but receive their regular salary in accordance with the schedule. The modification is as follows:

> Notwithstanding the foregoing schedule, an employee who in any period of 12 months, beginning with the first day of any absence due to illness or accident, is absent on more than five occasions, and who has not exhausted his paid sick leave entitlement, shall not be paid for the first two days of the sixth and any subsequent period of an absence during such twelve months period unless hospitalized during such additional absence. This provision shall be effective March 20, 1979.

---

[6] In the *Bendix Corp.*, 242 NLRB 1005 (1979), production of charges and complaints involving unit employees was directed because it was expressly found that the union had established the relevance of the charges and complaints. A similar result was reached in *General Motors Corp.*, 243 NLRB 186 (1979), enfd. 648 F.2d 18 (D.C. Cir. 1980).

[7] *Kroger Co.*, 226 NLRB 512 (1976) (note comment by Board that when relevant request for information is received, employer's obligation is to provide it or set forth adequate reasons why it is unable to do so); *Borden, Inc.*, 235 NLRB 982, 983 (1978), enfd. in relevant part 600 F.2d 313 (1st Cir. 1979); *Bel-Air Bowl*, 247 NLRB 6, 11 (1980), enfd. mem. 631 F.2d 736 (7th Cir. 1980).

[8] *New York Times Co.*, 265 NLRB 353 (1982) (the fact that employees may have the information and be willing to divulge it does not relieve the employer of its responsibilities under the Act).

[9] No request was made for this information for the year 1978 because of the existence of an anomalous situation during that year.

[10] An additional request by the Guild for information respecting the reasons for the absences was withdrawn.

In the event of excessive absences during any year an employee is placed on the absentee control program. This means that he must present a medical certificate for each illness or day of absence or alternatively charge the day to vacation entitlement or to optional holiday. If neither option is elected he is not paid for the day. The review period under the absentee control program runs from September 1 to August 31 of each year. An employee's name is removed from the list if he reduces the number of absences during the following year to no more than six occasions of illness. It is to be noted that specific provision is made for the case of recurring illness: if an employee's physician attests that an illness is of a recurring nature, the employee need not furnish a certificate for each day of absence but is obligated to continue course of treatment and furnish a certificate attesting to each visit to his physician.

The Guild claims it sought the information requested for the purpose of negotiating the elimination or modification of the sick leave provisions that had been inserted in the 1978 contracts. The Guild attempted to delete the provision during the collective-bargaining negotiations with the Respondent in 1981. However, bargaining was concluded without obtaining management agreement to such deletion because management took the position that the overall program, consisting of the sick leave entitlement, the absentee control program, and the 1978 provisions for docking employees after excessive absences, was effective in curbing chronic abuse, especially on Friday afternoons and Monday mornings. The Guild representative specifically advised the representatives of management that the sick leave information requests continue to be pending notwithstanding the conclusion of the 1981 negotiations and that the Guild expected to press the issue again in 1984.

The Guild asserts that it needs the information in order to establish that the provision does not protect the Employer from chronic abuse of sick leave and yet actually penalizes employees who work when they are ill in order to complete specific assignments because if they suffer lapses they are docked under these provisions, with the result that they are better off if they do not come into work and have one continuous period of illness even if important work remains unfinished. The Guild contends that the figures for the years requested would provide a comparison which would show the true impact of the provisions; that the individual absentee records would show that the employees were being placed in a position analogous to double jeopardy, being required to present medical certificate in order to obtain sick leave and then being docked thereafter even if they possess a certificate, and that employees who are not abusing the program are penalized unfairly because the data respecting chronic abusers is not excluded from consideration by the Post in assessing the impact of the docking provisions. Whether the Guild is right or wrong in its contentions, the advancement of these points is clearly within the scope of its duties and obligations as the collective-bargaining representative of the unit employees. As its contentions are not frivolous, the Guild is entitled to the information which would tend to support (or undermine) its position. The statistical information requested is precisely what the Guild needed for the purpose of eliminating discrepancies between Guild and Post figures for the size of the unit and the number of staffers and for an analysis of the individual absentee records that it was hoped would support the Guild's contention that major abuses of sick leave by a few persons should not be counted in assessing the impact of the sick leave provisions on the remainder of the unit. To the extent that information related to members of the unit, it was presumptively relevant and to the extent that it related to other employees the relevance was clearly shown.

The information requests, as communicated to Arnold, were phrased only in terms of unit members, but the response was not based on any such limitation. The Post took the position that the requested information was confidential and notified the Guild that its representatives could examine the records but would not be permitted to photocopy them or gather statistical information from them.

The Respondent was only willing to provide information as to the number of persons affected by the docking provision, the number who were docked, the total number of days they were docked during the period from March 1979 to March 1980 and from then until March 1981, and a list of individuals who were on the absentee control program. The Respondent asserted that this information was provided but Cook denied having ever received the list of employees on the absentee control program.

I find it difficult to believe that the Respondent was acting in good faith in this regard, and I believe the Respondent simply determined not to make the requested disclosure. The Respondent imposed restrictions solely on the basis of the purported confidentiality of the information contained in the sick leave records, yet inconsistently authorized the Guild to send representatives to examine the records. It persisted in this contradictory stance even after Cook notified Arnold that she was seeking only aggregate totals and would be content to accept copies of the records with the confidential information blocked out. Thereupon the claim of confidentiality was extended to the aggregate totals and the breakdown by occurrences, matters whose disclosure could not possibly have violated anyone's right to confidential treatment of their records. By refusing permission to photocopy records, the Respondent denied to the Guild what has been referred to as "the now nearly universal use of photocopies in business affairs."[11] Its refusal to allow the Guild representatives to take copies with the confidential information blocked out demonstrates the insincerity of its position. The Respondent's insistence on imposing a hardship on the Guild makes excusable the Guild's failure to accept the invitation to send people to the personnel office to sit making extensive notes of the contents of the records. In situations where confidentiality claims have been upheld, the reasonableness of the concern for secrecy was apparent.[12]

[11] *Communications Workers Local 1051 (American Telephone) v. NLRB*, 644 F.2d 923, 929 (1st Cir. 1981), enfg. 250 NLRB 47 (1980).

[12] See *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

The point is significant, for Cook's protestations of necessity for the data lose some of their effectiveness in light of her failure to avail herself of the opportunity given to her by Arnold to inspect the records; on February 23, 1981, he advised her that the balance of the information sought was available for inspection. Because aggregate totals were sought, the photocopying limitation would not necessarily have created a severe problem. Even the availability of the records for investigation in convenient form was not controverted: an absentee record is maintained for each employee by the personnel department in a three-ring looseleaf binder and the records are available for inspection by both the employee and the Guild. Both Cook and other officials of the Guild have availed themselves of these records on other occasions in the past. Furthermore a copy of the list of employees on the absentee control program is routinely furnished to the Guild annually, when the list is made up in September of each year. Nancy Lambert, one of Respondent's record custodians, testified that anyone with access to the absentee records for all the employees for the years 1977 through 1982 could determine the pattern of absences simply by looking at the absentee sheet for each employee for each of the 5 years. This does not help the Respondent, however, in view of the refusal to permit the gathering of statistical information, and it was conceded that no copying of the absentee records was permitted.

In its brief the Respondent asserts that access to the records having been offered, the burden was on the Union to show the inadequacy of the offer. I find that the Union has done precisely that by testimony, uncontroverted, that it was permitted neither to make copies nor to make statistical abstracts of the information being made available. Under such limitations the information was not really made available.[13]

Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to make the requested information available under such circumstances as to allow the Guild to make copies of information or to collate and codify the results of the examination.[14]

At the hearing, the General Counsel moved to amend the complaint to allege violation of the Act by reason of the Respondent's delay in furnishing the Guild with the information requested by it. To the extent that information has been furnished, but only after a protracted delay, I find a separate violation of the Act.

3. Independent contractors, freelancers, and stringers

The Guild requested "detailed information regarding the names, contractual status and fees and all compensation for anyone holding independent contractor, freelance or stringer status with the New York Post in 1978, 1979, 1980 and 1981." In response, the Respondent furnished a list of the names of individuals whose work appeared in the Post during a 2-month period. None of the other information was provided, though initially the Respondent agreed to provide the requested information for 1980 and for the month of January 1981 exclusive of the monetary information.

The stated objective of this request by the Guild was the preparation of the contract bargaining positions and preparation for pending arbitrations. The issue of Respondent's use of independent contractors, freelancers, and stringers has been a source of dispute between the Guild and the Post since 1977. There can be little question that the Guild needs the information requested in order to determine the nature of the business relationship between the Respondent and these people or entities. To support its contention that the Respondent violated the collective-bargaining agreement by assigning unit work to nonbargaining unit individuals, the Guild must be able to show that they would be deemed includable in the unit. The Guild is therefore entitled to the information requested with the exception of the amount of the individual compensation.

The Guild argues that the determination of which of the nonunit individuals it would seek to assert jurisdiction over at an arbitration depends on their contractual status and the fees and compensation paid to them. It is contended that these are the guidelines mandated by the rationale employed in the decisions of earlier arbitrations involving the columnist, Murray Kempton, and the cartoonists, Shain and Day. However, it has been held specifically that only information respecting the aggregate amount paid to independent contractors, freelancers, and stringers for editorial products is required to be disclosed and not the individual personal financial arrangements entered into between the publisher and the contributors. The amounts paid to individual nonunit writers are required to be kept confidential out of concern for the right to privacy of those persons who are not represented by the Union.[15] Furthermore, the arbitration awards specifically negate the relevance of the compensation paid to the individual writers. The compensation figures were not supplied at all in the Shain-Day arbitration and were expressly stated to be insignificant, in and of themselves, in the Kempton decision, where they came into play only to prove another point. Both decisions profess to be based on criteria used by the National Labor Relations Board. In the Kempton arbitration decision, it was stated:

[13] In *United Aircraft Corp.*, 192 NLRB 382, 389 (1971), modified on other grounds 543 F.2d 422 (2d Cir. 1975), it was held that an employer fulfilled its obligation by making information available not necessarily in the exact form or on the exact times requested, at a reasonable time, and in a reasonable place with an opportunity to make copies if so desired. In short, there are limitations to the burden which may be placed on the Employer, but there is no doubt about the Union's right to make copies and to take down information to codify the results of the examination of the records, without which right there is no point in examining them at all.

[14] It is apparent from the testimony of both sides and the manner in which they approached the question that it was clearly understood that the Guild wanted the total number of staffers and the number taking sick leave and the number of days for the years 1979, 1980, and 1981 of unit members and nonunion members. The Guild memorandum to Arnold, however, referred only to staffers who are members of the Guild. In her testimony, however, Cook testified that what was asked for was the total number of staffers and the number taking sick leave for the year stated, without limitation to unit members. There is nothing in the record to indicate that Arnold ever understood the request differently.

[15] *Press Democrat Publishing Co.*, 258 NLRB 1355 (1981).

> The criteria used by the NLRB to determine if an employment relationship exists are the degree of control and direction that the Employer has a right to exercise over the objective of the work to be done and over the means by which that objective is accomplished.

The Shain and Day arbitration award was based entirely on the degree of direction and control exercised by the Post over the work of those two cartoonists. They were both held to be employees. Murray Kempton was held not to be included in the collective-bargaining unit on the basis of considerations such as the lack of control over the contents of his column or the manner in which they were written, his freedom regarding hours and work places (he had an office at the Post), and the uniqueness of the work he contracted to supply. The arbitrator specifically noted that method of payment is not the basic criterion and that there is not necessarily a relationship between the form of payment and status. In Kempton's case the amount of compensation was considered only to the extent that its size was deemed a measure of his independence, insofar as it put him in a position to negotiate a sale of columns. The transaction was in the nature of a business deal, rather than a sale of his time measured by hours. It was only in respect to the manner in which the size of his salary reflected the basic nature of his dealings with the Post that it was considered. The number of dollars in itself was not considered meaningful.[16]

The arbitration awards and earlier rulings of the Board thus make it clear that the amount of compensation paid to the individual contributors is not pertinent. The Post is correct in its contention that lack of information regarding individual compensation does not at all affect the ability of the Guild to process the grievance. The Post was therefore not required to furnish data respecting individual compensation. However, all of the other information should have been provided. The list of individuals whose work appeared during a 2-month period was a patent failure to comply with a legitimate request. The failure to do so violated Section 8(a)(1) and (5) of the Act.

Respondent's counsel argues in the posthearing brief that because the request involves nonbargaining unit data, the burden is on the Guild to show the specific uses to which the information would be put, it being contended that the Guild had failed to do so by "mere assertion" that the information was sought to arbitrate certain cases. However, I find that this is a sufficiently specific reason and was a proper basis for the informational request.[17]

In addition, the Guild asserted that the data would be used to determine which of the nonunit individuals the Guild would seek to assert jurisdiction over at arbitration. Thus two good reasons have been stated.

4. Lerner-King associates

The Guild requested a list of all promotion jobs assigned to Lerner-King Associates, an advertising firm, and to any other advertising firms since November 1979; the hours spent on each job as reflected by the firm's billing statements, and the amounts billed to the Post; a list from January 1, 1977, to current date of all personnel in the creative services department showing their job classifications, dates of hire, and (if applicable) termination.

The Post made no response to this demand, and in this proceeding defends its failure to do so on the basis of the alleged failure on the part of the Guild to advise the Post of the precise use to which the information would be put. However, it is beyond question that, as the Guild contends, a jurisdictional dispute had existed since 1980 with respect to the entire matter of subcontracting. The use to which the information would be put was obvious from the nature of the information sought. The need for it was unmistakable if the Guild was to make any comparison between the work contracted out and the work performed by the bargaining unit for the purpose of determining if its jurisdiction was being eroded. An inquiry into the amount of compensation being diverted from unit members would be an essential part of such an investigation, as would be the time data and the other information requested. Intelligent assessment of the impact of subcontracting requires knowledge of the number of manhours of work performed by the outside contractor. Because a grievance is now pending for possible violation of article I, section 4 of the collective-bargaining agreement and, in addition, the information will be relevant in a forthcoming arbitration, it is plain that the data is relevant to the policing of the contract and the performance of the Guild's duties under it.

A showing that work is in fact being subcontracted out and that reasonable basis exists for believing that the work of the bargaining unit is being thereby reduced adequately demonstrates a specific purpose in requesting the information. The Guild's objective in requesting supporting data is self-evident[18] and the Respondent's contention that the Post was never advised of the intended use of the information requested must be regarded as specious. The Guild is not obligated to accept the Respondent's assurances that its jurisdiction has not been invaded, but has the right to determine such matters for itself and, indeed, would be derelict in the performance

---

[16] The arbitrator noted:

> The way a man is paid is not the basic criterion. We have already noted that the NLRB uses control and direction rather than pay or fringe benefits as its criteria, reflecting a recognition that the form of payment bears no necessary relationship to the status. . . .
>
> The evidence leaves no doubt that Kempton was selling columns rather than hours of work and that his columns are so unique and desirable that he was compensated far above the ordinary. He has reached a level where he must be deemed capable of making a business deal to sell his product as a principal rather than his work as an employee.

[17] *Boeing Co.*, 182 NLRB 421 (1970) (information sought in order to reach decision whether to proceed to arbitration).

[18] Subcontracting information must be furnished when it will aid the Guild either in negotiations or in discharging its responsibilities to the unit, as in this instance. *ACF Industries*, 234 NLRB 1063 (1978), enfd. in relevant part 596 F.2d 1344, 1353 (8th Cir. 1979). As to the current requirement for furnishing of such information when it is not unduly burdensome to the Respondent, see the statement of the later view of the Board in *Safeway Stores*, supra, fn. 1.

of its duties if it failed to do so.[19] It is entitled to such information as it needs to ascertain whether there have been breaches of the contract.[20] Thus, an adequate showing has been made that the data is potentially relevant to the policing of the contract and will help determine the scope of the work being subcontracted and compensation due bargaining unit members for work removed from their jurisdiction—all of this in aid of a grievance proceeding now pending. It therefore must be provided. The result would not be different if no grievance were pending.[21]

5. Stat-Tab

The Guild commenced an arbitration proceeding against the Post for violation of its jurisdiction under article I, section 4 of the collective-bargaining agreement. The Post had subcontracted keypunch and other data processing work to a company known as Stat-Tab. On November 28, 1980, the Guild requested information about the terms and conditions of the Post (or News America) contract with Stat-Tab and the volume of work performed by Stat-Tab pursuant to it. In addition, information was requested respecting Stat-Tab's employees (without limitation to those involved in the Post's work): name and address, date of hire, date of termination, classification or job title, duties actually performed, the names of immediate and other supervisors, and data relating to pay raises, starting pay, and changes in rates of pay and fringe benefits, including vacation, holidays, sick leave, overtime, pension, and severance. The Guild also inquired about work schedules, employee manuals, and job classifications and descriptions.

As in the Lerner-King situation and the SSI situation (discussed below), the Guild asserted that it seeks to determine whether work previously performed by unit members has been subcontracted and, if so, whether such subcontracting is an ongoing jurisdictional violation, and that the information is needed for arbitration and to determine which job levels have sustained the most injury.

The Post has refused to comply with this request in any respect. The Post's argument is that it is not obligated to make disclosure because the burden of showing the relevance of the information requested is not met by the Guild's bare assertion that its jurisdiction has been invaded. Cases which I have already cited effectively disposed of this argument.

The Post also asserted that the information requested is already in the possession of the Guild, an argument which is somewhat difficult to understand in view of the fact that the contracts are between Stat-Tab and the Post or News America and the Post disclaims knowledge of most of the information. The fact that the issue has been between the parties is documented in the memoranda which have passed between them and was testified to by Cook. Both parties appear to have tried to make a record.

In a memorandum to Arnold dated November 28, 1980, Cook mentioned that the subcontracting of keypunch work to Stat-Tab had been discussed on numerous occasions and in a formal grievance session on February 5, 1980. In a memorandum to Arnold dated February 8, 1980, Cook mentioned that "we touched on this issue briefly in the grievance meeting." On December 4, 1980, Arnold sent Cook a memorandum denying that he had any record that the matter had ever been discussed at the grievance meeting of February 5, 1980, or at any prior meeting.

In *Boeing Co.*, 182 NLRB 121 (1970), it was held that a union is entitled to information necessary to enable it intelligently to evaluate the grievances filed; providing information which advances the process of arbitration by enabling the Union to evaluate the merits of claims and prove those which are meritorious prevents overburdening of the arbitral system. It is the Union's responsibility to administer the collective-bargaining agreement, detect infractions of its terms, and intelligently counsel the employees whom it represents. Its right to the information which it needs to do so does not depend on the existence of a pending formal grievance. The potential value of the information is what is significant. Board policy favors disclosure of wage and related information even without apparent direct relationship to negotiation or administration of the collective-bargaining agreement.[22] When

[19] Cf. *Rockwell-Standard Corp.*, 166 NLRB 124, 131 (1967), enfd. 410 F.2d 953 (6th Cir. 1969):

> Certainly, it was not unreasonable for the Union to suspect that more work may have been transferred . . . than the Respondent admitted, and the Union had the right to know if, and to what extent, its suspicion might have some foundation." In *Doubarn Sheet Metal*, 234 NLRB 821, 824 (1979), it was noted that a union "need not accept Respondent's conclusionary statements" on the issue of whether a single-employer relationship existed between the employer and the company to which it was subcontracting work.

[20] *NLRB v. Designcraft Jewel Industries*, 254 NLRB 791, 797 (1981), enfd. 675 F.2d 493 (2d Cir. 1982).

[21] *Boeing Co.*, 182 NLRB 421, 426 (1970). Nothing contained in *S & W Motor Lines v. NLRB*, 621 F.2d 598 (4th Cir. 1980), or *Atlas Metal Parts Co.*, 252 NLRB 205 (1980), enfd. as modified 660 F.2d 304 (7th Cir. 1981), relied on by the Respondent, impels a different conclusion under the circumstances of the present case. *S & W Motor Lines* is concerned with a situation in which the court found that the union had asserted no reason why it needed the information demanded relative to nonbargaining unit employees and had made no demonstration to the employer of the need to know, under circumstances involving deep suspicion as to the true purposes for which the union sought the information requested. The request was made at a time when a prior collective-bargaining agreement had expired and negotiations for a new one were not proceeding well. The court found that the union was inquiring about "persons who were not represented by the union and as to whom, absent special circumstances, the union has no business inquiring." In *Atlas Metal Parts* the court rejected what it characterized as a Board position that information was presumptively relevant and prima facie required to be produced on the ground that information concerning subcontracting "is so intrinsic to the employer and employee core relationship as to make it presumptively relevant in all cases." The Guild in the present case relies on no presumption but demonstrates the relevance and need for the information.

[22] *Whitin Machine Works*, 108 NLRB 1537, 1541 (1954), enfd. 217 F.2d 593 (4th Cir. 1954), cert. denied 349 U.S. 905 (1955). Where an employer has obligated itself not to subcontract maintenance work when to do so would have the effect of displacing maintenance employees and the union has cause to believe that the employer has in fact subcontracted such work at a time when employees are being displaced from their jobs as surplus labor, the information sought is clearly relevant and reasonably necessary. *Boeing Co.*, 182 NLRB 421, 426 (1970). Though *Boeing* did not determine the extent to which the Union may be justified in pursuing an examination of the Respondent's apparent subcontracting activities, because it was not necessary for the purposes of that case, it reiterated the general rule that the information which a union may request is subject to a "discovery-type standard."

there are grounds for belief that Respondent is subcontracting work while employees are being displaced as surplus labor, the issues are specific enough to justify the request for information in order to determine whether the Union should file grievance, and thereafter to permit it to evaluate intelligently the grievances filed and to attempt to resolve meritorious claims prior to arbitration. Securing the information will patently facilitate the inquiry and therefore it must be supplied.

Respondent's reliance on *NLRB v. A. S. Abell Co.*, 624 F.2d 506 (4th Cir. 1980), is misplaced inasmuch as that case merely holds that proof that the Union has misused information previously furnished rebuts a presumption of relevance of information requested with respect to members of the Union, requiring the Union thereafter to establish the relevance of the information sought to the performance of its duties as the employees' bargaining representative. In the present case there is, on one hand, no credible evidence that any information furnished to the Guild at any time has been misused and, on the other hand, the Guild has clearly established the relevance of the information requested to its obligations and duties as collective-bargaining representative. It is thus clearly entitled to information respecting the terms and conditions of the Post or News America contract with Stat-Tab, and to the other data requested, except information regarding "all Stat-Tab personnel," as to which the Respondent introduced evidence that it does not have the information. The Guild presented no evidence that the Post has or should have such information respecting Stat-Tab's personnel. Unlike the situation of User Services Systems, Inc., discussed hereinafter, which had personnel directly on the premises, there is no evidence that Stat-Tab personnel worked on the Post premises; on the contrary it appears that the work was done off the premises at Stat-Tab. Under the circumstances, therefore, the information respecting "all Stat-Tab personnel," some of whom obviously may not be involved at all with New York Post work, is excessive.[23]

6. User Services Systems, Inc.

User Services Systems, Inc. (USSI) was an in-house subcontractor which supplied five computer operators who performed computer services at the premises of the Post at 210 South Street, New York City, under the supervision of a USSI operations manager named Barbella. They worked in space assigned to them by the Post. Arnold, in a memorandum to Cook dated December 5, 1980, declared, "Their Function is in relation to computer operations for News America and its subsidiaries based in New York."

On November 28, 1980, the Guild requested the following information for all USSI personnel who had worked at the Post up to that date: name and address, date of hire, date of termination, classification or job title, duties actually performed, names of immediate and other supervisors, pay rate (current), starting pay rates and changes in such rates, fringe benefits (including vacations, sick leave, holidays, overtime pensions and severance), work schedules and copies of employee manuals or job classifications and descriptions. Also requested were the terms and conditions of the Post or News America contract with USSI and the duration of such agreement. The memorandum cited previous requests for such information made over the preceding 2 years including specific formal requests on March 22 and 24, 1978, January 11 and February 5, 1979, January 16 and 21, 1980, and on November 25, 1980, the last-mentioned being an oral request by Joy Cook to Leonard Arnold.

In response, Arnold advised Cook that six USSI employees were working in the Post's premises, five of whom were computer operators and one of whom was an operations manager; they were supervised by the president of USSI and liaison between News America and USSI was the responsibility of Jeff Leist, an employee of News America. The Post has not otherwise responded to the Guild's request for information respecting the transactions with USSI, except that in September 1982 the Guild was furnished with a document which the Respondent contends is a copy of the contract between the Post and USSI. The document is undated and unsigned and the Guild has questioned its authenticity.

In April 1981 the Guild commenced an arbitration proceeding against the Post, which is still pending, on the issue of whether the collective-bargaining agreement had been violated by transfer to USSI of work previously performed only by unit members.

The General Counsel has contended that the information requested is needed by the Guild for the purposes of the arbitration. Unquestionably, the information is relevant to the issues therein and would either support the Guild's position or require that the Guild modify its position in the light of the known facts. Whether a violation of article I, section 4 was committed by the Respondent by subcontracting work to the Guild can be determined with information relating to the terms of the subcontracting agreements, the description of the work being performed by USSI personnel, the job classifications of the personnel performing such work (which would relate to job classifications of the Post's employees from whom the work was removed), the wage rates, and the employees' manuals. This data would enable the Guild to define the scope of the unit work being performed by nonbargaining unit personnel and would to some extent suggest the nature of an appropriate remedy.

The Guild's requests for the names of the specific USSI employees and the dates of their hire and termination would not, however, seem to contribute to that objective.

Accordingly, I conclude that the Post has violated Section 8(a)(5) by failing to furnish to the Guild, with respect to all USSI personnel who worked at the Post, past or present, their classifications or job titles, a description of the duties actually performed by them, their current and past pay rates, the information requested concerning fringe benefits, their work schedules, the contents of the manuals or the job classifications and descriptions, and

[23] The situation herein is not the same as that involved in *Doubarn Sheet Metal*, 243 NLRB 821 (1979), in which the union was held to be entitled to specific information which would help it to determine whether there existed a single-employer relationship between the employer and a company to which work was being subcontracted.

the terms and conditions (including duration) of the Post or News America contract with USSI. The Respondent has not committed a violation by its failure to furnish the names and addresses of such personnel and their dates of hire and termination because the request for such data related to all employees of USSI and was not limited, as it should have been, to those employed at the premises of the New York Post. Only that portion of the data would have been relevant to the needs of the Guild.

At the hearing, the General Counsel moved to amend the complaint to allege violation of the Act by reason of Respondent's failure, since December 5, 1980, to furnish the Union with the information requested and by reason of the fact that with respect to such information as it did furnish Respondent "has delayed in furnishing such information." The motion granted and I find a separate violation by reason of the fact that, even to the minimal extent that information was furnished, and a questionable copy of the contract between the Post and USSI provided, as described above, the delay in furnishing the same since 1978 was unwarranted and constituted a refusal to bargain in violation of the Act.

Some of the Respondent's counterarguments merit discussion.

Notwithstanding the Respondent's assertion that the information sought by the Guild is not in its possession, I find that it is in fact available to the Respondent. The situation herein is not comparable to the request by the Guild for information about the Stat-Tab employees. The information about USSI which was requested, and is herein directed to be furnished, relates to functions being performed right on the Post's own premises. The Post obviously is able to finish the work schedules of these USSI personnel who are walking in and out of the Post premises every day utilizing building passes issued by the Post. The contract provisions by themselves contain much of the information sought and the availability of the rest of it is easily ascertainable by a simple request from the Post to USSI for that information. The burden of proving the Post's ability to get the information is not on the General Counsel; rather, the burden is on the Post to establish that this data, which would appear to be readily available to it, is not in fact available. The Respondent made no serious effort to prove this.

The defense that the Guild did not meet the burden of showing its specific need for information relating to nonunit employees simply does not comport with the evidence adduced at the hearing. An arbitration is pending and pursuant to the Guild's duty of policing the contract it attempted to obtain above-described information which I have held to be relevant.

The contention that the information is sought for a purpose wholly outside the scope of the Guild's bargaining relationship with the Post, to wit, for use in an organizational drive, has merit only to the extent that it is contended that the intended use is altogether outside the scope of the Guild's functions as representative of the unit employees. I have, however, found that argument devoid of merit. Consequently, there is left only the question of whether the fact that the information may have additional uses besides the uses to which the Guild would put it as representative of the unit employee in any way affects the situation. Cool conceded that the Guild was seeking to contact USSI personnel for purposes of a contemplated organizational drive. On February 3, 1981, she had sent a letter to USSI addressed to it at the premises of the Post, notifying it that a committee had been formed to organize its employees working at the Post. Nevertheless, the evidence does not support the Respondent's contention that the organization of USSI personnel was the Guild's sole objective in requesting the information. I have found as a matter of fact that the information was needed by the Guild for purposes relevant to its obligations as representative of employees at the Post. The happenstance that it might be additionally useful in organizing USSI employees generally would not destroy that relevance. Moreover, if the objective were to bring into the Guild the USSI employees performing unit work, then the relevance would be beyond question. The possibility of dual use of information does not extinguish the Guild's right to it for an existing relevant purpose.

It should be noted that the Post did not contend that the Guild, if given the information to which it was lawfully entitled, would abuse any confidence and misuse the information, nor did it contend that any information lawfully obtained by the Guild because it was entitled to it would be used unlawfully if used in an organizational campaign. Unquestionably, such use would be lawful, even if not approved by the Respondent. Accordingly, to the extent that any of the information which the Post is required to turn over to the Union might have been used for an organizational campaign among USSI personnel, that factor would not militate against or affect the obligation to turn over such information. The fact that the requested information may relate to the employers and employees outside the representative bargaining unit, does not, by itself, negate its relevance.[24]

The issue is the relevance of the information to the Guild's performance of its duties as bargaining representative, even to the exclusion of consideration of its purpose in requesting the information.[25]

CONCLUSIONS OF LAW

1. The New York Post Corporation, the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

---

[24] *NLRB v. Leonard B. Hebert, Jr. & Co.*, 259 NLRB 881 (1981), enfd. 696 F.2d 1120 (5th Cir. 1983); *AGC of California*, 242 NLRB 891 (1979), modified on other grounds 633 F.2d 766 (9th Cir. 1980), and cases previously cited.

Respondent cites *NLRB v. A. S. Abell Co.*, 624 F.2d 506 (4th Cir. 1980), in support of its position. See the discussion of this case in connection with Stat-Tab, supra. In that case the court found that the union had not established the relevance of information sought and that it wanted the information solely for an illegal purpose (harassment of employees). In the present case there is no fear of harassment, no proven history of misuse of information by the Guild, and no demonstration that the furnishing of the information that I have directed to be furnished would permit any abuse by the Guild.

[25] *White Farm Equipment Co.*, 242 NLRB 1373 (1979), enfd. sub nom. *Electrical Workers IUE v. NLRB*, 650 F.2d 334 (D.C. Cir. 1980); *Utica Observer-Dispatch*, 111 NLRB 58 (1955), enfd. 229 F.2d 575 (2d Cir. 1956); *AGC of California*, supra.

2. Newspaper Guild of New York, Local 3 of the Newspaper Guild, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees in the Editorial, Business, Advertising, Circulation, Publication, Mechanical and Maintenance Departments, excluding exempt employees and employees already covered by a union contract other than that between the Respondent and the Guild, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Guild is the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. The Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by delaying the delivery to the Guild for a period of approximately 1 year and 4 months a list of minority personnel by name, job classification, and history of promotional record as requested in a memorandum to the Respondent from the Guild dated February 23, 1981, and by failing and refusing on request to supply the following relevant information required by the Guild in order to perform its duties as bargaining representative of the employees in the above described unit:

(a) Information requested by the Guild in a memorandum dated February 23, 1981, consisting of a list of minority personnel by name, job classification, and history of promotional record relating to nonunit employees (the list that was furnished tardily having related only to unit employees).

(b) Information requested by the Guild on February 23, 1981, consisting of the total number of staffers and the number taking sick leave, and the number of days of sick leave taken in the years 1977, 1979, and 1980 and, with respect to those years, a breakdown showing the number of occurrences of illness, the average length of absences, the number of persons affected by and the number of days docked under the terms of article XI, section 1, paragraph 2 of the collective-bargaining agreement, the names of the individuals placed on the absentee control program and their individual absentee records. The Respondent also violated the Act in connection with this request by its refusal to permit photocopying of pertinent records and the making of statistical abstracts therefrom.

(c) Information requested by the Guild consisting of the names and contractual status of anyone holding independent contractor, freelance, or stringer status with the New York Post in 1978, 1979, 1980, and 1981.

(d) A list of all promotion jobs assigned to Lerner-King or any other advertising agency since November 1979; the hours spent on each job as reflected by billing statements and the amounts billed to the Post; a list from January 1, 1977, to the date of the request of all personnel in the creative services department, showing their job classifications, dates of hire, and, if applicable, dates of termination.

(e) Information requested by the Guild on November 28, 1980, consisting of the terms and conditions of the contract under which work was being performed for the Post by Stat-Tab, and the volume of work performed by Stat-Tab pursuant to the contract.

(f) Information requested by the Guild on November 28, 1980, consisting of the terms and conditions of its contract with, and the following data concerning all personnel of, User Services Systems, Inc., past or present who worked on the premises of the New York Post: their classifications or job titles, a description of the duties performed by them, their current and past pay rates and fringe benefits, work schedules, and contents of manuals or job classifications or descriptions.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not violate the Act by failing or refusing to furnish any of the other information requested by the Guild as hereinabove set forth.

THE REMEDY

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

[Recommended Order omitted from publication.]

Terpening Trucking Co., Inc. *and* Terpening Drivers Association *and* Gene R. Lariviere. Cases 3-CA-11101 and 3-CB-4081

31 March 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 16 July 1986 Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions but not to adopt the recommended Order.

We agree with the judge's finding that it is appropriate to calculate the gross backpay due discriminatees Lariviere and Bagley on the basis of employee Tickner's actual earnings during the backpay period. The judge further found that employee Tickner did not have any earnings for the second quarter of 1982, and therefore the judge substituted the earnings of employee Cummings in calculating the gross backpay for that quarter for the discriminatees. It is clear from the record, however, that Tickner had earnings of $388 in the second quarter of 1982 and our Order reflects computations based on those earnings. In addition, because the record shows that both discriminatees used 2 days of sick leave during 1982 prior to their discharges, we have reduced their sick pay entitlement for 1982 by $50 each. In all other respects, we adopt the judge's backpay computations.

ORDER

The National Labor Relations Board orders that Respondent Terpening Trucking Co., Inc., Syracuse, New York, its officers, agents, successors, and assigns, and Respondent Terpening Drivers Association, Syracuse, New York, its officers, agents, and representatives, jointly and severally, shall

1. Pay to Gene R. Lariviere the sum of $38,228 net backpay, plus interest computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), less tax withholdings required by Federal and state laws.

2. Pay to Howard Bagley the sum of $42,618 net backpay, plus interest computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), less tax withholdings required by Federal and state laws.

Doren G. Goldstone, Esq., for the General Counsel.
Raymond W. Murray Jr. Esq. (Bond, Schoeneck & King), of Syracuse, New York, for Terpening Drivers Association.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. These consolidated cases were heard by me on 18, 19, and 20 November 1985 in Syracuse, New York, pursuant to a backpay specification and notice of hearing issued by the Regional Director for Region 3 of the National Labor Relations Board on 27 June 1985. Having considered the entire record in this matter[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following findings and conclusions.

1. Background

The Board in a decision reported at 271 NLRB 196 (1984), adopted the opinion of the administrative law judge who had concluded, inter alia, that Terpening Trucking Co. had unlawfully discharged its employees Gene Lariviere and Howard Bagley. The judge also concluded that the Union (the Terpening Drivers Association), had failed to represent in good faith these two employees in relation to grievances about their discharges. Accordingly, the Board ordered, among other things, that both Respondents jointly and severally make whole Bagley and Lariviere for any lost earnings they may have suffered by reason of their discharges which occurred on 24 June 1982.

Following the Board's Order, the United States Court of Appeals for the Second Circuit, on 31 December 1984, issued an order denying the Company's petiton for review and granting the Board's application for enforcement of its Order. On 14 February 1985 the court denied the Company's petition for a rehearing. Subsequently, there having developed a dispute regarding the amounts of backpay due to the discriminatees, the Regional Director for Region 3 issued a backpay specification and a hearing was held before me.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Chairman Dotson finds that the judge implicitly credited Gene Lariviere's denial of any involvement in the writing or sending of a letter the Respondent alleges as postdischarge misconduct. The Chairman therefore finds it unnecessary to pass on the judge's alternative finding that the letter could not have affected the Respondent.

[1] The General Counsel's unopposed motion to correct the transcript is granted. See Appendix [omitted from publication].

2. The issues

The parties agree that the backpay period for both employees commenced on 24 June 1982 and ended when the Company offered them reinstatement. Thus, for Bagley it is agreed that the backpay period ends on 6 March 1986. For Lariviere, it is agreed that the backpay period ends on 5 April 1985. Also, in Amended Exhibit 3 to the backpay specification, the General Counsel set forth certain amounts of interim earnings which he concedes each had during the backpay period.

In the case of Lariviere, the General Counsel asserts that he first obtained interim employment in the first quarter of 1984. Using a formula for gross backpay based on the weekly gross earnings of all the Company's full-time drivers[2] and including vacation and sick pay (in accordance with the collective-bargaining agreement), the General Counsel contends that Lariviere's net backpay is derived as follows:

Period	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1982:			
Q2	[3]$366	$0	$366
Q3	6,964	0	6,964
Q4	6,860	0	6,860
1983:			
Q1	6,631	0	6,631
Q2	6,695	0	6,695
Q3	7,178	0	7,178
Q4	6,341	2,482	3,859
1984:			
Q1	6,279	4,050	2,229
Q2	6,068	2,947	3,120
Q3	6,580	3,525	3,055
Q4	6,222	3,417	2,805
1985:			
Q1	6,766	5,792	974
Q2	520	312	208
Totals	$73,475	$22,525	$50,950

As to Bagley, the General Counsel's contentions, based on the same formula are as follows:

Period	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1982:			
Q2	366	0	366
Q3	6,964	0	6,964
Q4	6,866	0	6,866
1983:			
Q1	6,631	0	6,631
Q2	6,695	0	6,695
Q3	7,178	0	7,178
Q4	6,341	0	6,341
1984:			
Q1	6,279	0	6,279
Q2	6,068	0	4,512
Q3	6,580	6,707	0
Q4	6,222	7,114	0
1985:			
Q1	4,555	3,638	917
Totals	$71,764	$19,015	$52,749

The Respondents make the following contentions:

1. Neither discriminatee made a reasonable search for work after their discharge.

2. Lariviere engaged in misconduct after his discharge which would disqualify him for reinstatement and backpay from the time of the misconduct. Essentially Respondents argue that Lariviere caused a false and libelous letter to be sent to the United States Highway Administration and to a local newspaper.

3. The gross backpay formula used by the General Counsel unduly inflates the discriminatees' backpay. Respondents assert that both employees during the course of their employment consistently had lower earnings than the other drivers, this being due to their absenteeism. Thus, Respondents propose as an alternative formula that I reduce the gross backpay figure for each discriminatee, as calculated by the General Counsel's formula, by the percentage amount that each discriminatees' predischarge earnings deviated from the average earnings of all the other drivers during the same period. Pursuant to this concept, Respondents assert that Lariviere's gross backpay would be $58,267 and that Bagley's gross would be $53,837. As a second alternative formula, the Respondents propose that I simply project each discriminatee's average pay during a representative predischarge period into the backpay period. Using this alternative, the Respondents claim a gross backpay figure of $56,138 for Lariviere and $53,215 for Bagley.

[2] In accordance with standard procedure, the General Counsel did not include in his calculations workweeks of employees when they worked 24 or fewer hours. See NLRB Casehandling Manual, Compliance, Sec. 10564(a)

[3] I have rounded off all figures to the nearest dollar.

4. Neither discriminatee is entitled to vacation pay for 1982 as this had already been paid to them at the time of their discharges. (This amounts to $366 for each employee.)

5. Neither discriminatee is entitled to sick pay during the backpay period. (Like the vacation pay item, this is relatively minor. In each person's case it amounts to $225.)

3. Alleged willful loss of earnings

As noted above, the Respondents assert that the two discriminatees did not make a reasonable search for work after their discharges on 24 June 1982. In this regard, however, the Respondents have the burden of proving facts showing a willful loss of earnings. *Phelps Corp. v. NLRB*, 313 U.S. 177, 190–200 (1941), *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1121 (1965). Further, the fact that a discriminatee has not obtained employment for a significant portion of the backpay period does not, of itself, establish his or her failure to seek interim employment. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966); *Cornwell Co.*, 171 NLRB 342, 343 (1968).

Both Lariviere and Bagley testified that subsequent to their discharges they searched for work by registering with the State Employment Service, by visiting and making telephone calls to companies which employed drivers, by talking to friends, and by reviewing want ads in the local newspapers.

The Employer's counsel for his part demonstrated that both Lariviere and Bagley were extremely vague about their recollections concerning where they looked for work and when they did so.

The problem with cases of this sort is that the discriminatees were called on to testify concerning the details of their respective job searches more than 3 years after their discharges. Also they were not requested to make records of their job searches until receiving questionnaires from the Board's Regional Office more than a year after their discharges. In such circumstances it is not surprising that they had a difficult time recalling the details of their searches for interim employment, and I therefore conclude that the Respondents have not met their burden of proof on this issue. *Teamsters Local 164*, 274 NLRB 909 (1984); *Canova Moving & Storage*, 261 NLRB 639, 642 (1982); *Wayne Trophy Corp.*, 254 NLRB 881, 882 (1981).

In the case of Bagley, I also conclude that he was justified in rejecting a job offer from Neil Trucking in April 1984. In this regard the evidence shows that unlike his job at Terpening, the job at Neil Trucking would have required him to be on the road overnight for about 5 days per week. Also after accounting for expenses, Bagley's expected weekly earnings from this job would have been about $200 per week, an amount significantly lower than what he earned at Terpening. I therefore find that Bagley's rejection of the Neil Trucking job offer did not affect his entitlement to backpay. *Neeley's Car Clinic*, 255 NLRB 1420, 1421 (1981).

4. Alleged postdischarge misconduct of Lariviere

The Respondents contend that Lariviere sent a libelous letter to the United States Highway Administration with a copy to a local newspaper. They contend that this constitutes misconduct by which Lariviere forfeited his right to reinstatement and backpay. I do not agree.

The letter to the Government, *which was unsigned*, reads as follows:

> To Whom it may concern
> I understand your agency will look into cases when a trucking co. makes its employees drive more than the legal amount of time allowed by law. Almost every week I have to drive more than 70 hours. I can not complain to the bosses because I would be fired. Some of our drivers like it for the extra money, but its really dangerous because we haul gasoline. The company makes us fill in the log books so it looks like we only work the legal amount of time. I hope something can be done to make them stop working us so long before there is a bad accident with this gasoline. Our union president will not do anything about it because he is one of the drivers who like to work that many hours. Some drivers were fired last year because they spoke up to the company. Last week I almost went off the road because I started to fall asleep at the wheel, thats what made me decide to write this letter. I hope I am sending this letter to the right place. I read about your agency in a trucking magazine and I am enclosing part of the article so you can see if I have contacted the right place. I do not want to see the company get a fine, but if thats what it takes to straighten things out I think they could handle it because I heard they made 3 million dollars last year but never paid us overtime for all those extra hours. In the event I have contacted the wrong agency, I am also sending a copy of this letter to the newspaper because they sometimes help people to get in touch with the right place. Also I would appreciate it if you could forward it to the right place if I am wrong. The name of the company I work for is
> Terpening Trucking Co.
> Charles Ave. Syracuse, N.Y.
> As you can understand, I cannot sign my name.
>
> A TIRED TERPENING DRIVER

Subsequently on 11 May 1982 an article was written in the Syracuse Herald Journal by Columnist Rick Case, in which he referred to and quoted extensively from the above-described letter. He did not however, name the company.

There are cases in which the Board and/or the courts have terminated a discriminatee's right to reinstatement and backpay on his or her postdischarge misconduct. For example in *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380 (8th Cir. 1980), the court, although sustaining the Board's findings that an employee had been illegally discharged, concluded that the reinstatement and backpay remedy was improper because of the employer's

postdischarge misconduct. In that case the employee had dishonestly failed to report his earnings to a state agency in connection with unemployment benefits and the court stated that the employee's "dishonesty, although not directed at the company, nevertheless adversely affected his employer because the company's unemployment reserve account was initially charged $250 for benefits wrongfully paid." In *O. R. Cooper & Sons*, 220 NLRB 287 (1975), the Board held that two employees who were illegally discharged were not entitled to backpay after the time that they had engaged in postdischarge misconduct consisting of slashing tires. In *Colorado Forge Corp.*, 260 NLRB 25, 36 (1982), an employee was denied backpay after he forged his employer's signature on a bank loan application.

Even assuming for argument's sake that Lariviere authored the letter and assuming arguendo that some parts of the letter are untrue, I cannot see how either the letter to the Government or the article published in the newspaper adversely affected the Company. Although it is true that the Company was subjected to an audit by the Highway Administration, there was no showing that this was caused by the letter. Indeed it is more probable that the audit came about simply because the Company had, shortly before the audit, been granted authorization to engage in interstate trucking. I also do not see how the newspaper article damaged or in anyway adversely affected the Company. For one thing the Company's name was not mentioned. Further, there was no showing that the Company's business declined as a result of the article.

I also have substantial doubts that Lariviere was in fact the author of the letter. The Company produced an expert witness, Victor McNett, who testified that the letter to the Government (R. Exh. 5) was typed on the same typewriter as a letter concededly sent by Lariviere to the Union. (The second letter is identified in this proceeding as R. Exh. 4.) McNett's testimony to the effect that Respondent's Exhibits 4 and 5 came from the same typewriter was based on the number of similar defects in the typewritten letters on each page. In this regard he testified that in examining the two exhibits (using a magnifying glass), he saw that there were identical defects in each exhibit in the letters g,I,k,r, and w. Given the number of corresponding defects, it was McNett's opinion that the odds were very high that the two letters came from the same typewriter.

McNett did not, however, offer any opinion concerning whether the typist of the two letters was the same, and it appears to me that they were not. Thus, the typing style and the number of typographical errors on Respondent's Exhibit 5 as compared to Respondent's Exhibit 4 leads me to believe that there were two typists, one for each letter.[4]

Respondents would still maintain that even if two typists were involved, the evidence still leads to the conclusion that Lariviere was the author of the disputed letter. In this regard, they assert that Lariviere conceded that his woman friend (with whom he lives), typed the letter which is Respondent's Exhibit 4. They argue that if the two letters were from the same typewriter, then Respondent's Exhibit 4 can only have been typed by Lariviere's friend at his direction or by himself. Although this is possible, the fact that the evidence points to two different typists, the fact that Lariviere denies any involvement in the letter, and the possibility that the letter may have originated elsewhere leads me to conclude that the Respondents have not met their burden of proof on this question.

5. The backpay formula

As noted above, the General Counsel contends that the proper formula for backpay is one which uses the average of all the Company's full-time drivers during the backpay period excluding weeks in which a driver worked less than 24 hours. In this manner, the General Counsel derives an average weekly pay rate during each quarter of the backpay period, which is then assigned as the expected earnings of Bagley and Lariviere. Vacation and sick pay are also added.

The Respondents proposed two alternative formulas which, while conceptially different, nevertheless yield results which are remarkably similar to each other. In the first proposed formula, they propose that I determine the average earnings of all the Company's drivers during the backpay period. They then propose that I reduce the average amounts by about 21 percent in Lariviere's case and reduce it by about 24 percent in Bagley's case. The discounts are, in essence, arrived at by computing the percentage difference between the average weekly earnings of the other drivers during a predischarge period from the respective average weekly earnings of Lariviere and Bagley during the same predischarge period. As a second alternative formula, the Respondents contend that I determine the average weekly earnings of the two discriminatees during a representative period before their discharges and project those averages for each of them into the backpay period. I must say that, to my mind, this second alternative formula is far more preferable than Respondents first alternative formula because (1) it requires far fewer calculations (with a concomitant lower probability of error), and (2) it is one of a number of traditional formulas which has been adopted by the Board in the past.

The General Counsel argues that both of Respondent's proposed formulas should be rejected for a number of reasons which I think have some merit. First, the evidence shows that seniority was taken into account for purposes of job assignment. As there was a significant degree of turnover during the backpay period, the two discriminatees would have improved their relative seniority. This in turn would have permitted both men to get longer runs with a concomitant increase in mileage reimbursements during the backpay period had they continued to be employed. Thus given their relative rise in seniority had they remained employed, it is not at all certain that the two discriminatees would have continued to earn the same percentage difference during the backpay period as they had done during the predischarge period.

[4] I note that in typing the number 1, the typist of R. Exh. 5 used the capital L key, whereas the typist of R. Exh. 4 used the key for the number 1.

The projection formula proposed by the Respondents similarly does not take account of the relative rise in seniority that the discriminatees would have enjoyed had they not been discharged. Additionally it does not take account of the fact that both the load rate and mileage rates were increased after the two men had been discharged.

Frankly, whatever problems I see with the Respondents' formulas, I have an even greater problem with the General Counsel's proposed formula. To my mind, the essential difficulty with his formula is that the evidence shows that there were two categories of drivers, one on a 6-day-per-week schedule and the other on a 5-day-per-week schedule. The record also shows (particularly G.C. Exhs. 3 and 4), that those employees on a 6-day schedule generally had higher earnings than the drivers on a 5-day schedule. Thus, as both Lariviere and Bagley had elected to be on a 5-day schedule, it seems to me that to calculate their backpay based on the average earnings of all drivers, irrespective of what schedule they were on, would be to unduly inflate their backpay. (I am unpersuaded and unmoved by Lariviere's testimony that prior to his discharge he was thinking about the possibility of returning to a 6-day schedule.)

In connection with the above, I suggested during the hearing that perhaps the fairest way of determining gross backpay was to base it on the average earnings, during the backpay period, of those drivers who were on a 5-day schedule. All parties, however, assured me that this was not a good idea because there was insufficient data to do so and because in some instances drivers moved back and forth, at undertermined times, from a 6-day schedule.

In reviewing this record, I realized that prior to the time when all drivers were allowed to choose between a 5- or 6-day schedule there were two drivers who were on a 5-day schedule whereas all the others were on a 6-day schedule. These two were Tickner and Cummings. Moreover both Tickner and Cummings continued to work a 5-day schedule when some of the others, including the two discriminatees, elected to go on the same schedule. Also, the records show that after the discharge of Lariviere and Bagley, Tickner continued to work on a 5-day schedule throughout the entire backpay period although Cummings left the Company about the third quarter of 1982. Finally and most significantly, Cummings, and even more particularly Tickner (both of whom would have similar relative seniority as the discriminatees during the backpay period for purposes of mileage rates and job assignments), had remarkably similar earnings ranking as the two discriminatees. This is evidenced by General Counsel's Exhibits 3 and 4.

It seems to me that as the earning ranking of the two discriminatees were almost identical to Tickner's during the predischarge period (all being on a 5-day schedule)[6] it is highly probable that the discriminatee's earnings would have been almost the same as Tickner's during the backpay period had they not been discharged. Further, the similarity is strengthened because of the similarity in relative seniority among Tickner and the two discriminatees vis-a-vis other drivers for purposes of mileage rates and job assignments.

Based on the above, I conclude that the fairest method of determining gross backpay in this case is to base it on the actual earnings of Tickner during the backpay period except for the second quarter of 1982 when, for some reason unknown to me, he had no earnings. Thus for the second quarter of 1982, I shall substitute the earnings of Cummings. Accordingly, the gross backpay on quarterly basis would be computed as follows:

1982:					
Q2	$238	x	1/2	=	$119
Q3	[a]422	x	13	=	5,486
Q4	428	x	13	=	5,564
1983:					
Q1	414	x	13	=	5,82
Q2	383	x	13	=	4,979
Q3	410	x	13	=	5,330
Q4	368	x	13	=	4,784
1984:					
Q1	413	x	13	=	5,369
Q2	387	x	13	=	5,031
Q3	408	x	13	=	5,304
Q4	410	x	13	=	5,330
1985:					
Q1	437	x	13	=	5,681
Q2	437	x	1	=	437

In addition to the above, the record shows that all drivers were entitled to sick pay in the amount of $75 per year if they did not use their sick leave during the year. Therefore, the discriminatees are entitled to this amount in each year of the backpay period. Also, the record establishes that all drivers were entitled to vacation pay (in the amounts of 1 or 2 weeks depending on seniority), the weekly amounts determined by dividing an employee's annual earnings by 52 weeks.[7] As the evidence establishes to my satisfaction that both discriminatees received their vacation pay for 1982 at the time of their discharges, they each would be entitled to vacation

[6] The evidence strongly suggests that prior to the agreement that allowed drivers to choose a 5- or 6-day schedule, both Lariviere and Bagley had unilaterally adopted a 5-day schedule for themselves by virtue of absenteeism.

[7] Pursuant to the bargaining agreement, drivers employed for more than 1 year but less than 2 years were entitled to 1 week of vacation pay. Drivers employed more than 2 years were entitled to 2 weeks of vacation pay. As both discriminatees, in 1983 and 1984 would have been employed for more than 2 years but for their unlawful discharges, they each would be entitled to 2 weeks vacation pay in 1982 and 1984.

pay for the years 1983 and 1984. (The amounts determined by dividing their gross backpay in each year by 52 weeks and then multiplying by two.) Thus in 1983 each would be entitled to $787.50 and in 1984 each would be entitled to $809.

Summarizing all the above and taking into account interim earnings, it is concluded that the total backpay for Lariviere, exclusive of interest, would be as follows:

Period and Gross Backpay	*Interim Earnings*	*Net Backpay*
1982:		
Q2 $119	$0	$119
Q3 $5,486	0	5,486
Q4 $5,564 + $75 (sick pay) = $5,639	0	5,639
1983:		
Q1 $5,382 + $197 (vacation pay) = $5,579	0	5,579
Q2 $4,979 + $197 (vacation pay) = $5,176	0	5,176
Q3 $5,330 + $197 (vacation pay) = $5,527	0	5,527
Q4 $4,784 + $197 (vacation pay) + $75 (sick pay) = $5,056	2,482	2,574
1984:		
Q1 $5,369 + $202 (vacation pay) = $5,571	4,050	1,521
Q2 $5,031 + $202 (vacation pay) = $5,233	2947	2,286
Q3 $5,304 + $202 (vacation pay) = $5,506	3,525	1,981
Q4 $5,330 + $202 (vacation pay) + $75 (sick pay) = $5,607	3,417	2,190
1985:		
Q1 $5,681	5,792	0
Q2 $437	312	125
Total		$38,203

Using the same formula for Bagley results in the following:

Period and Gross Backpay	*Interim Earnings*	*Net Backpay*
1982:		
Q2 $119	$0	$119
Q3 $5,486	0	5,486
Q4 $5,564 + $75 (sick pay) = $5,639	0	5,639
1983:		
Q1 $5,382 + $197 (vacation pay) = $5,579	0	5,579
Q2 $4,979 + $197 (vacation pay) = $5,176	0	5,176
Q3 $5,330 + $197 (vacation) = $5,527	0	5,527
Q4 $4,784 + $197 (vacation pay) + $75 (sick pay) = $5,056	0	5,056
1984:		
Q1 $5,369 + $202 (vacation pay) = $5,571	0	5,571
Q2 $5,031 + $202 (vacation pay) = $5,233	1,556	3,677
Q3 $5,304 + $202 (vacation pay) = $5,506	6,708	0

	Period and Gross Backpay	*Interim Earnings*	*Net Backpay*
1985:	Q4 $5,330 + $202 (vacation pay) + $75 (sick pay) = $5,607	7,114	0
	Q1 $4,401	3,638	763
	Total		$42,593

[Recommended Order omitted from publication.]

Handleman Company *and* Teamsters Professional, Public, Medical & Miscellaneous Employees Local 165, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 20–CA–19388

31 March 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

Upon a charge filed 29 November 1984 the General Counsel of the National Labor Relations Board by the Regional Director for Region 20 issued a complaint and a notice of hearing 15 January 1985. The complaint alleges[1] that the Respondent, Handleman Company, violated Section 8(a)(1) of the National Labor Relations Act by maintaining an employee stock ownership plan that precludes employees covered by a collective-bargaining agreement from participating unless the Respondent agrees to coverage under a negotiated agreement.

On 5 December 1985 all parties including the General Counsel filed a stipulation of facts and a motion to transfer proceedings to the Board. The parties waived a hearing and an administrative law judge's decision and submitted the case directly to the Board for findings of facts, conclusions of law, and a decision and order.

On 7 February 1986 the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. The Respondent and the General Counsel filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Michigan corporation with headquarters in Detroit, Michigan, and an office and warehouse in Sacramento, California. The Respondent is engaged in the wholesale distribution of records, tapes, and related products. During the 12 months preceding issuance of the complaint, the Respondent purchased and received at its Sacramento, California facility products, goods, and materials valued in excess of $50,000 directly from suppliers outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Teamsters Professional, Public, Medical & Miscellaneous Employees Local 165, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Since 1983 the Respondent has maintained an employee stock ownership plan under which qualified employees are entitled to acquire stock in the Respondent's corporation. The plan defines eligible employees as:

> (1) "Covered Employee" means any Employee who is classified by the Company as full-time and who:
>
> . . . .
>
> (ii) Is not covered by a collective bargaining agreement entered into by the Company unless such agreement, by specific reference to the Plan, provides for coverage under the Plan.

B. *Parties' Contentions*

The General Counsel contends that the Respondent's promulgating, maintaining, and publicizing the stock ownership plan is a per se violation of Section 8(a)(1) of the Act because it automatically excludes from coverage employees who become represented by a labor organization and covered by a collective-bargaining agreement. The General Counsel argues that the plan's exclusionary language punishes employees who choose a union because they become subject to risking loss of the plan's benefits in negotiations while unrepresented employees would continue to enjoy the benefits. Thus, the General Counsel argues that the exclusionary language interferes with, restrains, and coerces employees because it creates the potential of discrimination or a loss to employees for choosing union representation.

The Respondent contends that the plan merely recognizes that Respondent's duty to bargain with its employees' bargaining representative over mandatory bargaining subjects, including participation in employee benefit plans. Thus, the Respondent argues that an employee benefit plan may lawfully point out that employees covered by a bargaining agreement are not eligible to participate unless the bargaining agreement provides for coverage. The Respondent argues that its plan does not exclude any of its employees from participation but that all

[1] Other complaint allegations were settled by the parties and have been withdrawn from the complaint.

employees are eligible to participate, subject to its statutory bargaining obligations. The Respondent argues that the plan's exclusionary language simply points out that participation by employees covered by a bargaining agreement is governed by the bargaining agreement. Accordingly, the Respondent contends that the plan does not interfere with, restrain, or coerce any of the Respondent's employees.

C. *Discussion*

The Board has held that an employer violates Section 8(a)(1) of the Act by maintaining a benefit plan excluding employees who join a union, choose union representation, are members of a bargaining unit, or are covered by a bargaining agreement. See respectively *Toffenetti Restaurant Co.*, 136 NLRB 1156 (1962), enfd. 311 F.2d 219 (2d Cir. 1962), cert. denied 372 U.S. 977 (1963); *Channel Master Corp.*, 148 NLRB 1343 (1964); *Dura Corp.*, 156 NLRB 285 (1965), enfd. 380 F.2d 970 (6th Cir. 1967); and *Niagara Wires*, 240 NLRB 1326 (1979). Such plans interfere with, restrain, and coerce currently unrepresented employees because the exclusionary clauses automatically eliminate the benefits on selection of a representative and do not allow for their continuation pending negotiations. What is unlawful is the suggestion inherent in the exclusionary language that unrepresented employees will forfeit the plans' benefits if they choose union representation. In other words, the plans constitute threats to discontinue the benefits or to refuse to bargain over continuation of the benefits. Such threats violate the Act. *Como Plastics*, 143 NLRB 151 (1963).

The Respondent's employee stock ownership plan defines a covered employee as one who: "Is not covered by a collective bargaining agreement entered into by the Company unless such agreement, by specific reference to the Plan, provides for coverage under the Plan." This exclusionary language, unlike that in the above cases, indicates that coverage for the employees is subject to negotiations. The distinction is a critical one. The Respondent's plan does not cut off the benefit prior to negotiations, but contemplates the continuation of the benefits during the negotiations. Rather than automatically withdrawing or completely foreclosing coverage for represented employees, the Respondent's plan leaves continued coverage to collective bargaining, allowing the parties to agree to continued coverage or not. The Board has found that plans containing similar exclusionary provisions are not unlawful. Thus, in *Sarah Neuman Nursing Home*, 270 NLRB 663, 680 (1984), the Board found no violation where the employer maintained a profit-sharing plan excluding "any person who is covered under a collective bargaining agreement . . . unless the collective bargaining agreement provides for the inclusion of such person under the plan." Further in *Rangaire Corp.*, 157 NLRB 682, 683–684 (1966), the Board found lawful the employers' maintenance of a pension plan excluding "any person covered by a collective bargaining agreement entered into with the employer, which agreement does not provide for coverage of such person by this plan."

For the foregoing reasons we find that the Respondent's maintenance of an employee stock ownership plan does not violate the Act as alleged.[2]

CONCLUSIONS OF LAW

1. Handleman Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Teamsters Professional, Public, Medical & Miscellaneous Employees Local 165, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.
3. Handleman Company has not violated the Act as alleged.

ORDER

The complaint is dismissed.

---

[2] Member Stephens agrees with this finding for the reasons stated in this opinion and for the reasons stated in his concurring and dissenting opinion in *Lynn-Edwards Corp.*, 282 NLRB 52 (1986).

Cal-Western Transport *and* Building Material & Dump Truck Drivers, Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 21–CA–24322

31 March 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 9 May 1986 the National Labor Relations Board issued a Decision and Order in this proceeding, reported at 279 NLRB No. 115 (unpublished), granting the General Counsel's Motion for Summary Judgment. On 8 August 1986 the Board informed the parties of its sua sponte determination to reconsider its decision in the above case. The parties were invited to file statements of position with respect to the distinction, if any, between "major" and "minor" supervisors in the context of evaluating the coercive impact of preelection, prounion supervisory conduct. The Respondent filed a statement of position on 25 August 1986.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

As noted in our earlier Decision and Order, a secret-ballot election was held in the petitioned-for unit on 5 August 1983. Out of 28 eligible voters, 12 cast votes for, and 6 cast votes against, the Union; there were 8 challenged ballots, a number sufficient to affect the results of the election. The Company filed objections to the election, alleging, inter alia, that "supervisory taint" was present during the solicitation of authorization cards as well as throughout the course of the Union's organizing drive. On 19 October 1983 the Acting Regional Director issued a Supplemental Decision and Order directing that a hearing be held on the challenged ballots and on the Company's objections. A hearing was held on 26 October 1983, and the hearing officer's report and recommendations issued on 14 March 1984. The hearing officer found, inter alia, that the challenge to the ballot of Craig Kuyper should be sustained on the basis of Kuyper's supervisory status. The hearing officer also recommended overruling the Employer's objections to the election, including the objection alleging that Kuyper's involvement with the union organizing drive created a supervisory taint which invalidated the election, because Kuyper was only a minor supervisor and therefore his involvement in the union campaign was not coercive. The Employer filed exceptions to the hearing officer's report and recommendations. On 31 July 1984 the Regional Director issued a Second Supplemental Decision and Certification of Representative to which the Employer filed a request for review. On 24 January 1985 the Board issued a mailgram denying the Employer's request for review except with respect to the Union's alleged promise to waive initiation fees.[1] With respect to the alleged supervisory taint, the Board, citing *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961), found that because there was no allegation that any of the alleged "taint" occurred during the critical period, the Employer was precluded from raising the issue for the first time in this postelection proceeding.

By letter dated 5 November 1985, the Union made a formal demand for recognition and bargaining. The Employer refused, maintaining that the Board had committed reversible error in its decision certifying the Union. The Union filed an unfair labor practice charge and the Region issued a complaint. On 20 February 1986 the General Counsel filed a Motion for Summary Judgment which we granted in our 9 May 1986 decision. We now, however, wish to address in more detail the issues raised by our classification of individuals as major or minor supervisors.

In his report and recommendations, the hearing officer made a detailed analysis of Kuyper's supervisory authority and prounion conduct, finding that Kuyper was a supervisor and that he had been instrumental in the Union's organizing drive. He then noted that there are two situations in which a supervisor's conduct on behalf of the union can have an objectionable effect sufficient to warrant setting aside the election. The first involves a situation in which the employer takes no stand contrary to the supervisor's prounion conduct, and employees can be led to believe the employer favors the union.[2] The second involves the possibility that a supervisor's prounion conduct could coerce employees into supporting the union out of fear of future retaliation by that supervisor.

In order to determine whether a supervisor's conduct could reasonably tend to coerce employees, the Board has reviewed the degree of supervisory authority possessed by the supervisor and the extent of the supervisor's prounion conduct. The hearing officer, relying on *ITT Corp.*, 265 NLRB 1480 (1982), stated that the initial analysis in determining whether Kuyper's conduct was objectionable centered on his status as a major or a minor

[1] In a Third Supplemental Decision and Certification of Respondent dated 24 April 1985, the Regional Director adopted the hearing officer's recommendations that this objection be overruled. On 21 October 1985 the Board denied the Employer's request for review of this issue.

[2] No party asserts that such is the case here.

supervisor. A major supervisor was defined in that case as one who can hire, fire, promote, and issue written warnings to employees, or effectively recommend that such action be taken. Only supervisors who possessed such authority were viewed as possessing sufficient retaliatory potential to make their prounion conduct coercive. Applying this analysis, the hearing officer concluded that since Kuyper did not possess the above-described authority, he was a minor supervisor. Thus, although the hearing officer found that Kuyper was the central figure in the organizing campaign, the hearing officer's classification of Kuyper as a minor supervisor led him to conclude that Kuyper's prounion conduct was not coercive.

The Employer asserts that the Board's distinction between major and minor supervisors is an artificial one without any validity. It further asserts that Kuyper possessed extensive authority to retaliate against and to reward employees. In addition, the Employer maintains that Kuyper's prounion activity was sufficiently extensive to have reasonably tended to affect employees' choice in the election.

We agree with the hearing officer's conclusion that Kuyper's conduct did not interfere with the employees' free choice in the election. In so doing, we rely on all the relevant circumstances in the case. In particular, we evaluate, as we have in the past, all the relevant aspects of Kuyper's supervisory authority in determining whether his prounion conduct would reasonably tend to coerce employees in the exercise of their Section 7 rights.[3] However, we do not rely on the summary characterization of Kuyper as a minor supervisor.

The designation of a supervisor as major or minor has been used as a type of shorthand to indicate the extent of supervisory power exercised by an individual. The designation met with criticism, however, when certain courts of appeals perceived that the labeling of a supervisor's authority as major or minor was taking the place of a thorough analysis by the Board of the potential for coercion by a prounion supervisor of unit employees.[4]

Nowhere is this conflict more evident than in the series of cases involving ITT Corp. A representation election was held on 16 February 1979 in a unit of production and maintenance employees. The employer protested the inclusion of 31 group leaders in the unit, and these individuals voted subject to challenge. The company filed objections to the election, maintaining that the group leaders were supervisors and that their prounion conduct tainted the election. The Board adopted the Regional Director's finding that even assuming that all 31 individuals were supervisors, they were minor, as opposed to major, supervisors without any real authority to affect the working conditions of unit employees. The Board subsequently found that the company's refusal to bargain with the union violated Section 8(a)(5) and (1).

On review of the Board's bargaining order, the Second Circuit remanded the case to the Board, finding that the Board had not addressed the central issue of whether any of the unit employees' votes had been affected by the group leaders' conduct. In its supplemental decision, the Board interpreted the Second Circuit's opinion as approving its major/minor supervisor distinction, and found that the day-to-day supervisory authority of the group leaders did not afford an opportunity for effective retaliation against antiunion employees.

In its opinion on review of the Board's supplemental decision the court expressly noted that its earlier opinion had "not approve[d] an automatic conclusion that a supervisor's conduct might or might not affect voting based on a distinction between 'major' and 'minor' supervisory authority."[5] What the court was interested in, it stated, and failed to find in the supplemental decision, were the criteria used by the Board for determining whether a supervisor exercised major or minor authority, and whether the exercise of that authority could have an effect on employee voting. The court clearly rejected the Board's determination that an individual was a major supervisor only if possessed of "the authority to hire, fire, promote, or issue written warnings on his own volition, or has the authority effectively to recommend such action." Rather, the court concluded, the criteria to be used in determining the potential of a supervisor to influence unit employees should include not only the power to retaliate, as indicated by the Board, but the power to reward employees as well.[6] Based on these criteria, the court found that the group leaders did possess sufficient authority to influence employee votes by their conduct and set aside the election.[7]

---

[3] See, e.g., *Delchamps, Inc.*, 210 NLRB 179 (1974); *Sheraton Motor Inn*, 194 NLRB 733 (1971).

[4] See *NLRB v. Kahala Kai Photo Service*, 784 F.2d 1446 (9th Cir. 1986); *ITT Corp. v. NLRB*, 712 F.2d 40 (2d Cir. 1983); *Turner's Express v. NLRB*, 456 F.2d 289 (4th Cir. 1972). As the Ninth Circuit stated in *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459, 1463 (9th Cir. 1986), the characterization of an individual as a minor supervisor "cannot save an election when that supervisor has the power to punish or reward, and acts so that the threat of exercising that power reasonably tends to coerce employees in their voting."

[5] 712 F.2d at 43–44.

[6] Id. at 44.

[7] See also *NLRB v. Kahala Kai Photo Service*, supra, in which the Ninth Circuit also adopted the view that the Board should consider both the potential to reward as well as the potential to retaliate in evaluating the effects of a supervisor's prounion conduct.

We agree that in evaluating whether a supervisor's prounion conduct could reasonably tend to coerce employees' votes in a representation election, it is necessary to evaluate the ability of a supervisor both to reward and to retaliate against employees. In this regard, the indicia of authority which a supervisor possesses are factors to be considered in making this evaluation. That evaluation is not furthered, however, by characterizing supervisors as major or minor based on a summary of those indicia. To the contrary, the use of such characterizations has the tendency, as the Board's own experience has shown, to lead to an incomplete analysis of the degree of a supervisor's authority. Thus, to the extent that our decision in *ITT Corp.* and subsequent cases can be interpreted as suggesting that a major/minor characterization may be substituted for a complete analysis of the extent of supervisory authority, they are hereby overruled.

In determining that Kuyper's prounion conduct could not reasonably tend to coerce employees here, we rely on his minimal supervisory power to either reward or adversely affect unit employees. Primary among Kuyper's duties as dispatcher are the establishment, assignment, and adjustment of the drivers' pickup and delivery routes. Kuyper testified that those routes were designed by taking into account the milking times of the dairies, the delivery requests by customers, and the amount of milk which could be transported on a given route. Once the routes are established, they remain essentially the same throughout a season, and Kuyper is responsible for assigning them to drivers and establishing starting times. Although the assignment of drivers to routes may be a significant indicia of supervisory power in some situations, the circumstances here indicate that Kuyper exercised only a "degree" of independent judgment in that the routes are designed to accommodate factors outside of Kuyper's control, and thus cannot be easily manipulated in order to punish or reward an employee.

Other aspects of Kuyper's supervisory authority are equally benign with respect to the possibility of using such power for or against specific employees. Kuyper's ability to grant time off and sick leave is fairly routine, because the various routes require no special skills and the drivers frequently fill in for one another. Kuyper testified that when someone asks for time off, he will either take the route himself, call a casual employee, or call a regular employee who is normally scheduled to be off at that time. If no replacement can be found, the request is denied. An employee who is regularly scheduled to be off at that time is not compelled to come into work. Thus, although Kuyper has a degree of independent authority in making decisions about the routes, the extent to which that authority could be used for or against a particular employee is minimal.

Kuyper also reviews drivers' worksheets and paysheets, and has the authority to correct inaccuracies or discrepancies. Such corrections, however, would not be likely to give rise to a situation in which an employee could be rewarded or punished, because there is no evidence that Kuyper has any discretion in refraining from reporting them. Kuyper testified that his power to discipline employees is minimal, consisting of verbal warnings which are not recorded in the employees' personnel files.[8] He has no authority to hire, fire, or promote employees and, although on occasion his recommendations on hiring have been followed, the record indicates that employees have also recommended individuals who have been hired. Kuyper attends supervisory meetings concerning the profitability of routes, driver performance, and cost of supplies and vehicles. He also prepares monthly profit and route analysis reports used by the Employer to check revenue-to-ratios and to evaluate whether route changes can increase profit. Kuyper testified that with respect to employee performance, his role is basically suggesting modifications in the routes, depending on how quickly drivers were making their runs, but he takes no part in employee evaluations. None of these functions lends itself to creating a situation in which Kuyper can significantly reward or punish unit employees. Based on these factors, we find that Kuyper does not possess sufficient authority such that his prounion conduct could reasonably be said to have been coercive.

Moreover, we note that although Kuyper was involved with the initial organizing drive and solicited employees to sign authorization cards, there has been no allegation that Kuyper engaged in objectionable conduct after the representation petition was filed. The Board has, on occasion, considered prepetition actions as evidence of objectionable conduct, particularly when prepetition misconduct occurred in connection with a union's attempt to generate a sufficient showing of interest.[9] Here, however, the Employer is not objecting to the Union's showing of interest, but rather asserting that Kuyper's conduct created a supervisory taint that interfered with the conduct of the election. There is no evidence that Kuyper engaged in any

[8] Although Kuyper also testified that he was told he has the power to issue written warnings, he has never exercised this power.

[9] *Lyon's Restaurants*, 234 NLRB 178 (1978); *Gibson's Discount Center*, 214 NLRB 221 (1974).

significant prounion conduct after the petition had been filed. Although his conduct may have been influential in starting the union's organizing drive, we believe that this prepetition conduct, without more, and in light of its remoteness in time from the election, was insufficient to affect the results of the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). In addition, we note that it is not alleged that Kuyper threatened employees in any way or promised any rewards in order to ensure their support for the Union and, significantly, the opinions he expressed about the Union were strictly his own personal views.[10]

[10] See *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459, 1464 (9th Cir. 1986).

Therefore, we find that the objection was properly overruled and that the issuance of the Certification of Representative was appropriate. Accordingly, we reaffirm our earlier finding that the Respondent was obligated to bargain with the Union and that its refusal to do so violated Section 8(a)(5) and (1).

ORDER

The Order in case 279 NLRB No. 115 (May 9, 1986) (unpublished) is reaffirmed.

Jenkins Index Corporation, a Division of Universal Paper Goods Company, Inc., Single Employers; or in the alternative Universal Paper Goods Company, Inc., a subsidiary of OPC Holdings, Inc., successor with liability to Jenkins Index Corporation *and* Southern California Printing Specialties and Paper Products Union, Local 388, affiliated with the International Printing and Graphic Communications Union. Case 21-CA-21994

3 March 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 11 July 1986 Administrative Law Judge James M. Kennedy issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Jenkins Index Corporation, a Division of Universal Paper Goods Company, Inc., Single Employers or, in the alternative Universal Paper Goods Company, Inc., a subsidiary of OPC Holdings, Inc., Successor with liability to Jenkins Index Corporation, Montebello, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

William J. McCauley, Esq., for the General Counsel.
Norman Jones, of San Simeon, California, for the Respondent.

SUPPLEMENTAL DECISION

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me at Los Angeles, California, on June 11, 1986, pursuant to a backpay specification and notice of hearing issued by the Acting Regional Director for Region 21 of the National Labor Relations Board, on behalf of the Board, on February 19, 1986. The Board's original order was entered on December 14, 1984, and is reported at 273 NLRB 736. Thereafter, the entities collectively described herein as Respondent entered into a stipulation providing for the issuance of a backpay specification prior to obtaining court enforcement of the original Board Order. That stipulation was approved by the Board on December 19, 1985.

Among other things, the Board's original Order required Respondent to make whole three employees pursuant to its quarterly formula as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), together with interest thereon. The initial complaint was directed against "Jenkins Index Company" and the Board's original order directed "Jenkins Index Company . . ., its officers, agents, successors, and assigns" to comply with the Order. In the backpay specification, the Acting Regional Director asserted, and Respondent admits, that at the time the unfair labor practices were committed (February 17, 1983), Jenkins Index was a wholly owned division of Universal Paper Goods Company, Inc. The Acting Regional Director further asserted that as a result of a corporate transformation occurring after the commission of the unfair labor practices, Jenkins was completely merged into Universal and ceased operating as a division of Universal; he also asserts that Universal, in turn, is a subsidiary of OPC Holdings, Inc., a holding company. Respondent admits that as of July 1984 Jenkins had been completely merged into Respondent Universal and had ceased operating as one of its divisions. Respondent further admits that Universal is a successor for the purpose of remedying Jenkins' unfair labor practices.

The General Counsel has waived its right to file a brief; Respondent has filed a short brief challenging the credibility of one claimant. It has been carefully considered.

The Evidence

At the outset of the hearing the General Counsel and Respondent entered into a stipulation with respect to two of the three individuals entitled to backpay. After a modification which appears in Appendix A, the parties agreed that Ambrosio Contreras is entitled to net backpay of $19,367.92. In addition, they agreed that Michael Negrete is entitled to net backpay of $16,254.92. Accord-

[1] The Board's Decision and Order is reported at 273 NLRB 736 (1984).

[2] The Respondent, Jenkins Index Corporation, has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Respondent has excepted to the judge's awarding Celedon Armenta backpay for the period from 19 July through 1 November 1984. It appears from the record that during this period Armenta may have received vocational rehabilitation disability payments, and it is clear that a permanent disability award was made by the State of California on 2 November 1984, the last day of the backpay period. With regard to this exception, the Respondent's sole contention is its conclusionary claim that the backpay period should end on 19 July 1984 rather than the 2 November 1984 date set forth in the backpay specification and accepted by the judge. We find no basis in the record to establish that the backpay period should end on any date prior to the date of the permanent disability award. Moreover, we note that the Respondent has made no claim, and the record does not indicate, that the vocational rehabilitation disability payments constitute payment for wages lost by a claimant during the backpay period and thus are deductible from the gross backpay amount. See *Canova Moving Co.*, 261 NLRB 639 (1982), enfd. 708 F.2d 1498 (9th Cir. 1983).

ingly, a supplemental order will be entered liquidating backpay in those amounts for those two individuals.

The third individual is Celedon Armenta. The General Counsel has set forth Armenta's backpay period as beginning on February 10, 1983, when he was discharged, and ending on November 2, 1984, the date on which he was granted a disability insurance award.[1] The Respondent seeks to reduce backpay by asserting that Armenta was disabled and unable to return to work as of November 2, 1984. The evidence shows that Armenta actually suffered his industrial injury in 1981, more than a year before his unlawful discharge. It further shows that he had surgery in 1982 and returned to work on full duty in August of that year. Armenta testified he worked continuously from that date until he was unlawfully discharged on February 10, 1983. He says from that time on he was fully capable of performing all aspects of his job, those of a maintenance mechanic, and as late as 1985 when he actually returned to work for a short period he continued to be able to perform those duties. Respondent has offered no contrary evidence.

I conclude that although Armenta suffered an industrial accident in 1981 and although he had surgery in 1982, the injury was corrected and that at all times he was able to perform his job and could have done so from the time he was discharged until the end of the backpay period as alleged.

Respondent also challenges the validity of those figures in Appendix A relating to Armenta which show that he had no interim earnings during the entire year of 1984. Armenta testified he was not employed during that time and his only income was approximately $4200 from some rental property which he and his family own. The parties are in agreement that the rental income would not be considered interim earnings as the property was generating income before the discrimination. Respondent subpoenaed certain of Armenta's bank records in an effort to establish that he had received additional income from employment and from other sources. It is true that during this period Armenta's checking and savings accounts show substantial deposits. Nonetheless, Respondent was unable to show that these deposits came from employment. Armenta stated that some of the moneys deposited were given him by his three adult sons, one of whom works for an aerospace manufacturer and who earns a salary of approximately $45,000; another of whom works for the corporate office of a fast-food chain and who earns between $35,000 and $40,000; and a third who is in the military service. He testified that these three have told him that they did not want him spending his own money or depleting the family estate as they expect it to be part of their inheritance. Accordingly, Armenta says, he had accepted their assistance. Their assistance appears in both savings and checking deposits.

In addition, he says, before his unlawful discharge his wife had approximately $15,000 in cash which she kept in a safety deposit box. He says his wife, who handles the family finances, on various occasions during the backpay period, withdrew certain sums from the safety deposit box. She placed them either in the savings account for short periods or into short-term certificates of deposit which were frequently "rolled over." He says the deposits shown in the savings account appear to be substantial but, in reality, amount only to the same money being deposited several times. Although available, Respondent offered no bank records in evidence. As Respondent was unable to demonstrate any other source of these deposits, I conclude that it has failed to meet its burden of proving that Armenta had interim earnings in 1984.

In conclusion I find that the backpay specification with respect to Celedon Armenta is correct and that he is entitled to net backpay totaling $39,244.02 Accordingly, I issue the following recommended supplemental

ORDER

Based on the foregoing findings of fact and conclusions of law it is ordered that the Respondent, Jenkins Index Corporation, a Division of Universal Paper Goods Company, Inc., Single Employers; or, in the alternative Universal Paper Goods Company, Inc., a subsidiary of OPC Holdings, Inc., Successor with Liability to Jenkins Index Corporation, Montebello, California, shall pay the following named employees net backpay in the amounts set forth opposite their names, together with interest as required by the Board under *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962):

Celedon Armenta	$39,244.02
Ambrosio Contreras	19,367.92
Michael Negrete	16,254.92

[1] Armenta has not challenged the propriety of this event as ending the backpay period.

Lemco Construction, Inc. *and* International Brotherhood of Electrical Workers, Local Union 613, Petitioner. Case 10–RC–13029

31 March 1987

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN, BABSON, AND STEPHENS

The National Labor Relations Board has considered objections to an election held 24 October 1984 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows no votes for and one against the Petitioner, with no challenged ballots.

The Board has reviewed the record[1] in light of the exceptions and brief, has adopted the hearing officer's findings[2] and recommendations only to the extent consistent with this decision, and finds that a certification of results of election should be issued.

The election in this case was scheduled to take place between 7 and 7:30 a.m. on 24 October 1984. Of approximately eight eligible voters,[3] only one cast a vote. The Petitioner filed objections to the election, claiming, inter alia, that the number of votes cast was not representative of the unit and the election should be rerun. The Regional Director found merit in this objection, and recommended that the election be set aside on this basis. The Employer filed exceptions to the Regional Director's Report on Objections, contending that the vote was representative and that, in any event, the lack of participation in the election was due to the Petitioner's conduct. A hearing was held pursuant to a Board Order issued 8 April 1985.

In his Report and Recommendation on Objections, the hearing officer found that there was no credible evidence to support the Employer's contention that the Petitioner's conduct had interfered with the election. He also found that the low voter turnout was caused by two employee absences, the desire of some employees to wait outside the polling area together in order to vote as a group, and their mistaken belief that the timepiece used for the election would indicate the same time as their own. When this group presented itself to vote, the polls were already closed. Based on the fact that only one vote was cast, the hearing officer then concluded that a substantial and representative complement of employees did not vote, and the election should be set aside. We disagree.

The Board has long held that the "majority" required by Section 9(a) of the Act for purposes of selecting a collective-bargaining representative refers to a majority of those employees voting in an election. *R.C.A. Mfg. Co.*, 2 NLRB 159, 173–178 (1936). In situations where only one vote was cast, the initial Board position was to issue a certification. See *Williams Dimond & Co.*, 2 NLRB 859, 870 (1937) (union certified as the representative in three-person unit where only one vote was cast). Five years later, however, in *S.A. Kendall, Jr.*, 41 NLRB 395, 397 (1942), the Board reversed itself without any reference to *Williams Dimond*, and held that where only one employee voted in a three-person unit, the election was not representative, and a second election should be held.[4]

Neither *Kendall* nor the other one-employee-vote cases that followed contain any explanation of the concept of a "representative" election or any analysis of why a single vote cast in an election is not "representative" of employees' sentiment on unionization. It seems apparent, however, that this concept emerged as a counterbalance to the "simple majority" rule in *R.C.A. Mfg.*, supra, because a rigid application of that rule could lead to the certification of a union as the bargaining representative in a unit where only a small fraction of the eligible employees had voted. One way to offset this "inequity" would be to consider an election to be "representative," and hence valid, only if a "substantial" number of eligible employees voted.[5] No

[1] The hearing officer recommended that Objection 5 be overruled, and no exceptions to this finding were filed. We note that in his discussion of Objection 5 the hearing officer mistakenly identified a witness as "Adams" instead of "Lewis."

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the resolution.

The Employer also excepted the hearing officer's ruling that the Employer had the burden to go forward at the hearing. We agree with the Employer that the burden to go forward at a representation hearing lies with the objecting party, which in this case is the Petitioner. However, we find that this erroneous ruling by the hearing officer is not prejudicial to the Employer and does not affect the outcome of this case.

[3] The eligibility list stated that there were 11 employees eligible to vote in the election. Based on evidence provided by the Employer, the hearing officer found that three of these employees were no longer employed by the Employer on the election date and thus were ineligible to vote. No exceptions were filed to this finding, and we adopt the hearing officer's conclusion that there were eight eligible voters.

[4] See also *Gold & Baker*, 54 NLRB 869 (1944) (election petition dismissed without prejudice where only one out of two eligible voters cast a ballot in the election); *Firestone Tire & Rubber Co.*, 57 NLRB 868 (1944) (one valid ballot cast out of four eligible votes; election petition dismissed without prejudice); *Kit Mfg.*, 198 NLRB 1 (1971) (second election ordered where one out of two eligible employees voted). Compare *Gemco Automotive Center #507*, 198 NLRB 950 (1972) (election deemed representative where both eligible employees voted but one ballot was void).

[5] See *Standard Lime & Stone Co.*, 56 NLRB 522, 523 (1944), enfd. 149 F.2d 435 (4th Cir. 1945) (election valid where less than a majority but still a "substantial" number of employees voted).

numerical standard was established to define "substantial," however, and ad hoc judgments have since been made on a case-by-case basis. In general, as the percentage of employee participation declined, the likelihood of the election being set aside as unrepresentative increased.[6] The exception to this has been the one-voter participation cases which involve two-employee units.[7]

In another series of early cases, the Board did not measure the "representative" character of an election in terms of numbers or percentages alone. Rather, there developed a multifactor analysis concerned with certain elements in the election process. In these cases, the operative factors are: (1) whether there was sufficient notice of the election; (2) whether there was an adequate opportunity for employees to vote; and (3) whether there was evidence of interference with the electoral process by any party.[8] As long as the election was fairly conducted, the failure of a majority of employees to exercise their right to vote was not permitted to invalidate the election, and the reasons for the employees' failure to vote were considered immaterial to the certification of the election results.

We have considered these two lines of case law, and have determined that election results should be certified where all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter participation. The fundamental purpose of a Board election is to provide employees with a meaningful opportunity to express their sentiments concerning representation for the purpose of collective bargaining. The law does not compel any employee to vote, and the law should not permit that right, to refrain from voting, to defeat an otherwise valid election. As the Board observed in *Versail Mfg.*, 212 NLRB 592, 593 (1974), "[t]here must be some degree of finality to the results of an election, and there are strong policy considerations favoring prompt completion of representation proceedings." In political elections, voters who absent themselves from the polls are presumed to assent to the will of the majority of those voting. Similarly, when a Board election is met with indifference, it must be assumed that the majority of the eligible employees did not wish to participate in the selection of a bargaining representative and are content to be bound by the results obtained without their participation. Only if it can be shown by objective evidence that eligible employees were not afforded an "adequate opportunity to participate in the balloting"[9] will the Board decline to issue a certification and direct a second election.

Based on these considerations, we have decided to abandon any analysis dependent on a numerical test to determine the validity of a representation election. Rather, we will issue certifications where there is adequate notice and opportunity to vote and employees are not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election.[10] Precedent such as *Kit Mfg.* and *Gold & Baker* are inconsistent with this approach and are, accordingly, overruled.

In the present case, out of a unit of approximately eight eligible voters, only one employee, the Employer's election observer, cast a vote. Five of the other unit employees were present on the Employer's premises during the time of the election, and some had even indicated their desire to participate in the election. These employees failed to vote, not because they lacked an adequate opportunity to participate in the balloting, but because they chose to wait until the final minutes before the polls closed to vote together as a group, and then found that the timepiece on which they relied differed from the official timepiece used in the election. In the absence of a showing that any of the concerns articulated above have not been met or other unusual circumstances exist,[11] the reasons that an employee fails to exercise an opportunity to vote are not material to the certification of the election. As no such irregularities exist in the present case, the results of the election will be certified.

---

[6] Compare *Weldmaster Co.*, 56 NLRB 168 (1944) (18-percent participation unrepresentative), and *Mechling Barge Lines*, 69 NLRB 838 (1946) (21-percent participation unrepresentative), with *Wanzer Dairy*, 232 NLRB 631 (1977) (participation by two of three eligible voters considered representative).

[7] See, e.g., *Gold & Baker* and *Kit Mfg.*, in which elections were set aside notwithstanding the fact that the one vote cast represented 50-percent participation.

[8] See *Stiefel Construction Corp.*, 65 NLRB 925, 926–927 (1946); *S.W. Evans & Son*, 75 NLRB 811, 813 (1948); *Valencia Service Co.*, 99 NLRB 343, 344 (1952). See also *New York Handkerchief Mfg. Co. v. NLRB*, 114 F.2d 144 (7th Cir. 1940).

[9] *International Total Services*, 272 NLRB 201 (1984), quoting *S.W. Evans & Son*, 75 NLRB at 813.

[10] *Southland Corp.*, 232 NLRB 631 (1977); *Versail Mfg.*, 212 NLRB 592 (1974); *NLRB v. MacDonald's Industrial Products*, 731 F.2d 340, 342 (6th Cir. 1984), enfg. 264 NLRB No. 51 (Sept. 29, 1982) (unpublished).

[11] This case is distinguishable from *V.I.P. Limousine*, 274 NLRB 641 (1985), relied on by the hearing officer, where a 20-inch snowstorm of blizzard proportions occurred during the polling period and a substantial number of employees did not vote. There, unlike here, the election process was disrupted by circumstances so severe that the Board had no alternative but to set the election aside. In reaching that result, the Board focused on "whether the election was conducted properly and in such a manner as to assure that all employees were given a sufficient opportunity to vote," a test essentially identical to the one we have used in this case. Id. at 642. In the present case, the circumstances leading to the employees' failure to vote, although unfortunate, were within their control, and do not constitute "unusual circumstances."

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for the International Brotherhood of Electrical Workers, Local Union 613, and that it is not the exclusive bargaining representative of these bargaining unit employees.

Boise Cascade Corporation *and* Local Union 159, United Paperworkers International Union *and* Local 771, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada *and* Local 4–33, International Woodworkers of America *and* Local No. 50, International Union of Operating Engineers *and* Chauffeurs, Teamsters & Helpers Local 346 *and* Local No. 731, International Brotherhood of Electrical Workers *and* Local No. 49, United Paperworkers International Union *and* International Association of Machinists, Lodge No. 760. Cases 18–CA–9290–1, 18–CA–9290–2, 18–CA–9290–3, 18–CA–9290–5, 18–CA–9290–6, 18–CA–9290–7, 18–CA–9290–8, and 18–CA–9290–9

31 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 31 March 1986 Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Parties and the General Counsel filed briefs in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified, in accordance with the following analysis.

At the hearing the Respondent moved to dismiss the complaint insofar as it alleges that the Respondent unlawfully bargained with the three Charging Parties that represent its production employees (Local Union 159, United Paperworkers International Union; Local No. 50, International Union of Operating Engineers; and Local No. 49, United Paperworkers International Union), based on its assertion that there is no evidence linking those Unions to any alleged unlawful bargaining by the Respondent. The judge denied the Respondent's motion. He concluded that during the parties' 1985 negotiations the Respondent unlawfully insisted to impasse on its maintenance modernization proposal with not only the five Charging Parties who represent its maintenance employees, but also the three production Unions. Although we agree with the judge that the Respondent's proposal is a nonmandatory subject of bargaining because it would change unit scope, and that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse on the proposal with the five maintenance Unions, we find that the Respondent's motion should be granted as to the three production Unions.

The General Counsel conceded that the maintenance modernization proposal (that would consolidate the maintenance employee units, thereby effectively requiring shared representation by the maintenance Unions) "pertained primarily, if not exclusively," to the maintenance Unions. The judge reasoned that the proposal "significantly affected" the production Unions, and therefore that the Respondent and these Unions were at impasse on the proposal, because the proposal would permit the Respondent to assign production employees to maintenance work. However, the uncontradicted evidence shows that the Respondent actually was at an impasse with the production Unions on vacation pay, health insurance coverage, premium pay on holidays, and lines of progression, rather than the maintenance modernization proposal.

Moreover, although the maintenance modernization proposal was set forth in a memorandum of agreement presented to the Joint Union Council composed of all the Unions, there is no evidence that the Respondent insisted that the production Unions agree to the proposal. The uncontradicted testimony of the Respondent's chief negotiator, Fred Delaney, was that the production Unions were free to sign the memorandum of agreement without agreeing to the maintenance modernization proposal. Delaney in fact informed the Unions that the Respondent's intention was to sign separate contracts, which was consistent with the parties' past practice. The parties' past practice is also that each Union is not required to agree to all provisions of the Respondent's proposed memorandum of agreement and that provisions that do not apply to individual units have not been included in their respective individual bargaining agreements. During one set of past contract negotiations, several Unions signed final agreements with the Respondent even though one Union had rejected the memorandum of agreement presented to the Joint Union Council and called a strike. That the Unions also intended to have separately signed contracts during the 1985 negotiations is shown by the fact that they changed the wording of the Joint Union Council's counterproposal so that it would clearly require the Respondent to recognize "each of the signatory Unions as the sole bargaining representative," instead of the Joint Union Council. Further, the Respondent's 28 May 1985 final offer specifically refers to individual acceptances in two places.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Thus, the evidence does not establish that the Respondent insisted to impasse on the maintenance modernization proposal with the production Unions. Accordingly, we shall grant the Respondent's motion to dismiss the complaint insofar as it relates to the production Unions.[2]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4.

"4. The Respondent violated Section 8(a)(5) and (1) of the Act by (a) refusing to incorporate the prior recognized unit descriptions for the five maintenance Unions at its facility in a new agreement, (b) by insisting to impasse on, and by unilaterally implementing, a proposal which modified the bargaining units and the jurisdictions of the five maintenance Unions, and (c) by unilaterally imposing wages and other conditions of employment on its employees represented by those Unions."

ORDER

The National Labor Relations Board orders that the Respondent, Boise Cascade Corporation, International Falls, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Unions which represent its maintenance employees and refusing to incorporate in collective-bargaining agreements the recognized unit descriptions of these employees' respective bargaining representative.

(b) Insisting to impasse on, and unilaterally implementing, a proposal which modified the recognized bargaining units and the established jurisdictions of the Unions representing its maintenance employees.

(c) Unilaterally imposing on its employees represented by maintenance Unions wages and other conditions of employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and confer with the Unions which represent its maintenance employees at reasonable times and places with respect to wages, hours, and other terms and conditions of employment.

(b) At the Union's or Unions' request, rescind any or all unilateral changes in representation or in terms and conditions of employment made on or after 1 July 1985 affecting its employees represented by the maintenance Unions and make those employees whole, with interest, as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its International Falls, Minnesota location copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] The judge inadvertently omitted from his Conclusions of Law his implicit finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally implementing the terms of its 28 May 1985 final offer, as well as its maintenance modernization proposal, without first bargaining in good faith to impasse. We adopt this finding only to the extent that it applies to the final offer's implementation with respect to the maintenance Unions, and shall modify the Conclusions of Law accordingly.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with the Unions representing our maintenance employees by insisting to impasse on changes in the recognized bargaining units and jurisdiction of these Unions as a condition for new collective-bargaining agreements.

WE WILL NOT refuse to incorporate the recognized collective-bargaining units of the Unions rep-

resenting our maintenance employees in new collective-bargaining agreements.

WE WILL NOT unilaterally impose on our employees represented by maintenance Unions wages and other conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, meet and confer with the Unions representing our maintenance employees at reasonable times and places with respect to wages, hours, and other terms and conditions of employment.

WE WILL, at the Union's or Unions' request, rescind any or all unilateral changes made on or after 1 July 1985 affecting our employees represented by maintenance Unions and make them whole for any losses they may have suffered, plus interest.

BOISE CASCADE CORPORATION

James L. Fox, Esq., for the General Counsel.
Emery W. Bartle and *Mark B. Rotenberg, Esqs. (Dorsey & Whitney)*, of Minneapolis, Minnesota, for the Respondent.
William D. Watters, Esq., of Duluth, Minnesota, for the Charging Party.

DECISION

KARL H. BUSCHMANN, Administrative Law Judge. These consolidated cases were tried at International Falls, Minnesota, on 29 and 30 October 1985. The charges in Cases 18–CA–9290–1, –2, –3, –5, –6, –7, and –8 were filed on 15 July 1985; the charge in Case 18–CA–9290–9 was filed on 26 July 1985. The consolidated complaint was filed 29 August 1985. The primary issue is whether the Respondent, violated Section 8(a)(5) and (1) of the National Labor Relations Act, when it unilaterally implemented its final proposal which, in substance, did not include the preexisting bargaining unit descriptions, eliminated work assignment restrictions, modified the recognized bargaining unit classifications for maintenance jobs, and combined them into three broad categories.

On the entire record, including my observation of the witnesses, and after consideration of the briefs filed by the General Counsel, the Company, and the Union, I make the following

FINDINGS OF FACT

The Company, Boise Cascade Corporation, is a Delaware corporation with an office and place of business in International Falls, Minnesota, where it is engaged in the manufacture of paper products. Boise Cascade Corporation, the Respondent, is admittedly, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Since 1965, when Boise Cascade acquired the facility in International Falls, Minnesota, consisting of a paper mill and an insulite plant, it had separate collective-bargaining agreements with eight union locals, not counting the union for its railroad operation. They are: (1) Local 4–33, International Woodworkers of America, (2) Chauffeurs, Teamsters & Helpers Local 346, (3) Local 771, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, (4) Local 731, International Brotherhood of Electrical Workers, (5) International Association of Machinists, Lodge No. 760, (6) Local Union 159, United Paperworkers International Union, (7) Local No. 50, International Union of Operating Engineers, and (8) Local No. 49, United Paperworkers International Union.[1] These eight Unions that are also the Charging Parties in this case represent between 600 and 700 "maintenance" and "production" employees. The Unions had conducted their negotiations with the Employer by forming a "Joint Union Council" that was a committee of representatives of the eight Unions. The president of the Joint Union Council served as the spokesman during the bargaining sessions. According to established practice, the Joint Union Council and the Employer would agree to a "memorandum of agreement," which contained the provisions applicable to all Unions. Local issues were negotiated separately, and, on ratification of the memorandum of agreement and the resolution of local issues, each of the Unions would have a separate collective-bargaining agreement with the Respondent.

Negotiations for new contracts between Boise Cascade and the Unions commenced in 1984, since the parties' latest collective-bargaining agreements dated, 1 May 1981 and effective for 3 years, expired on 30 April 1984 (G.C. Exhs. 2(a)–(h)). These eight separate agreements had provided for a "Recognition" article that defined the collective-bargaining unit of employees that each of the Unions represented. Of particular importance were the unit description of the "maintenance" employees, because during the negotiations for new contracts, the Respondent expressed its goal to remove jurisdictional barriers for its maintenance employees and to "[i]ncrease employee working efficiency by removing any jurisdictional restraints" (G.C. Exh. 3). In an attempt to demonstrate to the Unions the obsolete nature of the jurisdictional restraints, Respondent compiled a listing of the 28 job descriptions for maintenance employees ranging from "blacksmith" to "Oiler" as they existed in the contracts (R. Exh. 10) and compared them to 19 job descriptions that were still in use in 1984. Moreover, the Company saw the division of labor as grossly inefficient and bargained for greater flexibility in work assignments of its maintenance workers to remain competitive in its markets. Boise Cascade listed numerous examples of what it considered inefficient work assignments accompanied by proposed changes and proposed that (1) "Simple routine maintenance . . . be performed by operators," (2) "maintenance employees perform simple routine tasks normally performed by operators," and (3) "any work connected with an employee's primary craft assignment [be made] non-jurisdictional" (G.C. Exh. 4).

[1] The first listed six Unions represent "maintenance" employees that were directly affected by Respondent's "maintenance modernization programs."

Unable to agree to these proposals, the parties negotiated a 1-year extension of the old contracts and agreed to discuss the issues during the interval. The parties met repeatedly beginning in August 1984. In December 1984, Boise-Cascade closed its insulite plant. However, the parties continued to meet and to discuss "contract modernization" for the remaining operation, the paper mill. The Company proposed 11 items believed "necessary to allow the paper Manufacturing Operation to continue in the face of the rapidly changing competitive environment" (G.C. Exh. 6). Item 3 of the 11 points stated: "Achieve employee work efficiency by removing any union/departmental jurisdictional restraints throughout the mill." This issue was the most difficult for the Union, and the parties remained unable to agree on a new contract.

The negotiations carried over into 1985. During 1985, there were 31 bargaining sessions, beginning 27 March and ending 24 June. The Company's initial proposal, intended for each of the eight Unions, was offered with the following explanation on its face (G.C. Exh. 9):

> The following is a draft Labor Agreement to replace existing Labor Agreements. Nothing proposed is meant to change the member Union's right to represent those job classifications they presently represent. We do mean to remove Union jurisdictions as an obstacle to employees performing work efficiently and economically . . . .

The Company's proposed unit description and recognition clause, in lieu of describing each of the eight units, as in the past, provided as follows:

> The Company recognizes one of the identified Unions as the sole collective bargaining agency for its employees on those occupations listed in the wage schedule attached as Exhibits A-1 through A-9 as a part of this Agreement for the purpose of collective bargaining with respect to wages, hours of work, and working conditions for the period of this agreement . . . .
>
> This Article—*Recognition* —shall not restrict the right of the Company to assign work to employees or limit the Company's use of contractors as the Company deems appropriate.

The Company proposed a union-security clause that, as a condition of employment, required an employee "to become and remain a member of one of the Union's party to this Agreement." The appropriate Union that an employee was expected to join, according to the proposal, was "the one whose occupation the employee works in the majority of time." No employee was expected to belong "to more than one union in any calendar month, but [he] may be required to transfer to the appropriate Union."

Respondent's proposal was in line with its stated 12 February 1985 "Overall Objectives" to totally modernize the work rules, remove all jurisdictional restraints, modify the wage and benefit structure, and reduce actual labor cost per ton. More specifically, these objectives were stated as follows (G.C. Exh. 17):

> MAINTENANCE REORGANIZATION
>
> All current trades and crafts will be consolidated into three maintenance categories:
>
> Pipefitter
> Millwright
> Electrical/Instrumentation
>
> * There will be *no* union craft or departmental jurisdictional restraints to work assignment whatsoever.
> * All maintenance employees will be placed in one of the three categories.
> * Employees will first be required to acquire all the basic skills necessary to assist in *any* job assignment.
> * Next, employees will be required to acquire all functional skills of the other two categories.
> * Finally, employees must become proficient in the highly-skilled areas of their primary category.
> * Extensive training, both classroom and on-the-job, will be necessary for at least two years.
> * Basic, functional and proficient skills and qualification parameters are to be determined unilaterally by management and are not arbitrable.

Respondent specifically included among the items to be modified item 17, "Union Recognition Jurisdiction."

Negotiations between the parties indicated a preoccupation with Respondent's proposal to change the jurisdictional restraints for its maintenance employees and to reorganize the 28 existing job categories for maintenance employees into the 3 broad categories: pipefitters, millwrights, and electrical/instrumentation. A perusal of the transcripts of the bargaining sessions indicates that Respondent's chief negotiator, Fred Delaney, repeatedly expressed the notion that the Company intended to erase jurisdiction to get work done or to get around the jurisdictional issue to achieve greater efficiency. Although the Unions were expected to retain the same number of employees by proportionally sharing the maintenance employees in the three categories, the Employer would be able to assign the employees without restrictions to their union affiliation (Jt. Exhs. 1–24).

The union negotiator, Robert Walls, resisted Respondent's proposal as it related to Respondent's attempt to modify the Unions' respective jurisdictions and questioned not only the practical impossibility of the scheme but also its legality. For example, at one point during the discussions, on 4 April 1985, the following exchange occurred (Jt. Exh. 3, p. 5):

> Union: This whole thing is then to get us to cross over jurisdiction!
>
> Company: Absolutely. We have said that from day one. The jurisdiction is in-efficient. And we want to correct that.

At another point during the discussions on that day, the Unions stated the issue as follows (Jt. Exh. 3(b)):

> What, I guess what gives you the right to come in here and say that you're going to take jurisdiction away from one union and give it to the other union, or whatever? . . . I believe there is some laws that protect us in our jurisdiction and I'm sure every international is going to fight your jurisdiction . . .

The Company's negotiator Delaney replied:

> Well, first of all, we're not talking about jurisdiction for one and giving it to another. What we are talking about is sharing jurisdiction.

On 29 April, after lengthy discussions had already occurred, the exchange continues to show that the predominant issue was the Company's proposal to modify the Unions' jurisdiction. At one point the Unions' representative commented (Jt. Exh. 8b, pp. 1–2):

> Union: It just seems to me it's on the fringes of legal question and it's a jurisdictional.
>
> Delaney: I'm sure it is, and depending on which lawyer depends on maybe which answer you get, I don't know.

On 22 May, Delaney conceded that removing all the rights of jurisdiction previously held by the Unions was the central issue (Jt. Exh. 18(a), p. 1).

In one of the last sessions, Delaney has this to say (Jt. Exh. 22b, p. 1):

> We knew we cannot erode the maintenance unit. That is still a protection. We don't see anything in the agreement that would cause that. If we were to try to get that right, it would have to be directly stated to you very clear, unambiguous. We haven't done that so we know that there's protection there against erosion of the unit. In the recognition, there's no way that we see that we could use your recognition, your jurisdiction language and do what we want to do and that is a firm and final position of ours. We have to have the right to think, to get this work done effectively and efficiently. We will continue to present to you the proportion because we think that preserves the unit and we aren't trying to get rid of units. We aren't trying to reduce them.

On 28 May 1985 the Company distributed its final "settlement memorandum" to the Unions. It was Respondent's final offer (G.C. Exh. 10). The parties held their last meeting on 24 June, when the Company stated that there was no need for further meetings, because the parties had reached an impasse. By letter of 25 June 1985, Respondent informed the Unions, inter alia, as follows (G.C. Exh. 12):

> Over three weeks have passed since our Company made its final contract proposal to your Union. This final proposal was preceded by 36 negotiating meetings and contract modernization meetings with your Union since our initial discussions during the 1984 negotiations of the areas which needed to be addressed for a modern labor contract. Yesterday we met again with your Union representatives and a Federal Mediator. A counter-proposal was presented by the Unions. The terms of this counter-proposal and our final proposal are far apart. Our final contract offer has not been accepted, and the spokesman for your Joint Union Council stated that it contains features which are completely unacceptable.
>
> We clearly are at an impasse in these contract negotiations. Given the impasse which now exists in these contract talks, the period of negotiations has expired for purposes of ending any prior contract commitments with your Union.
>
> We hereby notify you that effective July 1, 1985, the Company will be implementing the terms and conditions of employment reflected in the Company's final contract proposal dated May 24, 1985, including the five pages of modifications/Addendums thereto dated May 31, 1985, and June 3, 1985.

On 1 July 1985 Boise Cascade implemented the final proposal that regrouped and reclassified its more than 203 maintenance employees as demonstrated by the following chart (G.C. Exh. 14):

Maintenance Modernization Program

Placing of 17 crafts into three (3) maintenance categories. Each category described by union, craft and number of employees.

Union Craft—General Mechanic	Employees[9]
Pipefitter Category:[1,2,3]	
UAJAPPI Pipefitter	35
UAJAPPI Welder	14
IWA Oiler	2
IWA Rigger	10
IWA Painter	5
IBT Pipecover	4
Total	70
Millwright Category:[4,5,6]	
IAM Millwright	45
IAM Tinner	8
IAM Machinist	6
IAM Garage mechanic	12
IAM Heavy equipment Operator	1
IAM Mason	1
IBT Steam plant millwright	4
IWA Rigger	3
IWA Mason helper	1
IWA Oiler	2
IWA Cement man	2
IWA Painter	2
Total	87
Electrical/Instrument Category:[7,8]	
IBEW Electrician	36
IBT Instrument repairman	10

Placing of 17 crafts into three (3) maintenance categories. Each category described by union, craft and number of employees.

Union Craft—General Mechanic	Employees[9]
Total	46
Totals:	
General mechanic—pipefitter	70
General mechanic—millwright	87
General mechanic—electrical/instrument	46
General mechanic employees	203

[1] 6 percent of employees in this category will be members of IBT No. 346.
[2] 24 percent of employees in this category will be members of IWA No. 4–33.
[3] 70 percent of employees in this category will be members of UAJAPPI No. 771.
[4] 4 percent of employees in this category will be members of IBT No. 346.
[5] 12 percent of employees in this category will be members of IWA No. 4–33.
[6] 84 percent of employees in this category will be members of IAM No. 760.
[7] 22 percent of employees in this category will be members of IBT No. 346.
[8] 78 percent of employees in this category will be members of IBEW No. 731.
[9] Approximate current number.

The proposal, as implemented, omitted the unit description that was formerly contained in collective-bargaining agreements for each of the Unions. Instead, Respondent's present description of the units is simply a statement under "Recognition" (art. II):

> The Company recognizes one of those identified Unions as the sole collective bargaining agency for its employees on those occupations listed in the wage schedules attached as Exhibits A-1 through A-9 . . . .

Exhibits A-1 through A-9 consist of detailed tables of wage rates and seniority lists for the eight Unions. Also shown are the classifications of individual employees as well as the percentage of the employees' membership in the respective Unions. The job classifications contained in the prior agreement for maintenance jobs have been substituted by the three broad categories.

On 3 June 1985, the Company added page A-9 to its final proposal. This proviso was drafted by Respondent's counsel and states:

> While this modernized Labor Agreement modifies and redefines substantially various job classifications and attendant duties thereto and removes previous contractual work assignment restrictions, the bargaining units described in paragraphs .1 and .2 above are the same at the time of execution of this Agreement as those represented by the identified Unions in previous Labor Agreements.
>
> Any unresolved disputes as to which bargaining unit a particular job classification belongs will be resolved through the National Labor Relations Board processes.

On its face, the addendum seemed to continue the expired unit descriptions, but the record shows otherwise. Respondent's negotiator, William Smerika, unequivocally stated that the Unions proposed and the Company rejected the proposal to retain the unit descriptions (Tr. 354). Similarly, Company Chief Spokesman Delaney clearly testified that the recognition clauses of the expired contracts were not carried forward in the final proposal that the Respondent had adopted unilaterally (Tr. 255–256). Moreover, a retention of the unit and recognition descriptions of the expired contracts would have prevented the flexibility and assignment changes that the Company had sought. This is clear from an analysis of the proposals as well as Respondent's own testimony.

Respondent's testimony about the negotiations and the implementation of its proposal clearly established that the Respondent considered the modification of the recognition clause as crucial to its efforts to increase the flexibility and to improve the efficiency of its maintenance employees. The testimony further shows that the Unions had proposed the continuation of the unit descriptions as they existed in the expired bargaining agreements. The Respondent refused to accept the Unions' proposal and declared an impasse on the issue (Tr. 268–270, 354). As explained by Delaney, the Company's negotiator in his testimony (Tr. 269): "Well, we wanted to change the definition of the trades or occupations, classifications, whatever, to reflect the broader skills that were needed by the employees." In order to accomplish that, Delaney admitted, that the recognition clauses of the old contracts had to be changed.

Analysis

Generally, changes in work assignments are considered to be a mandatory subject of bargaining; however, the definition of a bargaining unit is not. Although a unit may be altered by agreement of the parties, one party may not insist to the point of impasse to change the scope of the bargaining unit. *Bozzuto's, Inc.*, 277 NLRB 977 (1985); *Douds v. Longshoremen*, 241 F.2d 278 (2d Cir. 1957); *Young & Hay Transportation Co.*, 214 NLRB 252 (1974), enfd. sub nom. *General Drivers Local 554 v. NLRB*, 522 F.2d 562 (8th Cir. 1975).

The General Counsel has taken the position that Respondent refused to incorporate the Unions' prior unit descriptions in a new collective-bargaining agreement in violation of Section 8(a)(5) and (1) of the Act. Moreover, Respondent unlawfully insisted to impasse on, and unilaterally implemented, a nonmandatory subject of bargaining, namely, the proposal to reclassify maintenance employees into three broad categories. The General Counsel submits that Respondent's "recognition" proposal could not be interpreted as preserving the Unions' prior unit descriptions, and that a proper interpretation of the proposal and its practical effects as well as the testimony clearly indicate that the changes were not merely semantic or solely directed at assignment changes.

The Unions' brief illustrates how the unit description in the unilaterally implemented proposal differ in practical effects with the units of the expired contracts. The Unions' brief points out, as an example, that the modified unit description of the International Brotherhood of Electrical Workers consists of 22 percent of the employees in the new classification "General Mechanic—Electrical Instruments." As a consequence, the Union is no longer the exclusive bargaining representative for a described group, but the bargaining representative of some, but not all, the employees in that classification. This example is also illustrative for all other Unions that represent members who are in one of the three new categories for maintenance employees.

The Respondent, on the other hand, argues that its "Maintenance Modernization Proposal" was directed at revising only the anachronistic work assignment limitations and job categories and not the scope of any bargaining units. The Respondent argues in its brief that "the Company repeatedly emphasized [during the negotiations] that its proposed changes in 'jurisdiction' meant only that the restrictions giving particular unions (jurisdiction) over particular work would be abolished in the interest of greater efficiency" and that "[e]ach union would continue to represent or have 'jurisdiction' over, precisely the same employees as it had under the old contracts" (R. Br. 21). Respondent points to Delaney's testimony where he explained (Tr. 259), "we meant to maintain the recognition of the employees that—or numbers of employees, or presence of the unions that they had formerly represented, while at the same time removing—used in the context of work assignment—jurisdictional restraints, or work assignment restraints, to those employees performing work within their capabilities." Accordingly, so argues the Respondent, Boise Cascade had the right to insist to the point of impasse to make the changes in the work assignments for its maintenance employees.

There is no dispute between the parties that the Respondent unilaterally implemented its final offer, effective 1 July 1985, after notifying the Unions that the parties were at an impasse. The significance of Respondent's actions requires an examination of Respondent's final offer in relation to the prior contracts and an analysis of the effects of Respondent's "maintenance modernization program."

Initially, the inquiry is simply whether the collective-bargaining units contained in the expired agreements of the eight Unions were retained in the final offer. As already stated, Respondent has consistently refused to incorporate the unit descriptions of the prior contracts in its final offer and a comparison between the prior contracts and the final offer obviously shows that the unit descriptions are different.

Any suggestion that the proviso subsequently added by Respondent's counsel to the final offer on 3 June 1985 had the effect of incorporating the unit descriptions by reference is not persuasive. First, the unit description was not simply omitted due to an oversight or because of semantic reasons; neither is there any evidence that the proviso was an attempt to simplify the wording of the unit descriptions in the expired contracts. To the contrary, the record shows that the Respondent intentionally and unequivocally refused the Unions' demands to incorporate the prior unit descriptions. Indeed the proviso was not a part of Respondent's final offer. Because the Unions had a right to have their unit descriptions continued in any new agreement, and because Respondent refused the Unions' demands, Respondent's conduct amounted to a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. Moreover, the Respondent insisted to the point of impasse and unilaterally implemented its final offer without the established unit descriptions but with different descriptions. "[T]he description or size of the bargaining unit is not a mandatory subject . . . it is equally well established that insistence to impasse upon a non-mandatory subject of bargaining violates Section 8(a)(5)." *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981). "Unit scope is not a mandatory bargaining subject, and consequently a party may not insist to impasse an alteration of the unit. *Bozzuto's, Inc.*, 277 NLRB 977 (1985); *Douds v. Longshoremen*, 241 F.2d 278 (2d Cir. 1957). *Columbia Tribune Publishing Co.*, 201 NLRB 538 (1973), enfd. 495 F.2d 1384 (8th Cir. 1974); *Newport News Shipbuilding v. NLRB*, 602 F.2d 73 (4th Cir. 1979).

An examination of the new unit description of Respondent's final offer shows that it did not perpetuate the established units of the various Unions. For example, the Respondent argues that "the Company's proposal was neither intended to cause, nor did it result in, any modification of the scope of any bargaining unit" (R. Br. 26). The maintenance modernization proposal, according to the Respondent, consisted of the following: "Abolish the multitude of narrow, obsolete job categories and the work assignment restrictions . . . and create three broad maintenance classifications . . . of maintenance employees of the mill." Respondent, however, conceded that "some revisions would be necessary in the terms of each of the contracts' recognition and jurisdiction clauses if the Company were to achieve its objective." Respondent further argues "that the Company suggested a proportional representation guarantee . . . the unions, however, failed to offer any counter-proposal . . . that would satisfy the Company's basic maintenance modernization needs . . . . Instead the unions' final proposal demanded retention of the exact language contained in all previous recognition, jurisdiction and work restriction clauses." In sum, so argues the Respondent, "the Company's maintenance modernization proposal in no way constituted a proposal to modify the scope of any bargaining unit . . . each of the five maintenance unions continued as the exclusive representative of those same employees it had represented prior to July, 1985."

The General Counsel and the Unions disagree. Their position is that the revised jurisdictional and unit descriptions were not semantic changes, but changes that deprived each of the Unions of exclusive representation rights and that transformed established units "into overlapping bargaining units with more than one union representing employees in the same job classification." According to the Unions, the "Employer did not limit its negotiation objectives to bargaining only on the assign-

ment of work tasks"; the Unions were willing to negotiate the issues relating to the assignments of work tasks and the training for broader skills, but they were unwilling to accept any modification in the composition and description of the recognized and certified bargaining units, including the concept of shared jurisdiction and the loss of exclusive representation. Indeed, Respondent's version of the proportionate representation or shared jurisdiction by the Unions is, according to the Charging Party and the General Counsel, a unit inappropriate for certification by the Board, because the Employer, and not the employee, may dictate union affiliation and because of the absence of exclusive representation by the Unions.

The record is clear that Respondent's final offer indeed did not preserve the composition of the prior units, and that Respondent's maintenance modernization program was not limited to jurisdictional clauses relating to work assignments, as contended by the Respondent. The unit descriptions as unilaterally implemented differ from the established units not only in description but also in composition. By definition, each Union now represents some or a percentage of employees, but not all employees in one of the three maintenance categories. The consequences are shared or overlapping jurisdiction and a loss of exclusive representation. In addition, Boise Cascade had the right to assign maintenance employees to one of the three classifications. In certain instances, this would interfere with an employee's right to select his bargaining representative and would empower the Company to determine an employee's union affiliation. Respondent's new version of unit descriptions would therefore have the effect of interfering with an employee's Section 7 rights and be contrary to Section 9(a) of the Act. Such a unit would be inappropriate for certification by the Board.

Respondent's contentions that the Unions could have bargained for another approach to the shared jurisdiction or proportionate jurisdiction concept, and that the Company could lawfully bargain to impasse on new work assignment clauses may at first blush appear significant. However, the record is clear that the Respondent's recognition proposal lead to the impasse. The Unions would have been willing to bargain on the broad issues relating to work assignments and training if they had been assured that their exclusive jurisdictions were to remain intact without the qualifying factors of shared jurisdiction or any other forms of modified unit descriptions. For the record shows that Respondent insisted during the negotiations on retaining its right to assign the maintenance employees to one of the three maintenance classifications, and further insisted on the revision of the Unions' respective recognition clauses. For the Respondent to suggest repeatedly that each Union would continue to represent "precisely the same employees as it had under the old contracts" and that each Union would continue "as the exclusive representative of the same employees" and further that the Company had not insisted "that the relationship of any particular employees with their chosen union be served or altered" ignores the possibilities of future changes in the functions or the number of employees in one of the three categories. For example, should certain employees assigned to one of the three classifications and belonging to a particular union leave their employment or be laid off, it would change the proportional position of one or more Unions and require the Company to assign other employees to that Union to maintain the proportional balance.

Respondent's efforts to achieve efficiency and flexibility in its new contract could perhaps have been achieved had the Respondent directed its efforts solely at work assignment issues or work flexibility without the simultaneous attempt to redefine the established bargaining units. Respondent could certainly have proceeded by initiating a petition for unit clarification under Section 102.60(b) of the Board's Rules and Regulations. But the Respondent did not exhaust these remedies and, instead, took an inflexible approach from the outset of the negotiations by its intentions to modify the composition and the scope of the Unions' bargaining units and to implement its recognition proposal. It has no right to insist to impasse on the alteration in the bargaining units. Respondent thereby violated Section 8(a)(5) and (1) of the Act.

Respondent's motion. Because the Respondent proceeded with its negotiations with all Unions, not just those representing maintenance employees, Respondent's motion to exempt the three Unions is without merit.

During the trial of this case, the Respondent moved to dismiss those portions of the complaint that related to the production units, as opposed to the maintenance units, because the recognition proposal affected only the maintenance employees and because the General Counsel had failed to sustain the allegations with regard to the production units. The General Counsel argues that the Respondent, contrary to past practice, negotiated with the representatives of all Unions in an effort to arrive at a "master contract" or a single agreement to be applicable to all Unions. The Respondent, on the other hand, argues that the individual Unions were free to make changes in the memorandum of agreement and "that the three non-maintenance unions, UPIU Local #159, UPIU Local #49 and Operating Engineers Local #50, were free to sign an agreement without agreeing to the Company's maintenance modernization proposal."

Obviously, it would be reasonable to assume that the Respondent would exclude those units that would be uneffected by the maintenance proposal. But the question is whether the record supports Respondent's intentions in this regard. To be sure, past practice indicates that the individual Unions were able to agree to certain provisos that had not been part of the memorandum of agreement negotiated by the Joint Union Council. However, the record indicates that the provisions would be related to local issues. Here, the Company presented a single memorandum of agreement listing all nine Unions and occasionally referred to it as a master contract. Obviously, it must have occurred to the Respondent before, prior to the hearing in this case, that at least three of the Unions would be unaffected by its maintenance modernization proposal that was the key stumbling block in arriving at an agreement. The suggestion to exempt the unaffected Unions could have been made to those units during any stage of the negotiations. It might have lead

best copy available

to a bargaining agreement with those Unions. It is difficult to conclude at this stage of the proceeding that the Respondent had intended to exempt these three Unions when their representatives were part of the Joint Union Council and in regular attendance at the negotiations. There is simply no evidence that these Unions were exempt from the consideration of the much debated jurisdiction issues. Delaney's testimony that these Unions could have signed a separate agreement does not show that the Respondent or the Unions ever considered that possibility. In any case, according to the terms of the implemented final offer, the Respondent has the right to assign its production employees to perform maintenance work and to assign production employees to the three maintenance categories on a permament basis. In that eventuality, it is perfectly clear the production units as well as the production employees were significantly affected by Respondent's maintenance modernization proposal. In sum, the evidence shows that the nonmaintenance units were affected, albeit on a lesser scale, and that they were not explicitly exempted from the negotiations. Respondent's motion should therefore be denied.

CONCLUSIONS OF LAW

1. Boise Cascade Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The following Unions are labor organizations within the meaning of Section 2(5) of the Act: (a) Local Union 159, United Paperworkers International Union; (b) Local 771, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada; (c) Local 4–33, International Woodworkers of America; (d) Local No. 50, International Union of Operating Engineers; (e) Chauffeurs, Teamsters & Helpers Local 346; (f) Local No. 731, International Brotherhood of Electrical Workers; (g) Local No. 49 United Paperworkers International Union; and (h) International Association of Machinists, Lodge No. 760.

3. The following employees of Respondent constitute appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> (a) All employees employed by Respondent at its International Falls, Minnesota facility, in the unit described in the collective-bargaining agreement between Respondent and Local Union 159, United Paperworkers International Union, for the period from 1 May 1981 through 30 April 1984.

Their exclusive collective-bargaining representative is Local 159, United Paperworkers International Union.

> (b) All full-time and regular part-time employees engaged in welding and in the installation and maintenance of all piping and plumbing equipment at Respondent's International Falls, Minnesota facility; excluding all other employees, office clerical employees; manager, guards, and supervisors as defined in the Act, as amended.

Local 771, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada has been designated as their exclusive collective-bargaining representative.

> (c) All employees employed by Respondent at its International Falls, Minnesota facility, in the unit described in the collective-bargaining agreement between Respondent and Local 4–33, International Woodworkers of America, for ther period from 1 May 1981 through 30 April 1984.

Their exclusive collective-bargaining representative is Local 4–33, International Woodworkers of America.

> (d) All full and regular part-time employees engaged in the operation of the old and new turbine rooms, oxygen plant and filter plant, including air compressors located in the turbine room and demineralizers located in the filter plant (and such repairs to this equipment which are customarily made) and engaged in the operation of any new electrical generating steam turbines similar in nature to existing equipment in the turbine room; excluding all other employees, office clerical employees, manager, guards and supervisors as defined in the Act, as amended.

Local No. 50, International Union of Operating Engineers is their exclusive collective-bargaining representative.

> (e) All employees employed by Respondent at its International Falls, Minnesota facility, in the unit described in the collective bargaining agreement between Respondent and Chauffeurs, Teamsters & Helpers Local 346, for the period from 1 May 1981 through 30 April 1984.

Chauffeurs, Teamsters & Helpers Local 346 has been designated as their exclusive collective-bargaining representative.

> (f) All full and regular part-time employees engaged in the installation and maintenance of electrical (including electronic, refrigerating, radio, high frequency, radioactive radiation and television) equipment, and pump house and power house operators; excluding all other employees, office clerical employees, managers, guards, and supervisors as defined in the Act, as amended.

Local No. 731, International Brotherhood of Electrical Workers has been designated their exclusive collective-bargaining representative.

> (g) All employees employed by Respondent at its International Falls, Minnesota facility, in the unit described in the collective-bargaining agreement between Respondent and Local No. 49, United Paperworkers International Union, for the period from 1 May 1981 through 30 April 1984.

Local No. 49, United Paperworkers International Union has been designated their exclusive collective-bargaining representative.

(h) All employees employed by Respondent at its International Falls, Minnesota facility, in the unit described in the collective-bargaining agreement between Respondent and International Association of Machinists, Lodge No. 760, for the period from 1 May 1981 through 30 April 1984.

International Association of Machinists, Lodge No. 760 has been designated their exclusive collective-bargaining representative.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by (a) refusing to incorporate the prior recognized unit descriptions for the eight Unions at its facility in a new agreement and (b) by insisting to impasse on, and by unilaterally implementing, a nonmandatory subject of bargaining in the form of a proposal that modified the bargaining units and the jurisdictions of the eight Unions.

5. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices. I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall order that, on request, the Respondent meet and bargain collectively with the Unions with respect to wages, hours, and other terms and conditions of employment. I further order that the Respondent rescind, if requested by the Unions, the unilateral implementation of its final offer and that the Respondent restore the status quo of its employees that were affected by its unilateral action, including backpay.

If the Unions select to have previous conditions restored, calculations of the sums and payments necessary to make employees whole, with interest, shall be computed in accordance with normal Board policy. See *Ogle Protection Service*, 183 NLRB 682 (1970); *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]

St. Barnabas Hospital *and* Mark Fusco, Petitioner, and Local 1199, Hospital and Health Care Employees Union, RWDSU, AFL–CIO. Case 2–RD–1147

31 March 1987

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Leonard Grumbach of the National Labor Relations Board. On 12 June 1986 the Regional Director for Region 2 issued a Decision and Direction of Election in which he found, inter alia, that a group of laboratory technologists were not professional employees and thus could not vote with other professional employees in a decertification election.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Union filed a request for review of the Regional Director's Decision and Direction of Election. The Union contended, inter alia, that the Regional Director erred (1) in finding that the laboratory technologists were not professional employees, thereby barring them from voting with the rest of the professional employees in the decertification election; (2) by finding that the technologists did not exercise discretion in their work; and (3) by placing too much significance on the Employer's assertion that a college degree is not required.

By Order dated 24 July 1986, the Board granted the Union's request for review in Case 2–RD–1147 and stayed the election pending review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review and makes the following findings.

The Employer, St. Barnabas, operates a 415-bed acute care hospital in New York, New York. It employees approximately 1150 full-time and regular part-time employees. Local 1199 currently represents a unit consisting of approximately 561 professional and nonprofessional employees.

The Regional Director directed an election for all professional employees in the mixed unit.[1] The parties' only disagreement and the only issue before the Board is whether laboratory technologists I and II are professional employees. The Employer and the Petitioner argue that the 26 technologists are not professionals. The Union, however, contends that they are professionals within the meaning of Section 2(12) of the Act and should therefore be permitted to vote in the decertification election.

The Regional Director, relying on *Middlesex General Hospital*, 239 NLRB 837 (1978), found that the technologists were not professionals because their duties are not intellectual and varied and a college degree is not required. He determined that their analyses of test results are technical rather than medical and that any discretion they have is circumscribed by established procedures. We disagree.

Our review of the record reveals that the technologists[2] are assigned to four laboratory sections: hematology, chemistry, blood bank, and microbiology. Each technologist has a license in one of these specific areas and, unless the technologist has more than one license, there is very little interchange between the sections.

At the hearing the Employer presented a two-page job description for laboratory technologists. According to this document, a technologist must be licensed by the New York City Board of Health,[3] have attended 3 years of college with courses relevant to medical technology, and have at least 3 years' medical laboratory experience. The Employer characterized these requirements as "optimal" and that it actually only requires technologists to have a New York City license. However, 20 of the 26 technologists do have college degrees, 6 have master of arts degrees, and one has a doctorate.

Technologists perform various tests on patient specimens such as blood, urine, stool, sputum, and other body fluids and tissues. Generally the tests are done on complex machinery, although some may be done by hand. If the tests are done on the machines, the technologist must first calibrate the machine. Calibration is done by testing a control specimen with known values. If the machine does not report the values correctly, the technologist

[1] The parties stipulated that the pharmacists, dieticians, social workers-MSW's, an occupational therapist, and an activity therapist are professional employees within the meaning of Sec. 2(12) of the Act.

[2] The designations "I" and "II" refer only to the technologist's tenure with St. Barnabas and do not reflect any difference in job duties or responsibilities.

[3] To obtain a technologist's license, New York City's Board of Health requires: (1) a B.S. or B.A. degree with a major in biology, chemistry, or physical science and 1 year of laboratory experience, or (2) registry with a national professional society, or (3) passing an exam, if one holds a high school diploma, and 4 years' experience or 2 years of college and 2 years' experience or a college degree and 6 months' experience, or (4) a waiver.

must determine why it did not and then make the proper corrections.

The technologist must also prepare the specimen before testing. Among other things, the technologists visually examine the specimen and determine if it is usable. If they determine it is inadequate, they will call the doctor or the floor nurse and request another specimen. If the specimen is usable the technologists place it in the machine and start the machine. The machine will test the specimen and print out the results. The technologists read and analyze the printout and decide if the results should be accepted. If the results are outside the test range, the technologists must determine the reason. In making such a decision the technologists may consider the patient's condition, including any drugs the patient may be taking. If they determine that the problem is specimen related, they must choose which option to take to get acceptable results. The technologists may rerun the test with a diluted specimen, request a new specimen, or perhaps do the test manually. Although there are published guidelines, technologists generally rely on their own experience in making judgments when performing the various tests. Once the technologists obtain the results, they will call the doctor or floor nurse and report their findings. They also prepare a written report of their findings.

The technologists' duties are not limited to running tests. Technologists maintain and repair the complex machines they operate. They also supervise the work of less senior technologists, technicians, and trainees, while they themselves generally work with little or no supervision.

The Board has previously found technologists with virtually identical duties to be professional employees. Thus, in *Barnert Memorial Hospital Center*, 217 NLRB 775 (1975), technologists ran various tests on patient specimens using sophisticated machinery and prepared reports on the results. They also instructed students and repaired the laboratory equipment. Although there were, as here, procedural manuals, the Board found that the technologists relied heavily on their own judgment in analyzing the results. In finding professional status, the Board also relied on evidence that the technologists alone were responsible for the outcome of their work, gave instruction to students in their specialization, and used and repaired complicated laboratory equipment. Similar results on similar facts have been reached in a number of other cases.[4]

Despite the presence of all the above factors in the instant case, the Regional Director determined that the technologists were not professional employees. In so doing, he relied on *Middlesex General Hospital*, supra, where the Board concluded that technologists with duties similar to those in the instant case were not professional employees. The Regional Director pointed to the Board's statement in *Middlesex* that that case was distinguishable from *Barnert* and others, finding professional status because of the absence of the requirement for a college degree as a prerequisite for continued employment.[5] Noting that a college degree was not required here, he concluded that *Middlesex* controlled. We disagree with this analysis.

As stated, the vast majority of factors relied on by the Board to find professional status in *Barnert* and similar cases are present here. The St. Barnabas technologists in examining specimens, calibrating and repairing the machinery, analyzing results, and performing tests manually, constantly exercise discretion and independent judgment. Their duties are predominately intellectual and varied and their output cannot be standardized in relation to a given period of time. In these circumstances, we do not find the absence of a requirement for a college degree is so significant to warrant a finding that the technologists are not professional. We note in *Middlesex* the Board stressed that less than half the technologists had degrees. The Board specifically concluded that *Mason Clinic*, supra at fn. 4, which found professional status, was in accord with the result in *Middlesex* becaue in *Mason Clinic* only 2 of 54 medical technologists did not possess degrees.[6] We find that the instant case is closer to *Mason Clinic* than to *Middlesex*. Here 20 of the 26 technologists have college degrees. Of these 20, 7 hold graduate degrees. It is, therefore, clear that the possession of a college degree is highly valued, if not absolutely required. Accordingly, considering all factors in this case, we conclude that the technologists are professional employees.

Conclusion

Accordingly, on the entire record and for the aforementioned reason, we shall direct an election among the following professional employees currently represented by the Union in the mixed unit to ascertain the desires of the professional employees concerning their inclusion in a unit with nonprofessional employees:

> All full-time and regular part-time social workers (MSW's), pharmacists, dieticians, occupa-

[4] See *Alexian Bros. Hospital*, 219 NLRB 1122 (1975); *Mason Clinic*, 221 NLRB 374 (1975); *Samaritan Health Services*, 238 NLRB 629 (1978); and *Illinois Valley Community Hospital*, 261 NLRB 1048 (1982).

[5] *Middlesex General Hospital*, 239 NLRB at 838 fn. 10.

[6] 239 NLRB at 838 fn. 10.

tional therapists, activity therapists, and laboratory technologists I and II employed by the Employer at its facility at 183rd Street and Third Avenue, Bronx, New York, but excluding all other employees, laboratory technologists, registered nurses, and office clerical employees, and guards and supervisors as defined in the Act.

[Direction of Election omitted from publication.]

Omni-Dunfey Hotels, Inc. d/b/a Omni International Hotel of Detroit *and* Local 557, International Union of Operating Engineers, AFL–CIO, Petitioner. Case 7–RC–17825

31 March 1987

DECISION ON REVIEW AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN, BABSON, STEPHENS, AND CRACRAFT

On 20 December 1985 the Regional Director for Region 7 issued the attached Decision and Direction of Election in this proceeding, in which he found appropriate for collective bargaining the Petitioner's requested unit of engineering department employees. In accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, contending that the only appropriate unit was an overall unit of all hotel employees. By mailgram dated 15 January 1986 the Board granted the Employer's request for review. The Employer's request for a stay of the election was denied; accordingly, the election was conducted as scheduled on 16 January 1986 and the ballots were impounded pending the Board's decision on review.

The Board has considered the entire record in this case and concludes, for the reasons stated by the Regional Director in his decision, that the petitioned-for unit of engineering department employees is an appropriate unit for bargaining. In so concluding, we specifically find that the record contains no compelling facts which would mandate a finding that the smallest appropriate unit must include all employees of the hotel.

It is beyond peradventure that the Act allows a union to petition for *an* appropriate unit, and does not require it to seek the *most* appropriate unit, even when a different unit than that petitioned-for might be more appropriate than the one it seeks. In the hotel and motel industry, the Board at one time applied a rigid rule that only an overall unit consisting of all hotel/motel employees would be found appropriate for bargaining. See *Arlington Hotel Co.*, 126 NLRB 400 (1960). Six years after deciding *Arlington*, the Board reversed that decision, finding that the inflexible rule of that case was based on the false premise that all employees in the various facilities of hotels and motels shared such a high degree of integration of function and mutuality of interests that only an overall unit could be appropriate, and announced that henceforth it would consider each case on its facts. *77 Operating Co.*, 160 NLRB 927 (1966), enfd. 387 F.2d 646 (4th Cir. 1967). Since that decision, the Board has made unit determinations in the hotel/motel industry on a case-by-case basis, utilizing the same traditional community-of-interest criteria used in other industries. *Westin Hotel*, 277 NLRB 1506 (1986); *Atlanta Hilton & Towers*, 273 NLRB 87, 90 (1984); *Sheraton Motor Inn*, 210 NLRB 790 (1974); *Regency Hyatt House*, 171 NLRB 1347 (1968).

In the instant case, the dissent represents essentially a desire to return to the rigid rule of *Arlington* which, as indicated above, is not required by the statute. Here, the engineering department employees are separately supervised by the chief engineer, who interviews all engineering department applicants and makes the final hiring decisions for his department;[1] they employ skills unique to their classification, as indicated by the fact that the Employer requires them to have a minimum of 1 year of prior experience in their classification (the painter/carpenter is required to have 3 years); and they earn the highest hourly wage among the hotel's nonsupervisory employees (at least $1 per hour more than the next highest rate).[2] In addition, there have been no instances of transfer of employees into or out of the engineering department, whether on a permanent or temporary basis. Although the dissent correctly notes that on several occasions engineering department employees have assisted employees from other departments with various tasks such as construction of shelving and construction of a kitchen bulletin board, the record reveals that these incidents are sporadic and do not reflect an actual overlap of job functions, but are more in the nature of showing a spirit of cooperation or civility (such as a cook having handed an engineering department employee a shelf to be installed in the kitchen).[3]

[1] Our dissenting colleagues concede the existence of separate immediate supervision, but point to the existence of common *procedures* for interviewing and hiring new employees. To the extent that our colleagues may suggest that hiring procedures are of equal weight with the identity of day-to-day supervision, we believe they have lost sight of the question before us—determining employees' community of interest as to the terms and conditions of their employment. Surely the fact that the engineering department employees work under the direction of, and would likely address their immediate grievances to, someone different from those under whom other employees immediately work has greater bearing on collective-bargaining interests than the procedures by which the employees were interviewed for entry into the work force in the first place.

[2] Our dissenting colleagues seek to minimize the significance of the wage disparity by pointing to the fact that some of the employees outside the engineering department have their wages supplemented by tips from guests. If anything, however, this differentiating factor provides additional support for our conclusion that the engineering department employees have a separate community of interest. In making this observation, we do not, contrary to our colleagues' implication, intend to make this factor determinative.

[3] Chairman Dotson suggests that our resolution of this issue should turn, among other things, on the potential "vulnerability" of the majority of the hotel's employees to a work stoppage by the petitioned-for unit. We are aware of no authority outside of the health care industry to support this novel view.

The remaining facts cited in the dissent, such as that all employees receive the same fringe benefits, punch the same timeclock, and share common overall supervision, in our opinion fail to establish that the requested unit is not *an* appropriate unit for bargaining—though such facts undoubtedly would show that an overall unit, if sought, also would be *an* appropriate unit. Further, in view of the above evidence supporting the petitioned-for unit, we reject the Chairman's contention in the dissent that the extent of organization is the "only logical explanation" for the result reached herein.

Westin Hotel, cited in the dissent, is distinguishable. That case, which was before the Board on remand from the United States Court of Appeals for the Sixth Circuit,[4] involved circumstances which substantially differed from those of the instant case. Although both cases involve petitioned-for units of hotel maintenance and engineering employees otherwise similar to the engineering department unit found appropriate in *Sheraton-Anaheim Hotel*, 252 NLRB 959 (1980), the Board in *Westin* concluded that the unit sought was not appropriate because, unlike *Sheraton-Anaheim*, the prevailing areawide pattern of bargaining favored overall hotel units and a competing labor organization was seeking to represent an overall unit of hotel employees, including the petitioned-for maintenance workers. Neither of these factors is present in the instant case; indeed, the Regional Director specifically found, and the Employer does not dispute, that there are separate engineering department bargaining units at "*virtually all*" major Detroit metropolitan area hotels.

Based on all the foregoing, we conclude, in agreement with the Regional Director, that the petitioned-for unit of engineering department employees is *an* appropriate unit for bargaining. Accordingly, the Regional Director's Decision and Direction of Election is affirmed, and the case is remanded to the Regional Director for further appropriate action, including the opening and counting of the impounded ballots.

ORDER

This proceeding is remanded to the Regional Director for further appropriate action.

CHAIRMAN DOTSON AND MEMBER JOHANSEN, dissenting.

Contrary to our colleagues, we would find that the petitioned-for unit of maintenance employees does not constitute a separate appropriate bargaining unit, and we would dismiss the petition. The Employer operates a luxury hotel in Detroit, Michigan. The Union requested, and the Regional Director found appropriate, a unit limited to the maintenance employees at the hotel. The Employer requested review of this finding, contending that the only appropriate unit would include all the hotel employees. We agree with the Employer.

All the hotel employees are paid on an hourly basis, enjoy the same fringe benefits, use the same employee entrance, punch the same timeclock, are required to wear uniforms, share common cafeteria facilities, and are subject to the same work rules and personnel policies. Although the maintenance employees have separate immediate supervision, they are jointly supervised at a higher level with employees in six other job classifications by Denise Barker, rooms division head and resident manager. Management for the entire hotel is centralized in General Manager Andrew Swinney, who has the final authority over all personnel matters.

In addition, there is frequent day-to-day contact between maintenance employees and employees in other departments. Maintenance employees spend a significant amount of their time in areas of the hotel where other employees work. They usually receive their work orders from employees in housekeeping or at the front desk, and have assisted nonmaintenance employees in performing their job duties on several occasions. This is particularly true during occasions such as the hotel's opening, when the distinctions between job classifications all but disappear. Significantly, there are at least six more of these functions planned throughout the next year.

Further, it is clear that these employees do not constitute a craft unit. No engineering or craft license is required of them by the Employer, and no maintenance employee currently holds one. Although the Employer does require at least 1 year's prior maintenance experience for general maintenance employees and 3 years' prior experience for the carpenter/painter position, there are at least five other job classifications at the hotel which also require prior experience.

In reaching the conclusion that the petitioned-for unit is appropriate, the majority notes that the maintenance employees are separately supervised by the chief engineer, who interviews and hires new employees. The majority neglects to mention, however, that the interviewing and hiring procedures are the same for each department at the hotel. As mentioned above, although the maintenance employees have separate immediate supervision, they share higher supervision with six other departments, and authority for personnel matters affecting all employees rests with the general manager.

[4] The court's opinion is reported at 738 F.2d 765 (6th Cir. 1984).

The majority also relies on the fact that maintenance employees possess unique job skills, as evidenced by the requirement that they have prior job-related experience when hired and that they are paid the highest hourly wage. We note, however, that several other job classifications require prior experience, including those of the seamstress/tailor, fitness center attendant, servers, cooks, and cash manager. In addition, although maintenance employees receive the highest *hourly* wage, they are not necessarily the highest paid job classification because they do not receive tips from guests, as do employees in some other classifications. With respect to the majority's reliance on the lack of transfers or overlap of job functions between departments, we note that the record is replete with evidence of the constant contact among the employees and the assistance rendered by one classification to another whenever necessary. We further note that all employees, including those in the maintenance department, are specifically instructed to perform whatever tasks are necessary to accommodate the guests, even if those tasks are outside their job descriptions.

The majority avers that we have lost sight of our task of determining the extent of the employees' community of interest by equating hiring procedures with the identity of day-to-day supervision. Nowhere in our dissent have we made such a statement. Clearly, separate immediate supervision is *an* element that tends to support distinct bargaining units, just as a common hiring procedure, common overall supervision, and common labor relations policies support a finding of a single appropriate unit. None of these factors exist in a vacuum, however, and each must be evaluated in the context of all the relevant facts. Rather that attempting to equate one factor with any other factor, or identifying one fact as the decisive element in the case, we have weighed *all* the evidence which establishes a significant community of interest among the employees against *all* the evidence which supports a finding of separate units. On balance, we have determined that a single unit is appropriate.

Our colleagues also dispute the significance of our reliance on the fact that the maintenance employees are not necessarily the highest paid employees in the hotel because certain of the other employees receive tips from the hotel guests. The majority asserts that this is actually evidence of a disparity of interest. What our colleagues fail to realize is that the maintenance employees' receipt of the highest hourly wage is not particularly significant when other employees in the hotel are also paid in a manner which differs from their fellow employees. Not all nonmaintenance employees receive tips, just as not all are paid the same hourly wage. Surely the majority does not mean to suggest that we should establish separate units for all employees receiving tips and for each classification of employee that receives a different hourly wage any more than they are suggesting that every employee classification with separate supervision be granted a separate unit. These factors are merely elements to be evaluated when assessing all the evidence establishing a community of interest or lack thereof. No one factor should be elevated to the position of a determinative element. It is our understanding that this is still the test by which the question of whether a community of interest exists is resolved.

Thus, in light of the entire record, we cannot agree that the facts relied on by the majority support a finding that the petitioned-for unit is appropriate. *Westin Hotel*, 277 NLRB 1506 (1986).[1] Accordingly, we would dismiss the petition.

[1] Chairman Dotson notes that although it is true, as the majority states, that the Act allows a union to petition for *an* appropriate unit and does not require it to seek the unit which would be *most* appropriate, the Act, in Sec. 9(c)(5), also requires that the extent of union organization shall not be controlling in determining unit appropriateness. Yet given the sparsity of evidence supporting a separate unit herein, that very factor appears to the Chairman to be the only logical explanation for the conclusion reached by the majority. The Chairman also finds it significant that, given the nature of the maintenance employees' jobs and the extent of their involvement in all aspects of the hotel, finding that a separate unit is appropriate here could result in making the majority of the Employer's employees vulnerable to a shutdown of the entire hotel if this small group of employees engaged in a work stoppage or slowdown. Where, as here, the work of all the employees is so closely related and interdependent, it is inappropriate to give such a small, critically placed unit of 6 employees the power to potentially take work away from the other approximately 174 employees working at the hotel. In the Chairman's view, this factor, along with the strong community of interest the maintenance employees share with the other hotel employees, and the explicit statutory mandate against allowing the extent of organization to be controlling, requires the conclusion that a separate unit for the Employer's maintenance employees is inappropriate.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.[1]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, I find:[2]

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[1] The names of the parties appear as amended at the hearing.

[2] The parties have filed briefs, which have been carefully considered.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks an election among all maintenance employees employed by the Employer at its Detroit, Michigan hotel, but would exclude all other employees, guards, and supervisors as defined in the Act. The Employer contends that the only appropriate unit is hotel-wide. There is no history of collective bargaining and no evidence that any other labor organization is currently attempting to represent the Employer's employees in a broader unit.

The Employer had its "soft" opening on August 28, 1985. At that time, it opened its dining room, bar, and ballroom facilities and 50 of its 240 guest rooms. On October 20, 1985, the Employer had its grand opening, by which time all except three to five of its guest rooms and suites had become available. On November 1, 1985, the Employer opened its fitness center.

The hotel's structure consists of 20 stories. On the first floor are the lobby, front dest, lobby bar, restaurant, kitchen, and a ballroom area that can be sub-divided into two to four rooms, and various offices. On the next level, designated as 2.5, are the housekeeping and laundry departments, employee cafeteria and locker room and extensive retail space. The next level, designated as four, houses the executive offices, reservationists, and the catering, food, and beverage, sales and engineering departments. Floors five through seven are a parking garage, and the guest rooms are to be found on floors eight through twenty. The Employer employs approximately 180 employees in various classifications. All but two work at least 20 hours per week and are thereby classified as full-time by the Employer.

The engineering department consists of Donald Ruzyski, the chief engineer, and six employees. Five are classified as general maintenance and the sixth is classified as painter/carpenter. There is a third departmental classification, heat, light, power maintenance, but this position has not as yet been filled. The parties stipulated, and I find, that Ruzyski is a supervisor within the meaning of the Act. Thus, he interviews all engineering department applicants and, as with all department heads, makes the final decisions on hiring in his department. The engineering employees report to Ruzyski and he assigns the department's work to them. Under the Employer's yearly wage review policy, Ruzyski will also make recommendations on their merit increases.

[3] The Employer is a New Hampshire corporation engaged in the operation of a hotel at 333 E. Jefferson Avenue, Detroit, Michigan. The Employer opened for business on August 28, 1985. Based on business projections, during the 12 month period ending November 30, 1986, the Employer will have gross revenues in excess of $500,000 and will purchase goods and materials valued in excess of $50,000 which will be shipped to its facility directly from outside the State of Michigan.

The engineering department is primarily engaged in the maintenance and repair of the Employer's equipment. Departmental personnel are on duty 24 hours per day, seven days a week. The chief engineer and three employees work day shifts, one employee works afternoons, another works midnights and the sixth works a "floating" schedule, two afternoon shifts and three midnight shifts. The only other of the hotel's employee classifications who are on duty round-the-clock are room service, front desk and lobby, telephone operators and utility workers who clean the kitchen. Unlike the schedules of most other employee classifications, the schedules of, and number of hours worked by, engineering employees are not dependent on the Employer's occupancy rate.

Departmental tools and supplies for engineering are kept in that department. Those tools include a tilting arbor saw, electric drill, band saw, drill press, hammer drill, Hilti gun, various testing equipment, and diverse hand tools, such as pipe wrenches, pliers, channel locks, screw drivers, hammers, hand saws, and hammer punch. The engineering employees carry tools and a beeper with them during working hours. Each engineering employee has a locker in the department area. All other employees' lockers are in the locker room on the 2.5 level.

Most work assignments for the engineering department are generated by work orders, called maintenance request forms, submitted by the various other departments, mostly housekeeping and the front desk. There is no evidence that any other employees receive their assignments through work orders. These assignments include the maintenance of all equipment in the hotel except for the elevators. That equipment includes the emergency generator, fire pump, turbine pump, hot water heaters, refrigeration equipment, and all kitchen equipment. At present, because of the recent commencement of operations, all of this equipment is still under a one year warranty. Thus, major repairs are performed by the manufacturers. The department also maintains the hotel's swimming pool. It is also responsible for routine preventive maintenance functions, such as checking belt tensions, oil levels, operating temperatures, and general wear and tear, as well as checking for leaks or broken parts. The department also performs a wide variety of repair and maintenance work throughout the hotel, such as repairing radios, television sets, tape players, microphones, lamps, faucets, tub stoppers, dead bolts, doors, and ice machines, unplugging toilets and garbage disposals, installing shower curtain rods, changing light bulbs and nitrogen tanks in the bar, moving furniture, and performing various carpentry tasks. While the record discloses that certain other employee occasionally perform minor maintenance tasks, such as unplugging a garbage disposal, no other employees regularly perform maintenance work. In addition, no other employee has substituted for an engineering employee. Absences of engineering employees have been covered by other engineering employees. Likewise, while engineering employees have occasionally assisted other departments, such as setting up a meeting room for the banquet department in an emergency, none has been assigned to any other departments. Further, there have been no employee transfers into or out of the

engineering department. The one engineering employee hired since the grand opening was hired from the outside.

The Employer's position descriptions for the painter/carpenter and general maintenance classifications require that those employees have three years and one year of prior experience in their respective classifications. The painter/carpenter had well in excess of the required experience. All but one of the current general maintenance employees had at least one year prior experience and the one who did not had some general maintenance background and had attended a vocational school in heating, ventilation and air conditioning. The only other of the 40 employee classifications of the hotel that require any prior experience ar seamtress/tailor, fitness center attendant, cash manager, servers, and cooks.

All employees are hourly rated and receive the same fringe benefits and privileges. The engineering employees, however, earn the highest hourly rate, at least $1 per hour more than the next highest rate, although certain employees' wages are augmented by tips. All employees have a common employee entrance, time clock and cafeteria, and are subject to the same rules and policies. All employees, except reservationists and secretaries, wear a uniform and name tag. The uniforms differ among most of the departments, however, and the engineering employees' uniforms, while similar to housekeeping, are unique and their shirts have "Engineer" written on them.

As to the pattern of area bargaining, the record shows that the engineering employees at virtually all of the major Detroit metropolitan area hotels are separately represented. Thus, the Petitioner represents engineering or maintenance employees at seven major Detroit metropolitan area hotels and another labor organization represents those classifications of employees at two other major hotels. While this Region did in the past direct an election at one area hotel in a facility-wide unit, the petitioning union sought such a unit and no other union was seeking a smaller unit.

In the hotel industry, the Board determines appropriate units on the facts of each case in order to determine wherein lies the true community of interest among particular employees. *Holiday Inn Restaurant*, 160 NLRB 927 (1966), enfd. 387 F.2d 648 (4th Cir. 1967). In doing so, the Board applies the general criteria used for determining units in other industries, weighing all factors present, such as the distinctiveness or lack of discreteness in the skills and functions of the particular employee groupings, their supervision, whether separate or common, the employer's organizational structure, and differences or lack of differences in wages and hours. *Sheraton Motor Inn*, 210 NLRB 790, 792 (1974).

Based upon the foregoing and the record as a whole, I conclude that the engineering department employees enjoy a sufficiently distinct community of interest, apart from any broader interests they may share with other hotel employees, to warrant separate representation. I thus find that a unit limited to those employees is appropriate. In making this finding, I note in particular the unique experience and skills required by the engineering employees, the distinctiveness in function between the engineering department and other departments,[4] the separate immediate supervision of the engineering department, the lack of interchange with other employees, the pattern of area bargaining of separate maintenance units, and that no other labor organization seeks a broader unit.[5] *Sheraton-Anaheim Hotel*, 252 NLRB 959 (1980); Compare *NLRB v. Westin Hotel*, 738 F.2d 765 (6th Cir. 1984), denying enforcement of *Western Hotel*, 261 NLRB 1005 (1982), where there was no predominant area practice of separate engineering department units, and where another labor organization sought an overall unit. *Atlanta Hilton and Towers*, 273 NLRB 87 (1984), differs substantially from this case because of the much greater functional integration and interchange found there. Also, in that case, unlike herein, a large number of employees in the housekeeping unit performed tasks similar to those of employees in the food service unit, or outside both units, or vice-versa.

5. In view of the foregoing, I find the following employees constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time maintenance employees employed by the Employer at its facility located at 333 E. Jefferson Avenue, Detroit, Michigan, but excluding all other employees, guards and supervisors as defined in the Act.

Those eligible to vote shall vote as set forth in the attached Direction of Election.

---

[4] The record does not support the Employer's contention that there is close and functional integration of the duties performed by the engineering department and those duties performed by other employees; the minimal overlapping of some minor duties does not negate the engineering employees' distinct community of interest. *Sheraton-Anaheim Hotel*, 252 NLRB 959, 961 (1980).

[5] Based upon this finding, I need not decide whether the hotel-wide unit contended for by the Employer is also appropriate, or whether such a unit is more appropriate. The sole issue before me is whether the unit petitioned for is appropriate.

Vulcan Trailer Manufacturing Co., Inc. and its alter-ego Vulcan Solid Waste, Inc. and its alter-ego Preferred Solid Waste Systems and its alter-ego the Vulcan Company *and* International Brotherhood of Boilermakers, Local Lodge 583. Case 10-CA-21706

31 March 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 8 December 1986 Administrative Law Judge William N. Cates issued the attached decision. Respondents Vulcan Trailer Manufacturing Company, Inc., Vulcan Solid Waste, Inc., and Preferred Solid Waste Systems filed exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondents, Vulcan Trailer Manufacturing Co., Inc., and its alter-ego Vulcan Solid Waste, Inc., and its alter-ego Preferred Solid Waste Systems, and its alter-ego The Vulcan Company, Bessemer and Montevallo, Alabama, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to grant the April 1986 wage increases called for in its 15 April 1985 to 14 April 1988 collective-bargaining agreement with the Union.

(b) Failing and refusing to abide by the terms and conditions of its collective-bargaining agreement with the Union.

(c) Threatening to refuse to recognize the Union as the exclusive representative of the employees in the appropriate unit set forth below, and threatening employees with unspecified reprisals if they participate in any National Labor Relations Board proceedings.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the Union as the exclusive bargaining representative of its employees in the following unit appropriate for the purposes of collective bargaining and abide by the terms of its collective-bargaining agreement with the Union.

> All production and maintenance employees employed by the Company at its Montevallo, Alabama facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

(b) Pay the April 1986 wage increases called for in the collective-bargaining agreement with the Union retroactive to the effective date set forth in the agreement. Such monetary amounts are to be computed in the manner set forth in the remedy section of the judge's decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Montevallo, Alabama, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure

[1] The Respondents, in filing exceptions, did so without admitting they were proper parties and without waiving proper service of the charge, complaint, process, or jurisdiction.

[2] The judge erroneously reported the case name of *Ogle Protection Service*, 183 NLRB 682 (1970), and the citation to *Florida Steel Corp.*, 231 NLRB 651 (1977).

Subsequent to the issuance of the judge's decision, Preferred filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101 et seq. We note that the Board's proceedings fall within the exceptions to the Bankruptcy Code's automatic stay provisions. See 11 U.S.C. § 362 (b)(4), (b)(5); *J&B Smith Co.*, 280 NLRB 539 fn. 2 (1986).

[3] The judge included in his recommended Order a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Board's Order. In the circumstances of this case, we find it unnecessary to include such a clause. We shall modify the judge's recommended Order accordingly.

Additionally, we shall modify the recommended Order and issue a new notice to conform more closely to the violations found.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to grant the April 1986 wage increases called for in our 15 April 1985 to 14 April 1988 collective-bargaining agreement with the Union.

WE WILL NOT fail and refuse to abide by the terms and conditions of our collective-bargaining agreement with the Union.

WE WILL NOT threaten and refuse to recognize the Union as the exclusive representative of our employees in the unit described below.

WE WILL NOT threaten our employees with unspecified reprisals if they participate in any National Labor Relations Board proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive bargaining representative of our employees in the following unit appropriate for the purposes of collective bargaining:

All production and maintenance employees employed by the Company at its Montevallo, Alabama facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

WE WILL abide by the terms of our collective-bargaining agreement with the Union, and WE WILL grant the wage increases called for in our collective-bargaining agreement with the Union retroactive to the date called for in that agreement.

VULCAN TRAILER MANUFACTURING CO., INC. AND ITS ALTER-EGO VULCAN SOLID WASTE, INC. AND ITS ALTER-EGO PREFERRED SOLID WASTE SYSTEMS AND ITS ALTER-EGO THE VULCAN COMPANY

Virginia L. Jordan, Esq., for the General Counsel.
C. V. Stelzenmuller, Esq. (Burr & Forman), of Birmingham, Alabama, for Respondent.
George C. Longshore, Esq., of Birmingham, Alabama, for the Union.

DECISION

WILLIAM N. CATES, Administrative Law Judge. This case was tried at Birmingham, Alabama, on 17 September 1986.[1] The charge in this case was filed by International Brotherhood of Boilermakers Local Lodge 583 (the Union) on 25 April and amended on 6 June. The complaint, which issued on 9 June, was amended at trial. The complaint, as amended, alleges that Vulcan Trailer Manufacturing Co., Inc.[2] (Trailer) and its alter-ego Vulcan Solid Waste, Inc. (Solid Waste) and its alter-ego Preferred Solid Waste Systems (Preferred Waste) and its alter-ego The Vulcan Company[3] (Vulcan) are affiliated businesses with common ownership, common officers, common directors, common management, interrelated operations, and common control of labor relations, and are by virtue of that relationship alter egos of each other and responsible for the unfair labor practices. I shall hereinafter refer to all the alter egos jointly as the Company. The complaint alleges that all production and maintenance employees employed by the Company at its Bessemer, Alabama facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. It is alleged that the Union was certified on 12 February 1973 as the exclusive collective-bargaining representative of all the employees in the above-described unit and that the Union has been and is the representative of a majority of the employees in that unit. It is further alleged that since about 1973 the Company and the Union have been parties to successive collective-bargaining agreements with the most recent agreement being effective from 15 April 1985 until 14 April 1988. It

[1] All dates herein after are 1986 unless otherwise indicated.

[2] The name of the Respondent appears as amended at trial.

[3] Counsel indicates in his posttrial brief that no appearance is made on behalf of "The Vulcan Company" inasmuch as it is not a corporation or legal entity separate from the other companies but is a fictitious name. Counsel filed an answer (without waiving proper service of the charges or complaint and without consenting to jurisdiction), participated in a pretrial conference, and filed a posttrial brief; however, neither he nor any representative of the companies appeared at the trial herein. Counsel asserts in his posttrial brief that Vulcan Trailer Manufacturing Co., Inc. and Vulcan Solid Waste, Inc. "elected" not to participate in the trial, and that Preferred Solid Waste Systems had no notice of the hearing.

is alleged that pursuant to the most recent collective-bargaining agreement the employees in labor grades 1, 2, and 3 were on 5 April to have received a 25-cent-an-hour wage increase. It is alleged that the Company failed and refused to grant the wage increases. It is also alleged that the Company has since about 15 April refused to abide by the terms and conditions of its most recent collective-bargaining agreement with the Union. The complaint alleges that such failures on the part of the Company violate Section 8(a)(5) of the Act. It is also alleged that the Company about 9 March, through its supervisor and agent, Stanley Gaines, threatened employees it would refuse to recognize the Union as the exclusive representative of the employees in the above-described unit. It is further alleged that the Company, through its supervisor and agent, Michael Skeya, about 28 April threatened employees it would take unspecified reprisals against them if they participated in any Board proceedings.

The Company denies that Trailer, Solid Waste, and Preferred Waste are alter egos of each other and denies that any such entity as Vulcan exists. The Company raised other affirmative defenses and denied the commission of any unfair labor practices. All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Company (specifically Trailer, Solid Waste, and Preferred Waste).

On the entire record, including my observation of the witnesses and their demeanor, I make the following[4]

FINDINGS OF FACT

I. JURISDICTION

It is admitted that Trailer is[5] an Alabama corporation, with an office and place of business located at Bessemer, Alabama, where it is engaged in the manufacture of flat trailers, low-bed trailers, and log trailers. It is admitted that Trailer, during the past calendar year, purchased and received at its Bessemer, Alabama location supplies valued in excess of $50,000 directly from suppliers located outside the State of Alabama. Accordingly, I find Trailer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[4] The only witnesses to testify here, Jerry Chamblee and Hoover Wilson, were both called by the General Counsel. No witnesses were called by the Union and as is earlier indicated the Company did not appear at the trial. I carefully observed Chamblee and Wilson as they testified, and they appeared to be attempting to describe the events about which they testified as honestly as possible. Their testimony is supported by other record evidence. Accordingly, I credit the uncontradicated testimony of Chamblee and Wilson.

[5] The Company in its answer and posttrial brief contends Trailer has been out of business since 6 March, but admits it was subject to the Board's jurisdiction at least until that date. The Company in its posttrial brief describes Trailer as a corporation undergoing reorganization in Chapter 11 bankruptcy proceedings. A decision on the alter ego status of the related companies will resolve all questions of jurisdiction. I note the Company in its answer admitted that Solid Waste is, and has been for a number of years, an Alabama corporation.

II. LABOR ORGANIZATION

The complaint alleges, the evidence establishes, and it is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. BACKGROUND AND OPERATIVE FACTS

Trailer was founded in 1953 as a trailer repair/service company operated by and for the benefit of Deaton, Inc., a Birmingham, Alabama based trucking company.[6] As a result of Trailer's repair expertise, it soon thereafter became an original manufacturer of specialty type trailers. In 1968 Deaton, Inc. moved its operations to Ensley, Alabama, and Trailer moved as well. In 1969 Deaton, Inc. and Trailer were acquired by Expeditor Systems, Inc.

On 2 February 1973 the Board conducted a secret-ballot election among the production and maintenance employees of Trailer, and on 12 February 1973 the Board certified the Union as the collective-bargaining representative of those employees. Since approximately 1973 the parties have been parties to successive collective-bargaining agreements.[7]

In 1978 Expeditor Systems, Inc. was acquired by Old Dominion Freight Lines, a common carrier trucking company. In 1978 Trailer built a new plant at Bessemer, Alabama, and moved into its new facility in December 1979. Trailer was purchased by and became a wholly owned subsidiary of Interstate Transportation Products and Sales Co. Inc. in 1963. Interstate Transportation Production and Sales Co., Inc. is in turn a wholly owned subsidiary of Meansco, Inc. Meansco, Inc. is owned by Walter Jurek (25-percent shareholder), Andrew Jurek (50-percent shareholder), and Owens (25-percent shareholder). Andrew Jurek (A. Jurek) and Owens are the only directors of Trailer and they share responsibility for the management and operation of Trailer. A. Jurek is responsible for Trailer's operations and production, while Owens is responsible for the financial and accounting aspects of the Company. Preferred Waste was purchased by and is a part of Meansco's corporate structure. Preferred Waste was purchased from the Heil Company in the early part of 1984 so Trailer could and thereafter did manufacture solid waste disposal equipment. Preferred Waste was utilized as the selling company for the solid waste containers that Trailer manufactured. Employee and Grievance Committee Chairman Jerry Chamblee (Chamblee) testified Trailer sold the solid waste disposal equipment under the name Preferred Waste or Solid

[6] The background for Trailer as well as the information on the corporate structure of the various companies herein has been taken not only from the record testimony, but from the Modified Disclosure Statement and related documents filed by Trailer on 11 March in the United States Bankruptcy Court for the Northern District of Alabama, Southern Division in the matter of *Vulcan Trailer Manufacturing Company, Inc.*, BK No. 85-3205. The Modified Disclosure Statement was signed by Trailer Treasurer John B. Owens (Owens). The court-filed documents may be used as evidence regarding the corporate structure of certain of the companies herein inasmuch as the documents constitute admissions by a party opponent within the meaning of Federal Rules of Evidence 801(d)(2)(A) and/or (D).

[7] The most recent collective-bargaining agreement was effective from 15 April 1985 until 14 April 1988, inclusive.

Waste, but labeled it with the Trailer logo. For approximately the past 2-1/2 years all the speciality trailers and solid waste disposal equipment manufactured by the companies has been manufactured by the production and maintenance employees that are represented by the Union.

During the April 1985 negotiations for the most recent collective-bargaining agreement, the Union asked Trailer if any new job classifications were needed as the production and maintenance employees manufactured the solid waste disposal equipment. Chamblee, who was one of the Union's 1985 negotiating committee members, credibly testified:

> [W]e were talking about adding some language that would cover these [solid waste disposal] products and all by name. And . . . manager David Sullivan [who represented] the company at [the] negotiations . . . told us the Preferred and Solid Waste, all those load loaders and compactors employees would be covered under the current contract.
>
> He said there was not need for any new language. He said all it is it's just a different product. He says it's not really a different company, just a different product. They're one in the same.
>
> And we at that point agreed not to add any other language.[8]

On 23 May 1985 Trailer filed for bankruptcy under Chapter 11, Title 11, of the United States Code "Bankruptcy Code." Trailer's original plan of reorganization was rejected. On 5 March Trailer filed a modified plan of reorganization with the Bankruptcy Court. The modified plan of reorganization contained no provision concerning the collective-bargaining agreement between Trailer and the Union.[9] The modified plan of reorganization, a liquidation plan, called for the transfer of all assets to Solid Waste after disbursement was made to administrative creditors, secured creditors, and unsecured creditors.[10] Under the plan Solid Waste was to pay Trailer the fair market value for the property transferred to it. Additionally, the plan called for Solid Waste to move (with the Trailer assets) to a smaller location, merge with Preferred Waste, and produce solid waste disposal equipment as well as specialty trailers. On 21 May Bankruptcy Judge Fulford confirmed Trailer's modified plan of reorganization as summarized.

Chamblee credibly testified that on 9 March (4 days after Trailer filed its modified plan of reorganization) Supervisor Stanley Gaines[11] (Gaines or Supervisor Gaines) called the fabrication department employees around his desk and told them he had just come from a meeting with Plant Manager Michael Skeya and added: "[T]he company was planning on moving. And . . . the union would not be welcomed to go . . . that they didn't intend to put up with union problems." Chamblee asked why the Union was not going and Gaines told him he would have to ask Plant Manager Skeya that question. Gaines told the employees he did not know when the move would be accomplished.

Chamblee testified he and Wilson met with Plant Manager Skeya on 13 March to discuss a third step grievance.[12] After the grievance matter was discussed, Wilson asked Skeya if it was true that Trailer was planning on moving and if there was such a plan, would all the employees be going, would the Union be welcome, and would there still be a pension plan for the employees. Plant Manager Skeya said they were moving but they had no intention whatsoever of taking the Union with them to the new location. Skeya said the Company was having problems and had to take care of itself. Skeya told Chamblee and Wilson that Trailer "had gone out of business . . . [that] . . . there would be a new company" that "they were moving to Montevallo [Alabama] and the best qualified employees would be allowed to go with him but they would not take any union to Montevallo."

Thereafter, on 9 April Wilson learned from Chamblee that Trailer's management was having "one-on-one" meetings at the plant with unit employees. Wilson telephoned Plant Manager Skeya and asked about the meetings and asked Skeya if the Company was going to pay the contractually called for 5 April wage increases.[13] Skeya acknowledged meeting with the employees and indicated the Company was not going to pay the wage increases called for in the collective-bargaining agreement. Skeya agreed to meet with Wilson on 15 April to discuss matters.

Plant Manager Skeya met with Wilson and Chamblee on 15 April in the conference room at the plant. Skeya again stated they would be taking the best qualified employees with them to Montevallo, but added there would be no contract and no union there. Skeya also said they would not pay the wage increases called for in the collective-bargaining agreement. Wilson testified:

> I questioned [Plant Manager Skeya] about continuing to represent the people, I told him I thought he was in violation and he said, no, there would be no union there; that they would have some sort of in-house union that he would talk with his employees

[8] International Union Representative Hoover Wilson (Wilson) corroborated Chamblee's testimony as outlined above.

[9] Later, on 9 July Trailer applied to the Bankruptcy Court for an order approving the rejection of its collective-bargaining agreement with the Union. United States Bankruptcy Judge Clifford Fulford (Bankruptcy Judge Fulford) denied Trailer's application in an order dated 19 August. In re *Vulcan Trailer Mfg. Co.*, Case 85-3205, United States Bankruptcy Court for the Northern District of Alabama, Southern Division.

[10] Unsecured creditors were to receive 15 percent of Solid Waste's preferred stock.

[11] According to the undisputed and credited testimony of Chamblee, Gaines directed the work force in the fabrication department to include signing the employees' work forms and initialing their timecards. Gaines could grant employees time off and had the authority to discipline them up to and including discharge. Other supervisors at the Bessemer location were Gary Marsh and Timmy Parker.

[12] Skeya was not the highest level management representative at the Bessemer location. Owners Owens and A. Jurek had their offices there, with A. Jurek having overall responsibility for plant operations and Owens overseeing the financial and accounting aspects of the Company.

[13] The parties' most recent collective-bargaining agreement (effective 15 April 1985 to 14 April 1988 inclusive), Exh. B, p. 30, calls for certain specifically set forth wage increases to be implemented by the Company on 5 April.

about [it] once he got there . . . I told him . . . I thought he was wrong and I intended to file charges with the National Labor Relations Board.

Wilson testified that ended the conversation. He indicated he had not had any further discussions with Plant Manager Skeya since that time.

Wilson testified that union dues have not been checked off by the Company since March and he added the wage increases called for in the collective-bargaining agreement were never paid.

Within a day or two of the above-described 15 April meeting between Skeya, Wilson, and Chamblee, Trailer employees were given a letter from A. Jurek and Owens dated 15 April and written on "Vulcan Solid Waste Systems" stationery,[14] that read in part as follows:

> Almost everyone has questions about who we are, who do I work for, the move from Bessemer, wages, vacations and the like. This will attempt to answer the most frequently asked questions.
>
> . . . .
>
> As of now, we all work for Vulcan Solid Waste Systems, a company started two years ago in 1984. Any time you had with Vulcan Trailer will, however, roll over to Vulcan Solid Waste.
>
> . . . .
>
> Vulcan Solid Waste is the same company that sells Transfer Trailers, Load Luggers and Compactors that have been made by Vulcan Trailer these past two years. Now, Vulcan Solid Waste has become the manufacturer, too.
>
> . . . .
>
> In order to settle Vulcan Trailer's bankruptcy, the company agreed to liquidate its inventories and customer receivables. The money from this liquidation will be paid to Vulcan Trailer creditors. A further condition of the bankruptcy settlement requires that we vacate this plant—which was always too big for our needs.
>
> . . . .
>
> We intend to continue manufacturing Vulcan Trailers because we have a 33 year history of building quality products for the trailer industry. The principal difference is that Vulcan Trailers will now be built by Vucan Solid Waste in a new plant. Same trailers—new plant.
>
> . . . .
>
> Trailer orders have reached the lowest point in the past ten years. We do not expect any further reduction. In fact, we expect steady, perhaps increasing orders of the specialty trailers that earned Vulcan an enviable reputation. We build a quality product.
>
> . . . .
>
> Oders for waste handling equipment are *extremely* promising.
>
> . . . .
>
> We plan to increase work and your job is secure.
>
> . . . .
>
> The new plant, in Montevallo, is expected to be ready for occupancy in late April. We will be moving production first and then the office staff. There will be some obvious dislocations in production which we hope to keep to a minimum. We also hope for maximum effort on everyone's part to complete the move smoothly and economically. If you've got some ideas on ways to save money, speak up now.
>
> . . . .
>
> We will be using some of the same equipment, fixtures, jigs, and so on that we have here. They will simply move with us.
>
> . . . .
>
> Wages at the new plant will continue at the present rate. Owing to the phase-out of the corporation known as Vulcan Trailer Manufacturing Co., Inc., there is no contract between the present union and the new company. (The old company, Vulcan Trailer, ceased to exist as a wage payer in March by court order).
>
> . . . .
>
> Vulcan Solid Waste has no pension plan. We have no union dues either, which is a substantial savings for you.
>
> . . . .
>
> All policies concerning vacation at Vulcan Trailer will continue at Vulcan Solid Waste, and all time earned at Vulcan Trailer for vacations will roll forward to the new company.
>
> . . . .
>
> Finally, all employees with a year of service (either with Vulcan Trailer or Solid Waste) will be given three personal holidays to use, with full pay, any time they wish.

As is reflected elsewhere in this decision, the Union filed the charge giving rise to the instant case on 25 April. Chamblee testified that when Trailer received its copy of the charge[15] Plant Manager Skeya came out in the plant area with the charge and asked him what he knew about it. Chamblee told Skeya that Skeya knew as much about the charge as Chamblee did. Skeya asked what the charge was based on. Chamblee told him it was based on the things that he, Skeya, and Wilson had discussed in their meeting on 15 April. Plant Manager Skeya told Chamblee he felt it would be in Chamblee's best interest if he did not get involved in the case. Chamblee told Skeya it was "a sticky situation" for him, but he intended to testify because he had been asked to, and he intended to tell the truth to the National Labor Relations Board. Skeya told Chamblee he understood the situation and ended the conversation.

Chamblee testified that during April and May specialty trailer sales were "a little slack," but unit employees continued to make solid waste disposal equipment. Chamblee stated they started moving to the new facility in Montevallo, Alabama, during the next few months. In that

[14] The address on the stationery was 300 Industrial Parkway, Bessemer, Alabama. The stationery reflects in trademark style that it was formerly Heil Preferred Systems.

[15] The return receipt for the 25 April charge reflects it was received at Trailer on 28 April.

regard Chamblee testified: "I believe it was the fitting and welding area that started to move first. They started breaking down their equipment and loading it on trucks to be shipped to Montevallo." Chamblee asserts production continued all during this transition time, but that it was at "a very light flow." Chamblee stated one section would keep working while other sections were broken down for the move to the new facility. Chamblee credibly testified the move to the new facility was complete around 1 August. Chamblee stated that 18 of the 20 production and maintenance employees, and 11 of the 12 clerical employees employed at the new facility had been employed at the old Bessemer, Alabama location and had simply transferred to the new facility. Chamblee testified the same supervision that had been utilized at the Bessemer location was utilized at the new facility, namely, Plant Manager Skeya and Supervisors Gaines, Parker, and Morris. Chamblee also stated that A. Jurek and Owens performed the same functions at the new facility that they had at the old Bessemer location. Chamblee testified that all the equipment utilized at the new Montevallo facility came from the old Bessemer location. Chamblee testified that some of the raw materials and supplies utilized at the new facility came from the old Bessemer location while others were delivered to the new location by the same suppliers that had supplied items at the old location. Chamblee stated the same products—solid waste disposal equipment and specialty trailers—were, and still are, being built at the new facility that had been built at the Bessemer location.[16]

IV. GOVERNING PRINCIPLES, ANALYSIS, AND CONCLUSIONS

In considering whether an alter ego relationship exists, the Board stated in *O. Voorhees Painting Co.*, 275 NLRB 779 fn. 3 (1985), that the standards set forth in *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984), were the proper ones to apply. In *Fugazy Continental Corp.* the Board held at 1301:

> In determining whether [one employer] is the *alter ego* of [another employer], we must consider a number of factors, no one of which, taken alone, is the *sine qua non* of *alter ego* status. Among these factors are: common management and ownership; common business purposes, nature of operations, and supervision; common premises and equipment; common customers, i.e., whether the employers constitute "the same business in the same market;" as well as the nature and extent of the negotiations and formalities surrounding the transaction. We must also consider whether the purpose behind the creation of the alleged *alter ego* was legitimate or whether, instead, its purpose was to evade responsibilities under the Act. [Footnotes omitted.]

The *Fugazy Continental Corp.*, supra, standards appear to have been adopted from an array of earlier Board and court decisions, particularly *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Not all of these indicia listed above need be present to find that an alter ego relationship exists. See, e.g., *Blake Construction Co.*, 245 NLRB 630, 634 (1979), enf. granted in part and denied in part on other grounds 663 F.2d 272 (D.C. Cir. 1981). In examining the question of common ownership in alter ego situations, the Board only looks for "substantially identical ownership." See, e.g., *Advance Electric*, 268 NLRB 1001, 1004 (1984). The Board in *All Kind Quilting, Inc.*, 266 NLRB 1187 fn. 4 (1983), noted that an alter ego relationship could exist even with no evidence of common ownership being present at all. Any employer that is found to be an alter ego of another is bound by any collective-bargaining agreement executed by the other. *E. G. Sprinkler Corp.*, 268 NLRB 1241 (1984), and *NLRB v. Tricor Products*, 636 F.2d 266, 269–270 (10th Cir. 1980).

Applying the above standards and principles to the facts herein, I conclude that a preponderance of the evidence shows that each of the four companies named in the complaint, as amended, are alter egos of each other.

Common ownership of these companies has been demonstrated. Meansco, Inc., which is owned by Walter Jurek and A. Jurek; and Trailer as well as Preferred Waste are owned by Owens. At certain relevant times Trailer manufactured and Preferred Waste sold the items produced by the companies. After the liquidation of Trailer was accomplished under the guidance of the Bankruptcy Court, Solid Waste became the companies' manufacturing arm and it merged with Preferred Waste to continue to produce specialty trailers and solid waste disposal equipment. The employees that had previously worked for Trailer began to be paid by Solid Waste and those same employees were informed by A. Jurek and Owens in writing that they, as of mid-April, worked for Solid Waste. Although the exact status of Vulcan is not clear in this record, it is being utilized as the company that pays the employees their wages.[17] Simply stated, the three owners of Meansco, Inc. own Trailer, Solid Waste, Preferred Waste, and Vulcan, if Vulcan exists as a separate corporate entity. The evidence is conclusive that A. Jurek was and/or is responsible for Trailer's, Solid Waste's, Preferred Waste's, and Vulcan's operations and production; and Owens was and/or is responsible for the financial and accounting aspects of those entities. Those two individuals' responsibilities are the same at the Montevallo facility as they had been at the Bessemer location. Simply stated, the management structure of these entities has not changed from the beginning to the present. It is quite clear the same business purpose has existed throughout, at Bessemer as well as at Montevallo. The nature of the operations, although smaller in size at Montevallo, is identical to that which had been at the Bessemer location. Supervision for the various companies has been the same at both locations (namely, Plant Manager Skeya and Supervisors Gaines, Marsh, and Parker). All the equipment used at the Montevallo facility was

[16] Additionally, Chamblee testified that from April until the date of the trial herein he had received various paychecks from the Company some, for example, with the name Trailer crossed out and the name Solid Waste typed in and others from "The Vulcan Company."

[17] If Vulcan is not a corporation or legal entity separate from Trailer, Solid Waste, and Preferred Waste but is a "fictitious name" as contended by company counsel, then that matter can be resolved with the Board, administratively, or at the compliance stage herein.

brought there from the Bessemer location. The customers, throughout the history of the companies, have remained the same. Some of the raw materials and supplies used at the Montevallo facility were brought from the Bessemer location. Additional supplies and raw materials have been supplied by the same suppliers that previously serviced the Company at its Bessemer location. The employees at the Montevallo facility—production and maintenance as well as clerical—came almost exclusively from the work force at the Bessemer location.

Although there is some evidence that tends to suggest the owners of Trailer had legitimate reasons for establishing certain of the alter egos, the evidence is overwhelming that they created the alter egos in order to evade their responsibilities under the Act. A number of factors persuade me that the owners of Trailer took the actions they did because of antiunion sentiments and in order to avoid their obligations under the collective-bargaining agreement with the Union. For example, Supervisor Gaines[18] told the fabrication department employees that Trailer was moving from Bessemer to Montevallo and the Union would not be welcome to go with it because they did not intend to put up with union problems.[19] Plant Manager Skeya told Wilson that Trailer was going to move to its new location, and the Union would not be welcome or recognized at the new location because the Company had problems and had to take care of itself. Skeya told Wilson there would be no contract, no union, and no called-for wage increases at the new location. Plant Manager Skeya also told Wilson the Company would form its own in-house union at its new location. That Trailer took the actions it did in order to escape its obligations under the Act is also demonstrated by the fact it discontinued payment of union dues-checkoff and refused to pay the contractually called-for wage increases even before the bankruptcy court approved its modified plan of reorganization. Instead of granting the contractually called for wage increases, Trailer transferred its employees to the payroll of Solid Waste and then stated it had no obligation to pay the increased wages or deduct union dues. The bankruptcy court never granted Trailer's belated request to reject its collective-bargaining agreement with the Union.

Based on all the above factors, I am persuaded that Trailer, Solid Waste, Preferred Waste, and Vulcan are all alter egos of each other and are all liable for all unfair labor practice violations found herein.[20] Inasmuch as the Company (Trailer, Solid Waste, Preferred Waste, and Vulcan jointly) failed and refused about 5 April to grant the contractually called for wage increases, it violated Section 8(a)(5) of the Act. Likewise, when the Company about 15 April failed and refused to abide by the terms of its most recent collective-bargaining agreement with the Union it also violated Section 8(a)(5) of the Act.

Finally, I find Plant Manager Skeya threatened employee Chamblee with unspecified reprisals when he told Chamblee in late April after the Union had filed a charge with the Board that it would be in Chamblee's best interest not to get involved in the case. The remark was made by a high level member of management and occurred at a time when the Company was committing other unfair labor practices. No valid or justifiable reason was advanced or suggested for Skeya's conduct. Accordingly, I find Skeya's comments violated Section 8(a)(1) of the Act. See *S & R Sundries*, 272 NLRB 1352 fn. 2 (1984).

CONCLUSIONS OF LAW

1. Vulcan Trailer Manufacturing Co., Inc., Vulcan Solid Waste, Inc., Preferred Solid Waste Systems, and the Vulcan Company (jointly the Company) are alter egos of each other and constitute an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Boilermakers, Local Lodge 583 is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Company at its Montevallo, Alabama facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 12 February 1973 and at all times material, the Union has been the duly designated collective-bargaining representative of the employees in the above-described unit.

5. The Company violated Section 8(a)(5) of the Act by failing and refusing since about 5 April to grant the wage increases called for in its collective-bargaining agreement with the Union, and by failing and refusing since about 15 April to abide by the terms and conditions of its collective-bargaining agreement with the Union.

6. The Company violated Section 8(a)(1) of the Act when about 9 March it threatened its employees that it would refuse to recognize the Union as the exclusive representative of its employees in the unit described above, and when about 28 April it threatened its employees with unspecified reprisals if they participated in any Board proceedings.

7. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that the Company has engaged in certain unfair labor practices, I recommend that it be required to cease and desist therefrom and take certain af-

[18] The evidence clearly establishes that Gaines is a supervisor within the meaning of the Act. He had and exercised certain indicia of supervisory status. For example, he directed the fabrication work force, granted time off, and disciplined employees up to and including discharge.

[19] I find, as alleged in the complaint, that Gaines' remarks constituted a threat that the Company would refuse to recognize the Union as the exclusive bargaining representative of its production and maintenance employees.

[20] Trailer's, Solid Waste's, and Preferred Waste's contention that due process was not afforded them because they were not all served with the charge and/or complaint herein is without merit. The record reflects service was perfected on Trailer. The Board has held that where a complaint and charge have been served on one alter ego it constitutes service on all entities found to be alter egos of the company receiving proper service of the relevant documents. See *Sturdevant Roofing Co.*, 238 NLRB 186, 188 (1978), enfd. in pertinent part 636 F.2d 271 (10th Cir. 1980).

firmative actions necessary to effectuate the policies of the Act.

Inasmuch as I have found the Company violated the Act by failing and refusing to abide by the terms of collective-bargaining agreement with the Union, I shall recommend that it be required to recognize and, on request, bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit described in this decision and that it abide by the terms of the collective-bargaining agreement it has with the Union. Likewise, inasmuch as the Company violated the Act by failing and refusing to grant the April wage increases called for in its collective-bargaining agreement with the Union, I shall recommend the Company be ordered to grant such wage increases retroactive to the effective date set forth in the collective-bargaining agreement. Such monetary amounts are to be computed in accordance with the Board's decision in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest thereon as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1971). It is also recommended that the Company be ordered to post the notice to employees attached hereto as "Appendix" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

[Recommended Order omitted from publication.]

Buck Brown Contracting Co., Inc. and A.S.C. Constructors, a Joint Venture *and* Randal F. Fansler *and* Robert J. Kelly *and* Wendell Bridges *and* David Mark Doran *and* John Angle. Cases 31-CA-10035, 31-CA-10043, 31-CA-10047, 31-CA-10141, and 31-CA-10155

31 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND CRACRAFT

On 2 February 1982 Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision[1] and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.[3]

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by making several coercive and threatening statements. We also agree that the Respondent unlawfully discharged three employees.[4] We find merit, however, in the Respondent's exceptions to the judge's findings with respect to certain statements of Project Manager Jim Joy.

1. On 7 May 1980[5] following the discharge of employee Randal Fansler, Joy met with two union agents and an employee steward. During their meeting, one of the union agents mentioned a threat by union members to picket the jobsite in protest of the discharge. According to one union agent, Joy replied that if "things didn't work out and the men didn't get back to work, the basic thing that would happen is that [the Respondent] would lose [its] contract," with the contract probably being awarded to Brown and Root, a nonunion firm also engaged at the jobsite. Also in early May at a safety meeting with the employees, Joy announced that employees from the nonunion firm would be sharing camp space with the Respondent's employees. According to the credited testimony, Joy stated that "if there were any union problems, either there or on the job, that the whole job could go to Brown and Root, that they are waiting to take it over." We do not agree with the judge that Joy's remarks are unlawful threats of business closure in retaliation for union activities. Joy's statements do not intimate that the Respondent would forfeit its contract as punishment for its employees' union activities. Rather, these statements suggest no more than the possibility that the Respondent could lose its contract due to the activity of parties beyond its control. Such statements concerning possible third-party action are statements of opinion, not threats of reprisal, and are protected by Section 8(c) of the Act. Accordingly, we dismiss that aspect of the complaint and shall modify the Order accordingly.

2. We disagree with our dissenting colleague's assertion that the General Counsel has not shown a prima facie case of unlawful discharge of Kelly. The General Counsel established that Kelly engaged in protected activity and that his supervisor who discharged him had knowledge of the activity and expressed union animus. The nexus which our colleague finds lacking is supplied by credited testimony that Davis had told Union Steward Herndon, when he presented a job-related complaint, that "we can't be starting all this union shit," Davis' anger when Kelly threatened to take a work-break grievance to Herndon, and Davis' caustic remark when he gave Kelly his final paycheck that he had a "present" for Kelly. This is sufficient in our view to support an inference that Kelly's protected conduct was the basis for his discharge. As the Respondent has failed to show that

[1] The last sentence of sec. IV,D,2, par. 2, of the judge's decision should read "Further, while there is no record evidence that Easter was aware that Bridges *actually* spoke to Lively . . . ." The first sentence of sec. IV,D,2, par. 4, should read "Having established that Bridges engaged in protected concerted activities, however limited, and that Respondent, through Easter, was aware of, or suspected, such conduct . . . ." We correct the inadvertent errors.

[2] Both the Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find no merit in the Respondent's allegation of bias and prejudice on the part of the judge. On our full consideration of the record and the judge's decision, we perceive no evidence that he prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence.

[3] The judge inadvertently omitted from the cease-and-desist portion of his recommended Order a provision enjoining the Respondent from in any like or related manner interfering with the employees' Sec. 7 rights. We shall amend the Order to so provide.

We shall also modify the Order by adding the affirmative requirement that the Respondent expunge from its records any references to the unlawful discharges and notify the employees in writing that this has been done and that evidence of the unlawful discharges will not be used against them.

[4] In affirming the judge's finding that Robert Kelly and Randal Fansler engaged in protected concerted activity when they sought the Respondent's compliance with the terms of the parties' collective-bargaining agreement, we rely on *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Because we affirm the judge's findings in this regard, we find it unnecessary to decide whether Kelly's complaints regarding noncontractual matters were protected concerted activity.

[5] All dates refer to 1980.

Kelly would have been discharged even in the absence of his protected activity, we affirm the judge's conclusion that the discharge was unlawful. See *Wright Line*, 251 NLRB 1083 (1980).

On 14 May Kelly informed Wendell Bridges that Kelly had just been discharged. Bridges approached Foreman James Easter and asked if Easter would hire Kelly for the night crew. Easter refused, stating, "I got a new crew . . . I don't want any problems." Bridges told Easter that he would speak to General Foreman Joe Lively, and Easter advised Bridges not to go over his head. Later, after Easter again refused Bridges' request to hire Kelly, Bridges advised Kelly to speak to Lively. Easter again became upset and asked if Bridges was trying to go over his head. Easter corroborated this version of his encounter with Bridges, and the judge also credited Easter's testimony that Bridges responded by threatening that "they were going to wobble" (strike) the job. That evening, Bridges told Easter that he was driving Kelly home to Las Vegas and would return for work the next day. Easter asked whether Kelly was supporting Bridges, and, when Bridges said they were just friends, Easter replied, "Look, son . . . you want to work on my crew . . . you stay out of other people's business." The judge found, and we affirm, that this statement was a threat of discharge in violation of Section 8(a)(1) of the Act.

When Bridges returned for work the next day, Easter informed him that he was laid off, stating, "I don't want no problems on my job." Bridges responded that such actions could lead to a wildcat strike, and Easter replied, "To hell with your wildcat strike. Get the hell off my job." Later, Bridges encountered Superintendent Sam Aiton III and asked, "Wasn't my work satisfactory?" Aiton replied, "That's not the point. . . . Anyone that creates any problems from now on is going down the road." The judge found, and we affirm, that Aiton's remark was an unlawful threat of discharge.

We agree with the judge's finding that Bridges' attempt to assist Kelly in procuring employment with the Respondent was protected concerted activity, and base our conclusion that the Respondent unlawfully discharged Bridges on the judge's finding that this assistance was one reason for Bridges' discharge.[6]

We do not agree with the judge's finding that Bridges was engaged in protected conduct when he threatened a wildcat strike in protest of Kelly's discharge.[7] We nevertheless conclude that the Respondent has not met its burden under *Wright Line*, supra, of proving that Bridges would have been discharged even in the absence of his protected conduct of attempting to secure employment for Kelly after Kelly was unlawfully discharged. The Respondent has never asserted that Bridges' threat was the reason for his discharge. In fact, in its exceptions, the Respondent argues, based on credibility, that Bridges never even threatened a strike before he was terminated. Its asserted reason for the discharge, Bridges' allegedly poor work performance on 13 May, had nothing to do with his threat of an unauthorized strike. The judge found, based on credibility resolutions, that this asserted reason was a sham and a pretext. Further, Bridges again mentioned the possibility of a wildcat strike after he was discharged, and Easter admitted that he discounted this threat. Accordingly, we conclude that the Respondent has not met its burden of proving that it discharged Bridges because he threatened a wildcat strike and not because of his protected concerted activity of attempting to obtain employment for Kelly.

4. We also agree with the judge, rather than with our dissenting colleague, that the Respondent unlawfully attempted to interfere with the steward's duties. The Respondent's threat to put the steward "up on a hill" suggests isolation from the rank-and-file employees which would preclude a steward's effectiveness.

We further agree with the judge that the Respondent unlawfully interrogated employee Fansler regarding why he contacted his steward about a pay dispute.

The judge found that 2 hours after Fansler last spoke to the steward about the dispute, General Foreman Lively approached Fansler and asked him why he had contacted the steward. Fansler replied that whenever anyone tried to "screw him" out of pay, he was entitled to try to resolve the matter by speaking to the steward. Lively responded by calling Fansler and the other carpenters a "bunch of crybabies." Fansler then attempted to defend the reputation of the Union, and Lively walked away. Lively apologized to Fansler later that afternoon.

[6] We disagree with our dissenting colleague's assertion that Bridges' assistance to Kelly was unprotected. Bridges' attempt to secure employment for Kelly is not the type of dissident activity that could undermine the statutory system of bargaining through an exclusive representative. Cf. *Energy Coal Partnership*, 269 NLRB 770 (1984) (unauthorized strike). Bridges was not engaged in collective bargaining; rather, he was involved in classic concerted activity—joining with another to seek employment.

Because we conclude that the Respondent unlawfully discharged Bridges because of his assistance to Kelly, we find it unnecessary to determine whether complaints Bridges made about the night crew's work hours also constituted protected concerted activity.

[7] It is well established that an unauthorized, or "wildcat," strike is not activity protected by Sec. 7 of the Act. See *Harnischfeger Corp. v. NLRB*, 207 F.2d 575, 578–580 (7th Cir. 1953).

After officials of the Union intervened, Lively agreed to make up Fansler's lost wages, and Fansler testified that by his termination date he had received all the payment he believed was due him.

The Respondent's general antipathy toward the steward's role is clear from the above unlawful comments made to the steward. The Respondent's further questioning of an employee as to why he contacted his steward is coercive in these circumstances. We note that, despite Fansler's honest response and the supervisor's apology, the interrogation was followed by an unlawful discharge based on the matter questioned. Accordingly, we affirm the judge's conclusion.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, Buck Brown Contracting Co., Inc. and A.S.C. Constructors, a Joint Venture, Tonopah, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engaged in union or other protected concerted activities.

(b) Threatening to terminate employees because they engaged in union or other protected concerted activities.

(c) Threatening to affect adversely the job steward's ability to perform the duties and responsibilities of his office because of his activities on behalf of the Union.

(d) Interrogating employees with regard to their union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Randal Fansler, Robert Kelly, and Wendell Bridges immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges of Randal Fansler on 6 May 1980, Robert Kelly on 14 May 1980, and Wendell Bridges on 15 May 1980, and notify these individuals in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) If its work assignment at the Anaconda Mining project jobsite in Tonopah, Nevada, has not yet been completed, post at its office there copies of the attached notice marked "Appendix."[8] If its work on that jobsite has been completed, copies of the attached notice should be sent to the last known addresses of Randal Fansler, Robert Kelly, and Wendell Bridges and all union member/employees employed by the Respondent between 1 March and 31 May 1980, and to the Union so that the latter may, if it desires, post the notice at its dispatch hall or wherever notices are customarily posted. Copies of the attached notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated amended complaint is dismissed insofar as it alleges that the Respondent violated Section 8(a)(1) and (4) of the Act by refusing to reinstate Robert Kelly, Section 8(a)(3) of the Act by terminating Wendell Bridges, and Section 8(a)(1) and (3) of the Act by terminating David Mark Doran and John Angle.

CHAIRMAN DOTSON, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Randal Fansler and, through its supervisor Joseph Lively, by threatening to discharge employees who complained about Lively's violations

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of the parties' collective-bargaining agreement.[1] I also agree with the reversal of the judge's conclusion that certain statements made by Project Manager Joy violated Section 8(a)(1). I disagree, however, with the majority's conclusion that the Respondent unlawfully discharged Robert Kelly and Wendell Bridges or made other statements that violated Section 8(a)(1).

I. THE DISCHARGES

A. *Robert Kelly*

The judge and my colleagues find that Robert Kelly was discharged for raising complaints about perceived contract violations and working conditions in general. The judge found that Kelly complained to his supervisor Don Davis about the unavailability of cold drinking water and sanitary facilities and about Davis' performing unit work. Noting that Kelly alone on Davis' crew raised such complaints, the judge inferred that Davis took Kelly's complaining personally and was motivated by it to discharge him.

On this evidence, I find that the General Counsel has failed to make a prima facie case of unlawful discrimination. The record does not demonstrate any nexus between Kelly's protected conduct and his discharge. According to Kelly's own testimony, Davis did not respond in a hostile manner to Kelly when he raised his complaints, and the General Counsel has not alleged that Davis otherwise has violated the Act. I do not find Davis' general statements that the employees were, for example, crybabies, which were never directly addressed to or made about Kelly, are sufficient to warrant drawing an inference of personal antagonism against Kelly to support finding an unfair labor practice. Accordingly, I would dismiss this aspect of the complaint.

B. *Wendell Bridges*

The majority adopts the judge's conclusion that the Respondent unlawfully discharged employee Bridges. The judge found that Bridges engaged in three types of protected conduct: he complained about the number of hours scheduled for his shift; he attempted to secure employment for a discharged coworker; and he threatened to strike in protest of that discharge. In my opinion, none of these actions is protected by the Act and, accordingly, the General Counsel has failed to present a prima facie case of unlawful discharge.

Bridges' individual complaint that his scheduled number of hours of work on the night shift was 1 hour less than that scheduled for the day-shift employees is not protected concerted activity. As found by the judge, this was not a matter covered by the collective-bargaining agreement. Cf. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Further, the record does not support a finding that Bridges acted on the authority of other employees when he made this individual complaint. The conclusion that Bridges' complaint was solely personal is manifest by his proposed solution that he simply be allowed to work on another crew, i.e., on the day shift. Cf. *Meyers Industries*, 268 NLRB 493 (1984).

Second, I do not agree that Bridges' threat to strike the project, made when Foreman Easter refused to hire Kelly, is protected activity. There is no contention or evidence that Bridges' threat was supported by the Union or that he sought such support. Rather, his threatened action was a spontaneous and self-initiated "wildcat" strike, and not the product of majority action through the Union.[2] I do not believe that employees have a protected right to so circumvent their collective-bargaining representative. Therefore, I would not find the threat of a "wildcat" strike protected activity.

Similarly, I do not agree that Bridges' attempt to secure the reinstatement of Kelly is protected activity. Employees who are represented by a collective-bargaining agent and are aggrieved have at their disposal union representatives through whom the employees can seek redress. In my view, when employees have a duly elected and recognized union, efforts to assist colleagues by self-designated representatives undermine the exclusive statutory representative. I do not find such self-help attempts protected by the Act.[3] Accordingly, I would dismiss this aspect of the complaint.

II. THE ALLEGED 8(A)(1) VIOLATIONS

I disagree with my colleagues with regard to their adoption of two 8(a)(1) violations found by the judge. The first alleged violation occurred in early May when Project Manager Jim Joy and Superintendent Sam Aiton III approached Union Steward Mike Herndon as Herndon was returning

[1] In light of this finding, I find it unnecessary to decide if the Respondent violated Sec. 8(a)(1) by the two additional incidents found by the judge to constitute unlawful threats of discharge. See sec. IV,F of the judge's decision. Such a finding would be cumulative and would add nothing to the remedy.

[2] The conclusion that Bridges intended an unauthorized strike is bolstered by the frequent characterization of job actions as "wildcat." For instance, Bridges testified that, when he and Kelly returned to the day camp following Easter's refusal to hire Kelly, Kelly stated that he was "going to throw a wildcat," and Bridges responded that he would not cross a picket line. In addition, the judge dismissed the allegation that Bridges' discharge violated Sec. 8(a)(3) of the Act because there was no evidence that Bridges was involved in any union activity.

[3] Cf. *Emporium Capwell Co. v. Western Community Organization*, 420 U.S. 50 (1975).

to his work area after speaking with employees. Joy and Aiton asked Herndon what he was doing, and Joy said that he did not think Herndon should be walking around the project so much. According to Herndon, Joy also said that "he was going to put me up on a hill where I could see the whole job area, with an umbrella and a watering can, and that's where I would stay and sit for the whole 10 hours of the day." The judge characterized this incident as involving interrogation and harassment, and found Supervisor Joy's remark to be an unlawful threat to affect adversely the steward's ability to perform his duties in violation of Section 8(a)(1). I find nothing in this incident that can be characterized as coercive or destructive of employee rights. The inquiry to Herndon regarding what he was doing during his shift hours on the project is clearly permissible. I further find the cavalier remark about what they might do to Herndon does not rise to the level of an unfair labor practice. I would dismiss this aspect of the complaint.

The second incident occurred on 23 April. Employee Randal Fansler spoke to his steward Herndon concerning a pay dispute with the Respondent. A few hours later, Supervisor Joe Lively approached Fansler in the reclaim tunnel area and asked Fansler why he had come in contact with Herndon. Fansler replied that he was entitled to speak to a steward when someone tried "to screw" him out of pay. Lively replied that Fansler and the other carpenters were "crybabies" and walked away. Later that afternoon, Lively apologized to Fansler, stating that the pay dispute was a result of a misunderstanding and that he hoped Fansler would not quit. The judge and my colleagues find this was unlawful interrogation in violation of Section 8(a)(1). I disagree. Considering the brevity of the encounter, the informal setting in which it occurred, Fansler's honest and clearly unintimidated response, and the supervisor's subsequent apology, I cannot characterize this single question as coercive. See *Rossmore House*, 269 NLRB 1176 (1984). Therefore, I would dismiss this portion of the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge you because you engaged in union or other protected concerted activities.

WE WILL NOT threaten to terminate you because you engaged in union or other protected concerted activities.

WE WILL NOT threaten to affect adversely the job steward's ability to perform the duties and responsibilities of his office because of his activities on behalf of United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local No. 1780.

WE WILL NOT interrogate you with regard to your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Randal Fansler, Robert Kelly, or Wendell Bridges immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits they may have suffered as a result of our discrimination against them with interest.

WE WILL remove from our personnel records all references to the unlawful discharges of these employees and WE WILL notify them in writing that this has been done and that evidence of the discharges will not be used as a basis for future personnel actions against them.

BUCK BROWN CONTRACTING CO., INC. AND A.S.C. CONSTRUCTORS, A JOINT VENTURE

Douglas Gallop, Esq., for the General Counsel.
Michael W. Foster, Esq., and *Phillip M. Prince, Esq. (Shimmel, Hill, Bishop & Gruender)*, of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. This consolidated proceeding was heard before me in both Las Vegas, Nevada, and Phoenix, Arizona, on December 4 and 5, 1980,[1] and January 5–8 and 26–28, February 2 and 3, and March 2–4, 1981. On August 16, 1980, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated amended complaint, and notice of hearing, based on unfair labor practice charges filed by

[1] Unless otherwise stated, all events herein occurred in 1980.

Randal F. Fansler, an individual, in Case 31–CA–10035 on May 15, 1980; by Robert J. Kelly, an individual, in Case 31–CA–10043 on May 16, 1980; by Wendell Bridges, an individual, in Case 31–CA–10047 on May 19, 1980; by David Mark Doran, an individual, in Case 31–CA–10141 on June 27, 1980; and by John Angle, an individual, in Case 31–CA–10155 on July 2, 1980, alleging that Buck Brown Contracting Co., Inc. and A.S.C. Constructors, a Joint Venture (Respondent), engaged in acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). During the aforementioned hearing, the General Counsel was permitted to further amend the instant consolidated amended complaint, alleging that Respondent also engaged in acts and conduct violative of Section 8(a)(1) and (4) of the Act. Both in an answer and at the hearing, Respondent denied the commission of any unfair labor practices. All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue their respective positions, and to file briefs. Based on the entire record, on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a joint venture partnership, consisting of Buck Brown Contracting Co., Inc. (Buck Brown, Inc. and A.S.C. Constructors) and maintains an office and place of business at the Anaconda Mining molybdenum mine construction project near Tonopah, Nevada, where it is engaged in the construction of production facilities for the operation of the mine. Respondent, in the course and conduct of its business operations, annually purchases and receives goods and services valued in excess of $50,000 directly from suppliers located outside the State of Nevada. The consolidated amended complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The consolidated amended complaint alleges, Respondent admits, and I find that United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local No. 1780 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. About May 6, did Respondent discharge employee Randal F. Fansler in violation of Section 8(a)(1) and (3) of the Act?

2. About May 14, did Respondent discharge employee Robert J. Kelly in violation of Section 8(a)(1) and (3) of the Act?

3. About May 15, did Respondent discharge employee Wendell Bridges in violation of Section 8(a)(1) and (3) of the Act?

4. About May 30, did Respondent discharge employees David Mark Doran and John Angle in violation of Section 8(a)(1) and (3) of the Act?

5. Whether in late May or early June, Respondent refused to reinstate employee Kelly to his former position in violation of Section 8(a)(1) and (4) of the Act?

6. Did Respondent violate Section 8(a)(1) of the Act by the following acts and conduct?

(a) About April 24, interrogating employees regarding their union activities.

(b) In late April, threatening employees with discharge for complaining about perceived violations of a collective-bargaining agreement.

(c) About May 7, threatening to cease doing business because of employees' union activities.

(d) In early May, threatening to cease doing business because of employees' union activities.

(e) In early May, reprimanding employees due to their union activities.

(f) About May 15, threatening to terminate employees who cause union problems.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. The setting

Respondent is a joint venture, comprising Buck Brown, Inc. and A.S.C. Constructors, with the former acting as the managing partner. Since March 1980, and at all times material, Respondent, pursuant to a contract with the general engineering contractor Bechtel, has been engaged in the construction of certain portions of a molybdenum mine for Anaconda Mining. The construction project is located in an arid and remote section of the State of Nevada, near the town of Tonopah that is located approximately 200 miles from Las Vegas. With other contractors, including Brown and Root, responsible for other sections of the facility, Respondent contracted to construct the core portions of the mine facility: the crusher building, two reclaim tunnels, a radial arm stacker, and a concentrator building.[2] Each of these structures is constructed of steel-reinforced concrete. The record discloses that, in connection with the performance of its work, as of the commencement of the hearing, Respondent had employed approximately 370 employees, representing the various construction crafts at the project, and that over half of the workers have been carpenters, whose work consisted primarily of constructing the wooden wall forms of the building walls into which the concrete is poured. The record further discloses that Respondent's employees, as well as those of other contractors, lived and worked under what charitably may be termed as difficult conditions. As to the

[2] When molybdenum production commences at the mine, freshly mined earth will initially be deposited in the crusher building in which the raw earth ore will be subjected to intensive pounding. From there, the pulverized material will be sent to the reclaim tunnels for even more intensive grinding. Thereupon, the material will travel along the radial arm stacker that deposits the unrefined material into piles. Ultimately, the ore will be processed through the concentrator in which molybdenum will eventually be extracted from the ore.

latter, besides the oftentimes hazardous nature[3] of the work, there were continuing problems caused by the lack of cold drinking water and insufficient toilet facilities and the less than sanitary nature of the latter. As to the former, given the distance of the project from Las Vegas and the apparent lack of facilities in Tonopah, all workers were forced to live as close as possible to the jobsite. The area where project workers chose to park their trailers and/or campers or otherwise set up temporary living facilities became known as the dry camp and is located 3–4 miles from the mine. Respondent's Exhibit 31 shows this area to be flat and open, and Buck Brown, the president of Buck Brown, Inc., described the site as follows: "[I]t was pretty dry. There was no water, no electricity, no sanitary facilities at all." According to Brown, Respondent had no role in selecting the site as a living area; the workers leased the area from the State of Nevada. However, he did agree to provide the employees with drinking water for the camp, $9000 worth of electrical equipment, and toilets that were taken from the jobsite to the dry camp.[4]

The record establishes that neither Buck Brown, Inc. nor A.S.C. Constructors is a Nevada corporation and that the former is based in Arizona. Accordingly, as Buck Brown, Inc. operated as the managing partner of the joint venture, all Respondent's senior management at the jobsite came from Arizona and worked there with the cooperation of the Union. Among these individuals were Jim Joy, the project manager. In this capacity, Joy was responsible for overseeing Respondent's operations at the jobsite, acting as the management spokesman at safety meetings and at grievance meetings with union officials, approving the hiring of individuals, and acting as the ultimate management authority in discharge cases.[5] Directly beneath Joy in Respondent's managerial hierarchy at the jobsite and also from Arizona were General Foremen Joe Lively and Sam Aiton Jr. (Aiton Jr.) and Superintendent Sam Aiton III (Aiton III). These three individuals, who, Respondent stipulated, were supervisors within the meaning of Section 2(11) of the Act, were responsible for work at designated areas of the project and directly supervised the foremen in each respective area, assisting the latter with their job duties. Beneath Lively, Aiton Jr., and Aiton III were the crew foremen, each of whom was assigned a crew of workers. Those carpenter crew foremen with, at least, five carpenter employees on their respective crews normally performed no production work, responsibly directed the work of their crewmembers, were authorized to arrange transfers of employees between crews, and, most significantly, seemingly possessed unfettered authority to terminate employees. In this regard, the record further establishes that it was the practice of Jim Joy not to overrule or otherwise undermine the authority of the crew foremen in discharge cases. Among Respondent's carpenter crew foremen at relevant times were "Obie" Bodiroga, Dennis Jensen, James D. Easter, Donald R. Davis, Bruce Alford, and John P. Hendershot Jr.[6]

2. Respondent's relationship with the Union and attitude toward employee-members thereof

The record reveals that a prejob conference was held in Phoenix, Arizona, in late February; that such was attended by managerial representatives of Buck Brown, Inc. and A.S.C. Constructors; and that all aspects of the forthcoming Anaconda Mining Tonopah project were discussed. Buck Brown candidly admitted that Jack Carney, the president of A.S.C. Constructors, demanded that the project be done on a nonunion basis. Asserting that he was a former union member and that his company has never worked on an open shop basis and alluding to Buck Brown, Inc.'s membership in the Arizona Associated General Contractors and its status through the membership as a signatory to collective-bargaining agreements with several labor organizations, Buck Brown testified that he "felt pretty adamant about not doing that . . . . [and] prevailed over Mr. Carney's strenuous objections" that the project should be on a union shop basis. However, the testimony of another witness suggests that self-interest rather than any pristine prounion sentiments were involved in Brown's decision. Thus, according to Robert Flinchum, after Carney set forth his demand, Buck Brown replied that inasmuch as the project was a great distance from "home," he wanted to utilize union personnel as they would be the most qualified.

In any event, Brown subsequently had a meeting in Las Vegas with Elmer Laub, the business manager of the Union, Cliff Kahle, an assistant business agent of the Union, and representatives of the Teamsters Union and the Operating Engineers Union. Brown told the union representatives that although he personally wanted union personnel doing the work on the project, he "was under a lot of pressure from Anaconda and Bechtel and [A.S.C.] to do the job open shop." During the ensuing discussion, Brown learned that despite the aforementioned, his company might not be free from labor problems on the job. Thus, Laub warned that "we could probably expect a worse labor market situation in Las Vegas than we were accustomed to working with Phoenix," explaining that the Union's membership included "rebels" and "radicals." As to this, Brown requested that

[3] For example, the work of the carpenters required the employees to sometimes work at heights of, at least, 15 to 30 feet off the ground—either standing on wooden scaffolding or dangling freely while supported only by a safety belt. In view of this, safety appears to have been a major concern of Respondent, with weekly meetings held for this reason attended by all supervisors and employees. Other matters concerning employee working conditions were raised and discussed during the meetings.

[4] Robert Flinchum, Respondent's business and office manager at the jobsite, testified that there has been an unusually high degree of employee turnover on the project. He opined that such was "probably due to the remote area of the job, and working conditions . . . . Living accommodations were nonexistent or very primitive at best."

[5] Based on the record as a whole, I find Joy to be a supervisor within the meaning of Sec. 2(11) of the Act. Further, I shall draw no adverse inference from Joy's failure to testify at the hearing. It appears that, at the time of the hearing, Joy was working in Saudi Arabia and that Respondent was unable to contact him regarding testifying in its behalf. Accordingly, when testimony was offered as to Joy's conduct, I have particularly relied on the demeanor of the witnesses and the nature of the evidence in determining whether to credit such.

[6] The parties stipulated that Easter and Davis were supervisors within the meaning of Sec. 2(11) of the Act. The same appears true as to the others named, and I so find.

"anybody that would cause us any great . . . amount of problems" not be dispatched to the job by the Union. Subsequent to this meeting, Brown executed collective-bargaining agreements with all the construction craft unions, that between the Union and Respondent incorporated all the terms of the existing collective-bargaining agreement between several Nevada Carpenters union locals, including the Union, and the Nevada Associated General Contractors (R. Exh. 3) with the exception of the grievance and arbitration procedure (art. XV).[7]

The record further reveals that Respondent's project manager, Jim Joy, capitalized on Buck Brown's comments, regarding the pressure on Brown to perform the job on a nonunion basis, utilizing this as a "sword of Damocles" whenever union-related problems arose.[8] Thus, on May 7, Joy met with Laub and Kahle and employee-job steward Mike Herndon with regard to the discharge of employee Randal Fansler. During their meeting, Laub mentioned a threat by union members to picket the jobsite in protest of the discharge. According to Mike Herndon, after discussion concerning the legality of such action, Joy leaned back in his chair and said, "Ah, well, we're just going to give it all to Brown and Root.'" Cliffe Kahle testified that after being told of the possibility of a strike, Joy replied "that if things didn't work out and the men didn't get back to work, the basic thing that would happen was that Buck Brown would lose his contract . . . ." Joy added that the contract would probably be awarded to, and he thereupon gestured over his shoulder toward a window behind his chair, through which the Brown and Root yard was plainly visible.[9] I found Herndon and Kahle to be particularly credible and forthright witnesses and shall credit them as to the occurrence of this incident, noting that whether Joy mentioned Brown and Root or merely gestured toward its yard is a distinction without a difference.[10] In any event, the record also reveals that Joy repeated the identical threat at an early May safety meeting. According to the credible testimony of Herdon, while Joy was discussing the dry camp area, he said that he had given permission for its use by the Brown and Root employees "and that he didn't want any union problems . . . in the dry camp; and if there is any union problems, either there or in the job, that the whole job could go to Brown and Root, that they're waiting to take it all over."

Although Buck Brown denied repeating for his managerial staff at the jobsite Elmer Laub's warning that among the Union's membership were "rebels" and "radicals," the record discloses that Respondent's supervisors did little to disguise their anger and contempt and utilized blatantly coercive tactics to suppress such whenever carpenter-employees mentioned union involvement in job-related disputes, complained about their working conditions, or questioned supervisors about perceived contract violations and that most often manifestations of the foregoing were directed toward Job Steward Herndon, among whose duties was to present his membership's complaints to management. Herndon testified with regard to several instances of such harassment. He recalled an occasion in early May at which time while returning to his work area after speaking to employees at the reclaim tunnels, he was approached by Jim Joy and Aiton Jr. Each asked what he was doing there, and Joy said that he did not think Herndon should be walking around the projects so much and that "he was going to put me up on a hill where I could see the whole job area, with an umbrella and a water can, and that's where I would stay and sit for the whole 10 hours of the day." Aiton Jr. did not deny this comment, and I credit the forthright testimony of Herndon. On another occasion, a concrete pour was under way at the crusher building. Herndon approached the crew foreman, "Obie" Bodiroga, and asked the foreman if he wanted the men to take a lunch break. Bodiroga replied that he did and that he would oversee the pour in his crews' absence. Herndon replied that a crew foreman was not permitted to take possible overtime pay from a carpenter. Bodiroga thereupon said that an employee would be assigned to watch the remainder of the pour and also said, "We don't want to start a bunch of union problems out here." Bodiroga did not testify at the hearing, and I credit Herndon as to this conversation.

Don Davis, on whose crew Herndon worked, appears to have been the most vociferous of Respondent's supervisors in reacting to Herndon's job-related complaints. According to Herndon, his complaints to Davis usually concerned working conditions[11] or the latter's habit of

[7] Art. 4 of the memorandum agreement between the Union and Respondent reads as follows:

> 4. The provisions of Section XV of the above described labor agreement are excluded in their entirety from this memorandum agreement and the terms and conditions of such Section XV shall not apply in any manner to the union and the contractor signatory to this memorandum agreement. In the event a dispute should arise over terms of the agreement, the union and the contractor shall make an effort to resolve such dispute. However, failing such resolution, the union shall have the right to take any legal or economic action including, but not limited to, the right to withhold services of carpenters, refuse to dispatch carpenters, or strike an employer regarding the interpretation or application of any term or condition of the carpenters labor agreement or this memorandum agreement. This paragraph shall not be applicable to the enforcement of Section III of the labor agreement.

[8] The Union was well aware of the position of Buck Brown. Thus, Assistant Business Agent Kahle testified that Brown's comments were viewed as a "basic, open-shop threat . . . . And when I'm talking about the threat, that was the reason anytime anything happened up there that was critical to our position . . . we would hotfoot it up there . . . to straighten the problem out before it did blow out of context."

[9] Kahle testified that he was well aware that Brown and Root was the largest nonunion construction contractor in the United States and that the meaning of Joy's gesture was not lost on the participants: "that was a hammer that was used over the men's heads also."

[10] Honest men may differ as to their memory of the same event. Moreover, although I draw no inference from Joy's failure to testify in general and specifically about this incident, both Kahle and Herndon testified that Joy Lively was present at this meeting; he failed to deny the foregoing testimony.

[11] The record establishes that Herndon's complaints to working conditions normally were directed to the lack of cold drinking water and the unsanitary nature of the toilet facilities on the jobsite. The record further establishes that both concerns were based on the collective-bargaining agreement. Thus, sec. XVII(a) provides that both "iced drinking water" and "sanitary toilets" must be furnished by the employer on a jobsite at all times.

working with his tools.[12] Thus, one day, after he had been on the jobsite for approximately 1 month, Herndon spoke to Davis regarding the latter's use of his tools and the lack of decent working conditions on the project. Davis replied, "'You crybaby, you complain all the time about this. We're trying to get it worked out.'" Thereafter, according to Herndon, on "a couple of dozen times maybe" Davis repeated this comment after Herndon reported employee job-related complaints. The latter recalled one other particular conversation with Davis. Herndon was in the midst of complaining to another foreman about laborer-employees performing carpenter work when Davis approached. Davis asked about the nature of the complaint, and Herndon told him. Davis replied, "Yeah, that will be carpenters work. But we can't be starting all this union shit.'"

Davis admitted that Herndon complained to him several times regarding that lack of cold drinking water and the unsanitary condition of the toilet facilities and that Herndon also complained on occasion when Davis performed work with his tools.[13] Although he specifically denied calling Herndon a "crybaby" for expressing these admitted complaints, Davis' answers to the following questions cast doubt on his denial and, most significantly, illustrate Respondent's callous attitude toward its union member-employees:

BY JUDGE LITVACK:

Q. Well, did you ever call anybody cry baby on that project?

A. Yes.

Q. Who?

A. Yes, to the Nevada carpenters.

Q. Well you—

A. As a group.

Q. All right. Who did you make that statement to?

A. Old Sam, young Sam, to Joe Lively, to lots of people.

Q. Well to who?

A. I don't recall every person.

Q. Well, how many people did you tell that to? Did you tell that to other carpenters?

A. I don't recall.

. . . .

Q. Did you only make the statement to management officials of Buck Brown?

A. I don't recall.

Q. But you do—all right, who were you referring to when you made those statements? To anyone in particular?

A. No.

Q. All right. Now to what were you referring when you called the Nevada carpenters cry babies?

A. Their union contract is a lot different than Arizona's union contract and the circumstances that were up there where we were in a remote area,—and they expected to have when they came on the job the exact same things they had in Las Vegas, and when we were trying to suit that the best that we could, all being out of state and starting to familiarize ourselves, Mike Herndon was a great help in that he told us, you know, he brought things to our attention, but I mean, a lot of the stuff that they were crying about we were trying to work on and they just kept harping and crying about. And the—

Q. Who is they?

A. The carpenters from the State of Nevada.

Q. Yeah, but were these complaints directed to you personally?

A. No they weren't.

Q. So why were you using the term cry baby?

A. Because that is what I thought they were, and that is what I think they are still.

Q. Were you referring to Herndon when you used that terminology? Was he being a cry baby for bringing those complaints to you?

A. No.

Q. Then who was the cry baby?

. . . .

A. The Nevada carpenters.

Q. Okay, but not Mr. Herndon for bringing the complaints to you?

A. Not Mr. Herndon for bringing the complaints.

Q. All right. So the people who brought the complaints to Mr. Herndon were the cry babies?

A. Yeah.

Q. Did you have anyone in particular in mind when you did that?

A. No.

Q. Did you have any particular incidents in mind?

A. No.

Q. Did you have any particular complaints in mind?

A. No.

Q. Then why did you say cry babies? What were they crying about? Particularly, if you know?

A. I don't recall.

Q. But surely you had something in mind when you were calling everyone—all these Nevada carpenters cry babies. You must have had something in mind.

. . . .

MR. FOSTER: The witness is naturally trying to assist Your Honor in getting to the facts, I am not sure that he really knows what questions he is being asked.

BY JUDGE LITVACK:

Q. Do you understand the questions I am asking you?

A. Not really. I—I mean—

. . . .

Q. You did call those people cry babies?

A. Yes.

[12] The record establishes that Davis never had less than five carpenters on his crew. Sec. XXI of the collective-bargaining agreement, in part, states that a foreman, with five or more journeymen on his crew, may not work as a journeyman, except in assisting a journeyman or for the purpose of instruction.

[13] As to working with his tools, Davis asserted that such was limited to "when I felt it was appropriate or needed to assist in the work or in a teaching . . . opportunity or when I had to show somebody how I wanted the work done."

Q. All right. To management people and maybe to others?

A. I can't—

Q. Well, you either did or you didn't.

A. Yes, I called them cry babies.

Q. What I am asking you is what you were getting at when you made those statements. What were you referring to?

A. Is not a person entitled to his own opinion? Is not a person entitled to free conversation with somebody else?

Q. Whether you—

A. That was a—

Q. Go ahead.

A. That was a passing comment that they were a bunch of cry babies, that—

Q. Excuse me, was that a common held opinion by other management personnel of Buck Brown?

MR. FOSTER: Objection, Your Honor. How can he answer that?

JUDGE LITVACK:

Q. Was it?

A. Yeah, we agreed on it.[14]

As between Herndon and Davis, I credit the testimony of Herndon. As will be more closely examined and fully developed in regard to the discharge of employee Robert Kelly, I was not, at all, impressed with the demeanor of Davis as a witness.

The record reveals that other supervisors also reacted angrily and vituperatively to carpenter-employee complaints regarding perceived contract violations. Thus, Don Jackson and David Doran testified to a series of conversations with Joe Lively regarding the latter's alleged proclivity for performing carpenter work.[15] In early March, according to Jackson, 2 days after starting to work at the jobsite, he observed Lively loading materials and suggested to the latter that Lively have a carpenter do such work. Lively replied that he was the boss and could do what he wanted. Nothing more was said between them; however, Jackson subsequently was present on approximately four occasions during which Doran commented to Lively about the latter doing carpenter work. Jackson specifically recalled one such confrontation in mid-April when after both observed Lively doing rank-and-file work, Jackson and Doran approached Lively. Jackson stated that he had observed Lively doing carpenter work again and "I pleaded with him, asking to let us do the work for him . . . and that he should do his job as a general foreman and it could really help things get along." Doran then repeated what Jackson had stated, saying "that we believed things would go much smoother." After "indicating he didn't feel as though we had any legitimate complaint," Lively walked away. Fifteen minutes later, he returned and "said he'd like to have a heart-to-heart with us, man to man. He said that we were his two best workers, he appreciated the job we were doing, but that if we did not stop our complaining, that he was going to get our checks."[16] To this, both Doran and Jackson said that they wanted to do as much work as they could and would not complain as much about Lively's activities; Lively, in turn, responded that he would attempt to perform less employee work.

David Doran testified that he observed Joe Lively on four occasions during April performing carpenter work, normally either signaling to crane operators or hauling materials. On the initial three instances, Doran told Lively that if he needed more carpenters, Lively should hire them rather than perform the carpenter work himself. After Doran's initial complaint, Lively replied that he could do whatever he wanted but then said nothing after the next two complaints. Doran testified that the fourth incident occurred in late April. That morning, Doran observed Lively performing facets of carpenter work, and he and Jackson approached Lively, repeating that he should hire more carpenters rather than do their work. Lively apparently ignored them; however, that afternoon, Lively spoke to Doran and Jackson in the yard area. "He told us that if we continued to complain about him doing our work, he was going to have to get our checks." Also, "he had told us that we were the best carpenters he had on the job and he would hate to . . . get our checks for us but if we continued to complain . . . ."

Lively, who testified that he had been a union carpenter for 18 years, does not dispute that such a confrontation occurred and stated that he had two conversations with Jackson and Doran in March with regard to performing union work. On the first occasion, he was rigging panels when Doran and Jackson approached, and both said that he was required to stop doing the work. Lively responded that he did not have to stop as he had the right to do such work in Arizona and that he would continue until a business agent ordered him to stop. Doran replied that they would inform a business agent.[17]

---

[14] That Davis' admission was, in fact, Respondent's managerial response to and opinion regarding carpenter employee complaints is clear from the record. Thus, employee David Doran and Crew Foreman Don Jackson, who is a member of the Union, testified about a conversation between Jackson and General Foreman Joe Lively in late April. According to Jackson, who I found to be a particularly honest and candid witness, he was informed by another employee that Lively had labeled a carpenter crew, of which Randal Fansler was a member, "a bunch of crybabies because of their demands . . . ." Annoyed by Lively's suspected slur, after lunch that day, accompanied by Doran, Jackson confronted Lively and "asked him if he had called all the carpenters . . . crybabies, because of our demands . . . . He looked me straight in the eye . . . and said, 'No. No, I wasn't talking about you. It's the men down there,' point to the reclaim tunnel . . . . 'All they want to do is complain.'" Doran corroborated Jackson that the latter questioned Lively as to whether he had characterized the Las Vegas carpenters as crybabies and that Lively responded "that he was just talking about Randy Fansler and his crew." Joe Lively testified in great detail with regard to other matters but did not deny this conversation. Accordingly, I rely on the credible testimony of Jackson that this incident occurred, noting the corroborative testimony of Doran.

[15] Review of sec. XXI of the parties' collective-bargaining agreement discloses that general foremen are forbidden to work with their tools on a jobsite.

[16] Such appears to be an industrywide euphemism for a threat of termination.

[17] Lively, who admitted being unaware of the Nevada Carpenters Union work rules, stated that in order to avoid a serious problem, he asked Doran and Jackson to help him do the work—"And so I wasn't taking any work away from a man."

Later, according to Lively, when three more panels were ready to be loaded onto a truck, he again began performing the rigging work himself. Just as on the previous occasion, Jackson and Doran questioned his right, as a general foreman, to do carpenter work. Lively replied, calling Doran and Jackson his two best workers and stating that although he appreciated their efforts, he wanted them to stop complaining. "And I told them that the work was still there. If they wanted it, fine. If they didn't want it, there was the office right over there, and the guy didn't run out of ink; he could write a check for them. That's exactly what I told him."[18] Asked why he threatened Jackson and Doran with termination, Lively explained "because we'd have a lot of problems at the beginning of the job and having a hard time getting started and we couldn't afford to have any union problems."

Another supervisor who reacted in a similar manner to "problems" caused by members of the Union was Superintendent Aiton III. Wendell Bridges testified that immediately after being notified of his own termination on May 15 by Supervisor James Easter, he encountered Aiton III near Respondent's office trailer. According to Bridges, he asked, "Wasn't my work satisfactory?" Aiton III replied, "'That's not the point. I have to back my foremen up . . . . Anyone that creates any problems from now on is going down the road.'" Bridges impressed me as being a candid and reliable witness, and Aiton III, who testified at length as to other matters, did not deny this incident. Accordingly, I credit Bridges as to this matter, noting that the coercive comment by Aiton III is corroborative of the admissions of Don Davis and illustrative of Respondent's attitude toward members of the Union generally.[19]

B. *The Discharge of Randal Fansler*

1. Facts

Randal Fansler had been a journeyman carpenter for approximately 8 years prior to the instant hearing and a member of the Union since April 1977. Having been requested by name by Joe Lively, Fansler was dispatched to work for Respondent at the Anaconda Mining jobsite in Tonopah on March 28.[20] At the time Fansler reported to work at the mine project, there were only five or six carpenter employees, including Don Jackson and Dave Doran, working, and for the next 2 or 3 weeks they all worked on the same crew, constructing wall forms for the crusher building under the supervision of "Obie" Bodiroga.[21] Fansler testified that about April 16 or 17 Lively announced that carpenters were needed for work at the reclaim tunnels and that Bodiroga chose Fansler and an apprentice to work at that area, with Lively as the foreman. Two or three days later, Bodiroga spoke to Fansler near the reclaim tunnels, said that Respondent needed "a good man" to run things in that area, and asked whether Fansler would take that responsibility. Fansler refused. According to Fansler, 2 days later, on a Friday, Bodiroga spoke to him again with regard to his offer that Fansler assume responsibility at the reclaim tunnels. Fansler replied that he had reconsidered and would take the foreman position.

Fansler further testified that on the following Monday, April 21, he spoke to Lively at the reclaim tunnels area and that Lively gave him the job plans for that area "and said he would get me more money." Although admitting that neither Bodiroga nor Lively specifically stated that he was being promoted to a foreman position, based on the foregoing, the extent of his authority, and his job duties, Fansler believed[22] that he had been appointed as the carpenter crew foreman at the reclaim tunnels[23] and

[18] Lively asserts that after specifically being advised by Union Officials Laub and Kahle that he was not permitted to do such work, he ceased performing any rigging work on the project.

[19] Counsel for Respondent argues that there is no evidence to support a finding of general antiunion animus on Respondent's part. He points to Buck Brown, Inc.'s long history of stable labor relations in Arizona, the absence of prior unfair labor practices, the fact that Respondent met with union representatives on several occasions to settle disputes at the jobsite, and Respondent's efforts to solve, or at least alleviate, the aggravating cold drinking water and toilet facilities problems as evidence establishing that Respondent harbored no antiunion animus. Contrary to Respondent, I believe the weight of the above-described credited testimony and admissions strongly suggests that Respondent's supervisory staff at the Tonopah jobsite, either based on forewarning by Buck Brown, or early difficulties with the progress of work at the project, harbored a jaundiced view toward members of the Union, who they universally viewed as "crybabies" and were eminently capable of using blatant antiunion threats in order to avoid union problems. Thus, notwithstanding a history of peaceful labor relations in Arizona, given the pressure that Buck Brown had been under to perform the job on an open shop basis and Respondent's lack of familiarity with union attitudes and practices in Nevada, I have no hesitancy in crediting the evidence adduced by the General Counsel regarding Respondent's general antiunion animus. Likewise, Respondent's willingness to resolve jobsite disputes and to attempt to rectify working condition problems can be traced to the terms of the parties' collective-bargaining agreement, which requires such resolution of disputes and permits the Union to strike if disputes are not settled, and, thus, to its own self-interests.

[20] The record discloses that Don Jackson was among the first group of carpenters to be dispatched to work for Respondent in Tonopah; that he subsequently met Fansler and the latter expressed an interest in working on the mine project; and that Jackson recommend the hiring of Fansler to Lively.

[21] After only 2 or 3 days on the job, Fansler was laid off due to a lack of materials. According to Fansler, Lively assured him that he would be recalled as soon as materials arrived. Indeed, Fansler was quickly referred to the Tonopah jobsite on April 4 and began working again on April 7.

[22] Fansler testified that on April 21 and 22, he supervised the carpenter crew's work on the reclaim tunnels, checking that all form construction was performed in accord with Lively's instructions and making sure that proper materials were supplied and utilized. The record establishes such is the normal work of a foreman at the jobsite. Also in this regard, Don Jackson testified that Fansler reported to him that Fansler had been given a foreman position by Respondent.

[23] Contrary to whatever Fansler believed, Joe Lively testified that not only did the former specifically refuse to become a foreman, but also Fansler had ultimately been offered—and accepted—a leadman position. According to Lively, inasmuch as Bodiroga planned to be absent from the project for a short period and in recognition of his superior work, Fansler was offered a foreman job by first Bodiroga and then Lively. However, "he told us flatly. He said, I don't want the foreman's job." At that point, continued Lively, "I said, well, I'll just make it right by paying you more money and just call you a leadman. So that's what we did." Lively added, "And we also told him that we were just starting to build this thing and that if he produced . . . he would probably have a crew all of his own . . . ."

worked that day and the next under that assumption. By the following Wednesday, April 23, the carpenter crew under Fansler had increased from four to six employees. Therefore, on that day, prior to 9 a.m., Fansler approached Lively in the reclaim tunnels area and announced that he would no longer use his tools as there was more than the contractual quota of four men on his crew. Lively replied, "'You're not a foreman. I'm giving you welder's pay.'" Fansler responded that if such was his wage rate, he did not want supervisory responsibility and that he would rather work with his tools. Lively left the area, and Fansler announced to his crew that he was not a foreman as he was no longer being paid a foreman's wages;[24] that he no longer wanted the duties of a foreman; and that the crew should look elsewhere for supervision.

The record establishes that later that morning during a break period, Fansler spoke to Job Steward Herndon and complained that Lively was not properly compensating him for his job duties as a foreman. Fansler explained that he thought he had been performing foreman duties and believed he was, in fact, a foreman and said that he wanted the matter resolved. Shortly after lunch, Herndon reported back to Fansler that he had not received a satisfactory explanation from Respondent and that he had spoken to Elmer Laub, who would visit the jobsite the next day. Two hours later, at approximately 2 p.m., Lively approached Fansler in the reclaim tunnel area. According to Fansler, Lively "asked me why I had come in contact with [Herndon]." Fansler replied that when anyone tried "to screw" him out of pay, he was entitled to speak to the job steward in order to resolve the matter. Lively responded, "Well, all you Las Vegas carpenters are a bunch of crybabies anyway." After Fansler tried to defend the reputation of the Union, Lively turned and walked away. Later that afternoon, according to Fansler, in an obvious attempt to assuage Fansler and defuse a potential problem for himself and Respondent, Lively spoke to Fansler and apologized, stating that the foregoing resulted from a misunderstanding, that Fansler was a good worker, and that Lively hoped that Fansler did not quit.

Lively's efforts were too late and to no avail, for Union Officials Laub and Kahle visited the jobsite the next day. According to Kahle, he and Laub spoke to Lively that morning, raising the matter of Fansler's status as a foreman and his payment in that job classification. Lively replied "That Randy was a good hand and that he would like to give him the pay, but his management wouldn't allow him to pay the extra money on the situation." However, Lively did agree to make up what Fansler lost "in the guise of overtime pay," and Laub said that he would speak to Fansler. Kahle further testified that Laub presented the settlement to Fansler and that the latter accepted the bargain. Thereupon, according to Fansler, he and Laub met with Lively in the reclaim tunnel area. Lively repeated what he said the previous afternoon—apologizing and saying it was all just a big misunderstanding. "He shook my hand, said that we'd get the pay matter straightened out for the three days that I was foreman through welder's pay . . . and that he again hoped I wouldn't quit and needed me as a worker on the project." Fansler admitted that this settlement was a "satisfactory" resolution of the problem; that by his termination date, he had received all the payment which, he believed, was due him; and that I never had another cross word with [Lively]."

Lively's version of the resolution of the aforementioned dispute differs substantially from that of Fansler and Kahle. He testified that shortly after Fansler accepted the leadman position, while Lively was driving toward the crusher building, he observed Fansler talking to Herndon at least 100 yards from Fansler's work area. Later, Herndon approached Lively and said that there was a problem with Fansler because "he's short some money." Lively replied that the matter could be straightened out because money is not a problem. Thereupon, according to Lively, he spoke to Fansler who appeared to be upset. "I asked him . . . Mike says you got a problem." Fansler responded that "his pay was all messed up."[25] Lively replied that such could be easily corrected.[26] "And I took him in the truck over to the office and between Flinchum and I, we got it straightened out." Lively specifically denied the involvement of the Union in this matter—"[t]he Union officials didn't have anything to do with it."[27]

---

[24] According to the union collective-bargaining agreement job classification and wage rate schedule, "the hourly wage scale for foreman shall not be less than 10 percent more than the hourly wage scale of the craftsmen over whom they have supervision." Further, as of April 23, a carpenter welder earned 35 cents more per hour than a journeyman carpenter. As Fansler testified, he expected to earn more than what Lively apparently was willing to pay.

[25] Fansler and Lively contradict each other not only as to conversations regarding the pay dispute but also as to the basis of the dispute. Thus, to Fansler, the matter concerned his job classification and accompanying wage rate although Lively testified that the dispute merely concerned Fansler's receiving the wrong amount of wages. As between Fansler and Lively, I credit Fansler inasmuch as he impressed me as being a more truthful and forthright witness than Lively. Accordingly, I credit Fansler that the dispute concerned his entitlement to be paid at the foreman's wage rate. Further, notwithstanding that he may not have specified that Fansler would be placed in a foreman position, I do not credit Lively that he offered, and Fansler accepted, a leadman position at the carpenter welder wage rate. In this regard, I note that there is no such classification in the union contract; that Fansler, who exhibited a familiarity with the terms of the agreement, would not, I believe, have accepted promotion to a nonexistent position; and that Lively, who admitted no knowledge of the union contract, stated that there was not even a leadman classification in the Arizona Carpenters Union contract. Based on the foregoing, what is clear is that after he spoke to Lively on April 21 and after the latter handed the job plans to Fansler on that date, Fansler possessed a good-faith belief that he was the carpenter foreman at the reclaim tunnels.

[26] Lively denied that Fansler was a crybaby for going to Herndon with his problem but admits, "I asked him why he didn't discuss it with me first."

[27] Lively did admit that his resolution of Fansler's pay problem was disclosed to union officials—"That was mentioned, but we told them immediately it had already been taken care of." Lively places this disclosure at a time of a dispute with the Union over subsistence payments to union members. Such a meeting did take place, with Respondent ultimately agreeing to apply a double time rate but not agreeing to the Union's interpretation of the collective-bargaining agreement. However, whether Lively discussed the Fansler problem is highly doubtful inasmuch as, according to R. Exh. 25, the subsistence dispute was apparently resolved about April 11—at least 10 days prior to the date Fansler was placed in charge of the carpenter crew at the reclaim tunnels.

I have previously noted that Cliff Kahle impressed me as being an honest and candid witness and as between Fansler and Lively, I found the former to have been the more honest and forthright. Accordingly, I credit the testimonies of Fansler and Kahle as to resolution of the pay dispute—particularly with regard to the Union's involvement therein.[28] I further note that Lively asserted that he and Flinchum, Respondent's office manager, resolved the Fansler matter. However, Flinchum, who testified with regard to his involvement in several payroll disputes, did not corroborate Lively as to this matter.

After the resolution of his wage dispute, Fansler continued working at the reclaim tunnels on the carpenter crew. Approximately 1 week later, Lively informed Fansler that he was needed by Bodiroga to work on the latter's carpenter crew at the crusher building while concrete pours were ongoing and that when these were completed, he would be transferred back to the reclaim tunnels crew. Thereafter, until his discharge, Fansler worked on the crew that was supervised by Bodiroga. According to Fansler, during this time period he spoke to Bodiroga and Lively several times about returning to the reclaim tunnels area and both said that he could ultimately do so.[29] Finally, in the afternoon of May 5, Bodiroga told Fansler "that I was going to be transferred to the other crew shortly and he hated to lose me."

Fansler testified that at approximately 12 noon on May 6, Bodiroga informed him that he should have his tools ready by 2:30 p.m. as he would be transferred to Don Jackson's crew. Thereupon, Lively approached him in a pickup truck at that hour; Fansler loaded his tools in the back and got in. Contrary to his expectations, Lively handed him a check and a termination notice, saying "Here's your money."[30] After studying the notice, Fansler asked why he was being terminated "in that he knew darned well that I was a qualified workman . . . ." Lively replied "that he didn't need a reason to fire me, that my job was ended and that was that." Lively stopped the truck in the parking lot. Fansler got out, noticed Herndon standing nearby, and asked the latter to ascertain the reason for Lively's action. Thereupon, Fansler accompanied Herndon over to Lively, and Herndon asked Lively for an explanation. Lively replied that he did not need a reason—Fansler was fired and that was the end of it.

Meanwhile, a supervisory meeting was scheduled for that afternoon. Several foremen were already assembled in Respondent's trailer when Don Jackson arrived. He immediately was informed that Fansler had been terminated that afternoon; when Lively walked in, Jackson asked him what had happened and for an explanation. According to Jackson's credible testimony, Lively replied that he did not want to talk about it; Fansler had been fired, "that's it." Jackson said, "'You just have a personal problem with Mr. Fansler . . .'"; Lively responded, "'Yes, I do.'" Jackson thereupon said that he had specifically requested certain men for his crew; that Lively had agreed; and "that if he didn't hire Mr. Fansler back, that if he didn't put him on my crew, that I would quit . . . ." Lively just shrugged his shoulders and said okay.[31] Jackson stormed out of the meeting and met Jim Joy as the latter was walking toward the trailer. Jackson explained what had happened and asked Joy to rehire Fansler. Joy "told me that he . . . did not want to override Mr. Lively's decision."

After speaking to Herndon and Lively, Fansler returned to the dry camp and began informing other carpenters of his discharge. Previously angered over perceived contract violations, including the lack of cold drinking water and sanitary toilet facilities, the carpenter employees became incensed over what they believed constituted an unjustifiable discharge and calls for a wildcat strike ensued. That night, Fansler telephoned Laub in Las Vegas and requested that he and Kahle come to Tonopah as soon as possible.

The record establishes that both Laub and Kahle visited the jobsite and dry camp the next day (May 7) and that their major concern, in view of the perilous nature of the Union's relationship with Respondent, was the possibility of a wildcat strike over Fansler's termination. Thus, according to Kahle, investigating the strike threat was his and Laub's main concern that day. Kahle testified that on arriving at the mine project he, Laub, and Herndon met with Jim Joy and Lively in Respondent's office trailer. Regarding Fansler, Lively stated that Fansler "had dropped the ball" since the union officials had last been on the project. Kahle asked, why, inasmuch as 2 weeks before Lively said that Fansler was a topnotch hand. Rather than offering an explanation, Lively repeated that Fansler had just "dropped the ball" after acting as foreman, Laub then stated that he want to patch up all differences and to have Fansler return to work. Joy responded that he would back up his men and that when a decision was reached, he would back them "100 percent." At that point, according to Kahle and as described above, the discussion concerned the possibility of a wildcat strike. The meeting concluded with a discussion of the drinking water and toilet problems and Respondent's efforts to correct these. While stating that Aiton Jr. also attended the meeting, Herndon's testimony regarding what was discussed is corroborative of Kahle's version. According to the job steward, the meeting

[28] This, I believe, constituted Lively's second dispute with the Union—first being his rebuke from union officials regarding his practice of performing unit work, including the rigging of panels. The record establishes that as a union member, Lively was well aware of the possibility of fines for violating union work rules.

[29] When Fansler was transferred to Bodiroga's crew, Don Jackson was promoted to foreman over the carpenter crew at the reclaim tunnels. Jackson credibly testified that he immediately requested that Lively transfer Fansler back to his crew and that Lively agreed, saying he needed Fansler at the crusher building because of a manpower shortage there and Jackson could have Fansler on his crew "once they got squared away . . . ." Jackson further testified that he renewed his request for Fansler about 10 days later and that Lively replied that the work on the crusher building was almost completed and Fansler would be placed on Jackson's crew that afternoon or as soon as possible. According to Jackson, Lively said nothing about problems with Fansler's work either in these conversations or at any supervisory meetings, during which Lively did complain about other employees. Lively did not deny this testimony.

[30] The termination notice bore a checkmark next to the notation, "Too slow—poor work."

[31] Lively failed to deny this conversation.

began with Kahle raising certain problems regarding working conditions—including the lack of cold drinking water and the unsanitary toilet facilities. Joy replied that Respondent was trying to obtain an ice machine and have the outhouses cleaned more frequently. Kahle then mentioned Fansler and asked if he could be reinstated onto another crew, under a new foreman. "Joy said that it was his foreman's decision to terminate him and that he was going to back his foreman's decision on that matter." Laub responded that Fansler had been offered a foreman's job 2 weeks earlier and that he did not understand why he was now being terminated for poor, slow work. Lively replied "that in that two week period he had just changed his attitude toward the whole job anymore." Thereupon, after discussing the employees' threat of a wildcat strike, as described above, Joy agreed that Don Jackson could return to work as he performed well as a foreman and Respondent wanted him back.[32]

Denying that the pay dispute, at all, influenced his decision, Lively stated that Fansler was discharged "because his work had ceased almost. From the time that the incident happened . . . he steadily progressed downhill. He wouldn't do anything that you programmed him to do. He would do it, but it was slow and just an attitude that you can't live with when you're trying to build something." As an example, Lively testified that on one occasion, he approached Fansler and observed the latter just standing there, looking around. When he asked why, Fansler replied that he needed "some 4 x 4's." Lively further testified that a stack of such pieces was located no more than 20 to 30 feet from where Fansler stood. Admitting that, as was his practice, he never discussed what he noticed about Fansler's deteriorating work habits with the latter, Lively testified that he did speak to Fansler on one occasion subsequent to the resolution of the pay dispute: "I asked him . . . if he still had any bad feelings . . . about the money or anything else. And he said, no. But he didn't produce."[33] Finally, Lively corroborated Fansler that the latter was extremely upset over the reason for his termination, saying, "I don't understand how you can do that . . . ."[34]

Regarding his work after having been transferred to Bodiroga's crew on the crusher, Fansler testified that the former praised his work many times. Further, according to Fansler, he did things "beyond the call of duty" such as spotting a bad tie rod and reporting it. He denied ever having been told what to do. Corroborating Fansler, carpenter Charles DeLong, who reported for work at the jobsite on approximately April 21 and worked alongside Fansler at the crusher building, testified that Fansler was a very good carpenter and that he heard no foreman ever complain about his work. Also with regard to Fansler's job performance, Mike Herndon, who was on the carpenter crew at the crusher building, testified, "I thought he was a good carpenter and a knowledgable carpenter."

The General Counsel contends that a cause of Fansler's termination was his complaining about the jobsite toilet facilities during the weekly safety meetings. According to Fansler, these meetings were held each Monday and were attended by all employees, including the entire supervisory staff. Jim Joy conducted the sessions; the purpose was twofold—to discuss, promote, and improve safety conditions and to "air" employee gripes and job complaints. Fansler further testified that employees generally complained about the less than adequate toilet facilities, the lack of cold drinking water, and other perceived contract violations. He stated that he was one of the complainers and that he spoke up at several meetings regarding the number of and the condition of the toilets on the jobsite. During cross-examination, Fansler admitted that several other employees raised the identical complaint and that his complaints did not "stand out."—"I just said, 'Hey, the toilets stink. They're not clean.'"

2. Anaylsis

The consolidated amended complaint alleges that Fansler was discharged by Respondent in violation of Section 8(a)(1) and (3) of the Act. The General Counsel contends that Fansler was terminated by Respondent for having engaged in protected concerted activities, including complaining about the lack of and unsanitary nature of the jobsite outhouse facilities, demanding foreman's wages, and involving his job steward and ultimately the Union in the latter dispute. Counsel further contends that Lively harbored animus toward members of the Union and that the reasons that were advanced by Respondent for Fansler's discharge are pretextual in nature. Contrary to the General Counsel, Respondent argues that there exists no record evidence of animus towards Fansler inasmuch as his pay dispute was satisfactorily resolved and apparently not a subject of contention at the time of his discharge. Further, it is argued that Fansler was terminated for cause and not based on his involvement with the Union or other protected concerted activities.

As recognized by the parties, a determination of the legality of Fansler's discharge and, indeed, that of the other alleged discriminatees is governed by the traditional precepts of Board law in Section 8(a)(1) and (3) discharge cases, as modified by the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Thus, in order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish (1) that the individual engaged in union or other protected concerted activities; (2) that the employer had knowledge of the activities; (3) that the employer's actions were motivated by union animus; and (4) that the discharge had the effect of encouraging or discouraging membership in a labor organization. *WMUR-TV*, 253 NLRB 697, 703 (1980). Further,

[32] Fansler testified that Kahle and Laub came to the dry camp after speaking to Joy at the jobsite. No work was performed that day because of inclement weather conditions. The carpenters were gathered in a group, and after the union officials arrived, Laub reported on his meeting. He announced that Respondent would rehire Jackson but not Fansler. When calls for a strike ensued, Laub calmed them, advising that a strike would be detrimental to their, and the Union's, interests.

[33] Apparently this conversation occurred prior to Fansler's transfer to Bodiroga's crew, for, according to Lively, the move was influenced by his hope that Fansler would improve.

[34] As to whether at the time of Fansler's discharge, he was aware that Fansler had received all the extra wages to which he was entitled, Lively testified, "I think he'd received it the week before if I'm not mistaken because it wasn't that much."

the General Counsel has the burden of proving the aforementioned by a preponderance of the evidence. *Gonic Mfg. Co.*, 141 NLRB 201, 209 (1963). Although the aforementioned analysis was easily applied in cases in which the employer's motivation was straightforward, conceptual problems arose whenever dual motivation was involved—the presence of both a lawful cause and an unlawful cause for the discharge. In order to resolve this ambiguity, in *Wright Line*, supra, the Board established the following causation test in all 8(a)(1) and (3) cases involving employer motivation. "First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. at 1089. Two points are relevant to the foregoing test. First, in concluding that the General Counsel has established a prima facie violation of the Act, the Board will not "quantitatively analyze" the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act. Id. at 1089 fn. 14. Second, although apparently warranting the identical analytical approach, pretextual discharge cases should be viewed as those in which the "defense of business justification is wholly without merit." Id. at 1084 fn. 5.

Herein, there can be no question that Fansler engaged in union and other activities protected by the Act. Thus, I have previously concluded that, although unstated, Fansler believed in good faith that he had been promoted by Lively to the position of foreman;[35] that Fansler's demand for higher wages was based on the formula for determining the wage rate for a foreman as set forth in the Union's collective-bargaining agreement; that Fansler sought and obtained the aid of the Union in his pay dispute with Respondent; and that union officials were instrumental in concluding a settlement of the dispute with Respondent. The Board has long held—and Respondent concedes—that in seeking an employer's compliance with the terms and conditions of an existing collective-bargaining agreement, an employee engaged in union and protected concerted activities within the meaning of Section 7 of the Act and that an employer engages in conduct violative of the Act by disciplining an employee for the activity. *NLRB v. Pioneer Concrete Co.*, 637 F.2d 698 (9th Cir. 1981); *City Disposal Systems*, 256 NLRB 451 (1981); *Corry Jamestown Corp.*, 238 NLRB 320 (1978); *Adams Delivery Service*, 237 NLRB 1411 (1978); *Roadway Express*, 217 NLRB 278 (1975). This is so notwithstanding that an employee may act on an individual basis, for complaints under a contract are to the interest and benefit of all employees and the punishment of a complaining employee necessarily may tend to inhibit other employees from implementing the protections afforded by a union contract. *Bay-Wood Industries*, 249 NLRB 403, 406–407 (1980); *Corry Jamestown*, supra at 323; *Delta Electric*, 236 NLRB 1108, 1112 (1978). Further, the merits of the employee's complaint are irrelevant. *G & M Underground Contracting Co.*, 239 NLRB 78 (1978); *Perrenoud, Inc.*, 236 NLRB 804, 805 (1978); *United Parcel Service*, 234 NLRB 483, 491 (1978). The Board has also long held that efforts to enlist the assistance of a union in raising complaints concerning working conditions or grievances under a collective-bargaining agreement constitute union and protected concerted activity and that disciplining an employee for doing so interferes with, restrains, and coerces employees and tends to discourage union activities in violation of Section 8(a)(1) and (3) of the Act. *Harper & Arterburn Co.*, 255 NLRB 760 1981); *Perrenoud, Inc.*, supra; *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

Respondent further concedes—and the record clearly establishes—that it was well aware of Fansler's contractual assertion and the Union's role in the dispute. What Respondent disputes is the assertion of the General Counsel that the aforementioned were the motivating factors in Lively's decision to discharge Fansler. Close scrutiny of the record establishes the existence of ample evidence of union animus. Initially, I reiterate my prior conclusions that Respondent's supervisory staff generally viewed members of the Union as "crybabies" for constantly complaining about perceived contract violations and that supervisors utilized blatantly coercive threats to dissuade union employees from engaging in protected activities. Specifically, as to Joe Lively, I have credited the testimony of Don Jackson, as corroborated by David Doran, that Lively threatened to terminate them if they did not stop complaining that he was performing carpenter work in violation of the collective-bargaining agreement. In this regard, Lively admittedly complied only on being informed by union officials that to continue to do so would be in violation of the Union's work rules, which, he was well aware, would subject him to the possibility of fines. That the involvement of the Union in work disputes was an anathema to Lively is clear from his comment to Fansler (why didn't Fansler come to him first) on learning that the latter had complained to job steward—and union agent—Herndon about his wage dispute. In that same conversation, Lively called Fansler and the other union employees "crybabies." I specifically credit Fansler's uncontroverted testimony in this regard, noting that Lively did not controvert the testimonies of Jackson and Doran that Lively later repeated this same epithet to Jackson. Finally, in agreement with the General Counsel, I found wholly incredible Lively's testimony in which he attempted to minimize the involvement of the Union in Fansler's wage dispute. Not only is such at utter variance with the credited testimony but also it clearly buttresses the contention of the General Counsel that the involvement of the Union in Fansler's dispute—and the concomitant possibility of internal union disci-

[35] I specifically reject the argument of counsel for Respondent that Fansler could not have believed that he had been promoted to the position of foreman. This argument is solely based on Fansler's admission that neither Bodiroga nor Lively uttered the word "foreman" to Fansler. However, Fansler credibly testified that on April 21 and 22 he performed all the duties that are associated with that position. Further, I have discredited the testimony of Lively that Fansler accepted promotion to a leadman position. Finally, and most significantly, based on the Union's collective-bargaining agreement, there exists no other position but foreman to which Fansler could have been promoted in order to "run things" at the reclaim tunnels area.

pline for his conduct—was the motivating factor in Lively's discharge of Fansler.

Respondent makes two main arguments in support of the lack of union animus. First, counsel contends that Fansler's wage dispute was settled and no longer a matter of controversy when Fansler was terminated. In this regard, counsel points out that both Fansler and Kahle testified that the pay dispute was satisfactorily resolved; that, according to Fansler, Lively was apologetic to him and to the union officials over the problem; that, according to Fansler, his relations with Lively after the settlement of the dispute were extremely cordial; and that both Herndon and Kahle testified that Lively mentioned Fansler's deteriorating job performance as the reason for his discharge. Although quite cogent and logical, I nevertheless am not persuaded by these arguments for the following reasons. Lively did not deny Don Jackson's credible testimony that at a supervisor's meeting subsequent to Fansler's discharge, in response to Jackson's comment that Lively had a personal problem with Fansler, Lively said, "'Yes, I do.'" I find this comment to constitute, in effect, an admission, for I believe it more likely that Lively would be candid as to the true reasons for his conduct in the "friendly" atmosphere of a supervisor's meeting than in the "adversarial" atmosphere of a meeting with union officials. Again, Lively's attempt to minimize the involvement of the Union in the pay dispute strongly supports this view and suggests that such was, indeed, his personal problem with Fansler. Further, in agreement with the General Counsel, aware of the possibility of internal union disciplinary procedures, Lively's apologetic attitude toward Fansler and the union officials at the settlement meeting and his later cordial attitude toward Fansler is not surprising. Respondent's second contention concerns the timing of the discharge, occurring at least 12 days after resolution of the pay dispute and at a time when such was "seemingly a dead issue." This, I believe, obfuscates the true issue, for rather than the dispute itself, the record establishes that Fansler's involvement of the Union in the matter was the motivating factor in his discharge. Also, according to Fansler, his discharge coincided with the completion of Respondent's compliance with the terms of the pay settlement, a fact, the record reveals, about which Lively was apparently aware. Finally, a lapse of time between displays of animus and a discharge does not, without more, negate substantial evidence of unlawful animus. *Lauderdale Lakes General Hospital*, 227 NLRB 1412, 1413 (1977). Based on the foregoing,[36] and the record as a whole, I believe that the General Counsel has made a prima facie showing that Respondent's decision to terminate Fansler was based on unlawful considerations—his involvement of the Union in his wage dispute with Joe Lively.[37]

The burden of proof, thus, shifted to Respondent to demonstrate that it would have reached the same decision and taken the same action notwithstanding Fansler's protected concerted activities. In establishing its defense, Respondent relies solely on the uncorroborated testimony of Lively who testified that after the resolution of the pay dispute, Fansler's job performance "steadily progressed downhill" and his work was slow. The only example that Lively was able to relate was an incident during which Fansler, apparently ignorant of a nearby supply of wood, stood helplessly, unable to locate a 4 by 4 piece of wood. Analysis of the record convinces me that this evidence is pretextual and wholly without merit. Initially, as I have previously stated, Lively did not impress me as being a particularly honest or candid witness, and I cannot credit his testimony. In this regard, Lively did not controvert the credible testimony of Don Jackson that, while identifying several other bad workers, Lively never once complained about Fansler's deteriorating work quality and, in fact, on two occasions promised that Fansler would be transferred to Jackson's crew when work permitted. Also, if Fansler's work was deteriorating, it is strange that Lively would not speak to the former and either ascertain why or warn him to improve or face discharge. Yet, Lively admitted not doing so, and I cannot accept his explanation that he normally left such problem employees alone. In this regard, Lively could not even give an explanation to Herndon and Fansler for the latter's discharge. Further, the individual who was most closely aware of Fansler's job performance prior to his discharge was his foreman Bodiroga. Yet, Respondent failed to call him as a witness to corroborate Lively's unsubstantiated testimony. Presumably, he would not have done so.[38] Finally, several witnesses testified to the quality of Fansler's work as a carpenter, stating such was of a high quality. Accordingly, I do not believe that Respondent has met its burden of proof as to the discharge of Randal Fansler and conclude that he was discharged in violation of Section 8(a)(1) and (3) of the Act.[39]

---

[36] I note Respondent's reliance on *Vogt-Conant Co.*, 248 NLRB 500 (1980), as support for its arguments regarding the discharge of Fansler. Suffice to say, if I viewed the facts as urged by counsel, the decision would be determinative. I believe the record clearly supports—and warrants—the conclusion that Respondent did, indeed, harbor animus towards Fansler for his actions.

[37] I place no reliance on Fansler's "complaints" at Respondent's weekly safety meetings as a motivating factor for his discharge. Thus, his conduct was hardly disruptive or outstanding, and Fansler admitted that his toilet complaints merely echoed those of numerous other employees.

[38] Utilizing the *Wright Line*, supra, rationale, it was Respondent's burden to establish that Fansler would have been discharged notwithstanding his union activities, and it was, therefore, Respondent's obligation to call its own corroborative witnesses. In this regard, it cannot be said that Bodiroga would have been a neutral witness, for as Respondent's foreman, he presumably was under the control of that party. I am not unmindful of the Board's recent dicta in *Wayne Construction*, 259 NLRB 571 at fn. 1 (1981), but note that the cited decision involves a neutral employee witness. Bodiroga can hardly be so considered. See *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977).

[39] Counsel for Respondent points to the testimonies of Herndon and Kahle as corroboration for Lively's explanation for Fansler's discharge. I do not agree. Although both testified that, during the meeting subsequent to the discharge with Lively and Joy, the former explained that Fansler was discharged because of deteriorating work, in light of Lively's admission to Jackson that there was a personal problem between Fansler and himself and Lively's statement to Fansler at the time of the discharge that Lively did not need a reason to fire Fansler, I believe that Lively was less than candid in his reply to the union officials on May 7.

C. *The Discharge of Robert Kelly*

1. Facts

Robert Kelly, who has been a carpenter by trade for 10 years and a member of the Union for approximately 3 years, visited Respondent at the Tonopah jobsite on April 23, accompanied by two other carpenters. They spoke to Lively and Aiton Jr. and the latter took their names and telephone numbers. Kelly was called "by name" the next day at the Union's hiring hall and was dispatched to work for Respondent at the mine project. He reported for work that same day (April 24) and worked until his discharge on May 14. The record reveals that Kelly's foreman during his employment by Respondent was Don Davis; that in his initial few days of work he worked directly for Davis, constructing wall forms in the ball-and-sag area of the concentrator building; that he was transferred to the yard area for the next 2-week period, working under a working foreman, Larry Perrin;[40] and that from May 9–14, Kelly again worked directly under Davis at the concentrator building, building wall forms.

The record establishes that all employee complaints to Respondent, regarding working conditions, potential grievances, or other matters, were to be channeled through the job stewards—Mike Herndon, for example. The record also establishes that when Herndon, in particular, passed the complaints on to Respondent's supervisory personnel, he was careful never to identify the employee involved. Despite this procedure, the testimony of Robert Kelly indicates that he was not reticent about himself complaining—or, at least, making his feelings known—to his foreman, Don Davis, with regard to perceived contractual violations or other matters. Thus, according to Kelly, during his initial period under Davis' direct supervision, he observed Davis, who never had less than five carpenters on his crew, on more than one occasion working with tools or otherwise performing unit work. Kelly testified that after one such instance, he asked Davis if he was allowed to work with his tools, and Davis replied that he was a working foreman.[41] In addition, besides speaking out about these matters at the weekly safety meetings, during which Davis was in attendance and presumably listening, Kelly complained directly to Davis on several occasions regarding the unsanitary condition of the toilet facilities near the concentrator building and the lack of cold drinking water and/or the lack of an ice machine to cool the tepid drinking water that Respondent did provide. Kelly, who stated that he was the only member of his crew to not follow procedures and to complain directly to Davis about the conditions, recalled one particular conversation regarding the outhouse facilities. He approached Davis and said that he did not understand why, on a multimillion dollar project, Respondent could not afford another toilet. Davis replied that cleaning was difficult because of the location of the project, and Kelly responded that Respondent could obtain more toilets. Other than these matters, Kelly testified that he also complained to Davis regarding a shortage of necessary tools, working at excessively dangerous heights, and the daily starting time.[42]

According to Kelly, what precipitated his discharge was an incident that occurred on the Friday (May 10) prior to his discharge. He testified that Davis' crew, including Vern Hawkins, Larry Perrin, two carpenters named Dick _____ and Jim _____, and himself, was stripping (dismantling) a form that morning and that inadvertently the kickplate, which holds together the bottom of the form, was not removed. Davis became angered at this and directed Kelly to hook the form to a crane and fly the form from its setting. Kelly thereupon completed rigging the form, and while Perrin directed the crane, the remainder of the crew went to land the form. As this procedure commenced, Perrin and Davis argued over whether the failure to remove the kickplate would affect the stripping procedure, with Davis stating that such would not. He was wrong, for as the crane pulled the form out, the latter was ripped apart. By this time, it was approximately 9:30, and with all the other crews taking the normal morning break then, Perrin and Dick _____ just left the area. Seeing this, Kelly turned to Davis, and asked him for the time. When the latter responded, 9:30, Kelly said, "'Well, I guess it's break time,'" Obviously annoyed about what had just occurred, Davis replied, "Kelly, you're not getting a break today." Kelly retorted that the union contract mandated a morning break period[43] and that he was going to report Davis' conduct to Job Steward Herndon. Not bothering to reply, Davis walked away. He did, however, return to where Kelly, Hawkins, and Jim were working approximately 15 minutes later and said, while still visibly upset, "Kelly, go take your break." Thereupon the three carpenters took their morning breaks.[44] Davis did not deny the occurrence of this incident, and I credit the testimony of Kelly as to the incident.

Kelly was terminated on May 14. He testified that at 2:30 that afternoon Davis called him aside and handed

[40] Although not particularly clear in the record, Don Davis apparently was the foreman in overall charge of the carpenter crew in the yard area. Larry Perrin was paid a foreman's wages to "supervise" the yard work but, for some reason, refused to accept the duties and responsibilities of a foreman.

[41] Kelly testified that he also spoke to Herndon about this problem.

[42] Don Davis specifically denied that Kelly or any other member of the crew, under his supervision, ever complained to him about the condition of the toilets or the lack of cold drinking water. As to whether Kelly ever complained to Davis regarding the latter's use of tools or performance of union work, Davis generalized during direct examination that no crewmember ever so complained; however, when asked specifically about Kelly on cross-examination, Davis was considerably less emphatic: "Not that I can recall . . . . That's a possibility, but I don't recall." I previously stated that I was not at all impressed with Davis' demeanor while testifying. Further his testimony was contradictory at times and, particularly regarding the events preceding and causing Kelly's termination, was vague and at variance with his pretrial affidavit. On the other hand, at least as to the matter of his discharge, Kelly impressed me as being candid and forthright. Accordingly, when they conflict, I shall credit the testimony of Robert Kelly.

[43] Sec. XVII(j) of the parties' collective-bargaining agreement provides, in part, that so long as work progress is not impeded, a "reasonable allowance" for a refreshment break during the first half of a shift may be granted but that such is not an absolute requirement. Kelly admitted that such could be given on a staggered basis by the employer.

[44] Notwithstanding receiving permission from Davis to take his normal break, Kelly subsequently reported the incident to Herndon.

him two checks and a termination notice, with the notation "work unsatisfactory." Kelly asked Davis what the problem was, and Davis, other than saying he was not happy with Kelly, refused to give the latter any specific reason for the discharge. According to Davis, when he handed the checks and the termination notice to Kelly, Davis said, "I got a present for you, Bob." Asked why he spoke in such a flippant manner, Davis explained, "Presents can be good or bad depending on the way he looks at them." As to whether Kelly replied, Davis gave conflicting testimony. Thus, on direct examination, Davis recalled that Kelly responded, "I knew this was coming"; while during cross-examination, Davis abbreviated Kelly's alleged response to "I've expected it." This testimony must be contrasted with Davis' pretrial affidavit, dated just 8 days after the conversation (May 22), in which he professed not being able to recall *any* response by Kelly. I am convinced that Davis fabricated this testimony and do not credit him as to Kelly's alleged response. Further, Davis' admitted insensate opening comment to an employee who Davis was about to terminate is indicative of either utter and supreme naivete, or, more likely, his true feelings toward a perceived union crybaby.

Respondent, almost entirely, relies on the testimony of Don Davis to establish that the discharge of Robert Kelly was solely based on his unsatisfactory job performance. Davis, on whose decision Kelly was terminated, testified that his rationale for doing so was based on his conclusion that Kelly was not "doing the job to my satisfaction, wasn't performing as he should." Davis further testified that four separate incidents, each occurring within the 5-day period immediately preceding the discharge, cumulatively caused him to reach this decision. Before analyzing each separate occurrence, inasmuch as Davis steadfastly maintained during both direct and cross-examinations that no less than four instances, taken together, of work-related difficulties resulted in his decision to terminate Kelly, it is crucial to a determination of Davis' credibility in this regard to point out that in his aforementioned pretrial affidavit, given 8 days after discharge, Davis could recall only two such incidents and stated, "I cannot think of any other specific incident of Kelly's poor work."[45] In any event, the first of these incidents, according to Davis, occurred 4 days prior to the discharge, and began when he asked Kelly to go inside a form and predrill holes that were needed so that snap ties could be inserted through the form. After a short period of time, Davis observed that Kelly wasn't doing the work—"I mean he'd get frustrated, set the drill down, walk around, try and pick it up and try and do it again." Finally, Davis testified that he was forced to demonstrate how to perform the task correctly. Regarding this incident on cross-examination, Davis admitted that such was not included in his pretrial affidavit; that he did not observe Kelly performing his work on a continuing basis that day; and that, contrary to the impression created by his direct testimony, rather than Kelly's inability to perform the work or his lack of understanding of its requirements, what allegedly irked Davis was that Kelly did not take the proper amount of time to complete the job—"in the time that it took me to get back to where he was, he hadn't moved far enough."

Kelly testified that predrilling holes in forms was standard work and that he was never disciplined for doing such improperly. However, he did testify regarding an incident that occurred shortly before his discharge and did involve the drilling of holes. According to Kelly, he and Don Carle, a welder, were assigned by Davis to predrill holes in a form but they soon experienced difficulty because Davis gave them improper dimensions for the holes and, as a result, the ends of the rebar would not fit into the holes. Kelly testified that they did not have large enough drill bits to compensate and that when he and Carle mentioned this to Davis, the latter said to "just use a sledge hammer and pound the knuckles in." Kelly and Carle proceeded to follow instructions, but the process was taking an excessively long time. Finally, David yelled over to them, asking what was taking so long. Carle yelled back that more men were needed. "And the next thing I knew, [Carle and Davis] were in a heated argument, with Davis ending [it] by threatening to fire Carle."

Davis testified that the second alleged contributory incident occurred the next day. Kelly was working on a form that day and, according to Davis, at one point in the day, he observed Kelly hanging by his safety belt and doing no work for approximately 3 or 4 minutes. Davis asked why, and Kelly replied that he was out of nails and was waiting for a laborer to bring him a new supply. Davis responded that Kelly was not helpless and should get his own nails. After Kelly protested, Davis repeated the order, and the former came down from his working height and went to the supply area. Davis further testified that what annoyed him was that "a good carpenter is one that will do the work. If he is out of nails, he goes and gets his nails."[46] However, during cross-examination, Davis candidly stated it was not unusual for a carpenter to make such a request of a laborer and that even Davis supplied Kelly with needed materials on occasion. Further, Aiton Jr. testified that, depending on the circumstances, Kelly's actions in this instance were not necessarily indicative of poor work.

During his direct examination, Kelly candidly admitted the incident, placing it on the day prior to his discharge. He testified that while working from a safety belt high on a form, he had no nails left and requested his partner, who was on the ground, to obtain a new supply. Davis, who was standing nearby when Kelly made his request, heard Kelly do so and responded that Kelly had no time to wait for others and that he should get the nails himself. Thereupon inasmuch as no nails remained in the crews' supply bin, Kelly walked across the jobsite in order to obtain a full box of nails. On return-

[45] Asked why his memory was so much better 10 months later, Davis testified that when he gave his pretrial affidavit, he had just been discharged from the hospital wherein he had undergone treatment for a gunshot wound. Averring that he gave his affidavit under the influence of pain and a lack of sleep, Davis further testified that he missed just 1 day of work and was given no drugs that day.

[46] According to Davis, the laborer had not yet appeared; thus, Kelly had not yet even ordered a new supply of nails.

ing, according to Kelly, Davis was waiting for him and said that Respondent was on a tight schedule and that Kelly did not have time to waste waiting for someone to hand him nails.

Soon after this incident on either May 11 or 12 and, according to Davis, based on the aforementioned two instances, he approached his general foreman, Aiton Jr., outside the concentrator building, said that he was unhappy with Kelly's work performance and that if he did not improve, Respondent should "get rid of Kelly." Aiton Jr. asked if Davis had talked to Kelly about the problem and when the foreman said no, Aiton Jr. "suggested that I go talk to Bob and then we observe him for a couple of days and see if his performance improved."[47] Accordingly, Davis testified, approximately 30 minutes later, he pulled Kelly away from the other crewmembers and said that he was unhappy with Kelly's performance and that it needed improvement. Davis testified that Kelly somehow indicated that he understood. Kelly denied such an incident, testifying that the only such conversation, as set forth above, occurred on his return from obtaining a supply of nails.

The third alleged instance of Kelly's poor work prior to his discharge involved his failure to properly tie the corners of a wall form, which work consisted of overlapping 2 by 4 pieces of wood and nailing them together. Davis testified that he assigned Kelly this work, that he checked no less than three times as to whether Kelly completed the work, and that on each occasion, Kelly had not yet performed his assignment. Finally, according to Davis, after ordering Kelly to do the work a third time, the latter did so. During cross-examination, Davis averred that Kelly's actions irritated him: "The consistency of having to go back and say, I need this done . . . and then come back and find the person is not working on it or hasn't started it and then having to again tell him to do it and come back the third time and have to say, do it now." Despite this irritation, 9 days later in his pretrial affidavit, Davis could not recall this incident as contributing to his reasons for terminating Kelly. For his part, Kelly denied ever having been told more than once by Davis to perform any particular task.

Davis testified that the final instance of Kelly's poor work performance occurred on the day of the discharge in the morning. According to Davis, while he was supervising work at the top of a wall form, he asked Kelly to go get a piece of 4 by 4 wood of a certain length. A pile of wood was nearby, and Davis observed Kelly take what appeared to him to be an inordinate period of time choosing a piece of wood—picking up and discarding several pieces of wood of the wrong length before selecting a larger piece and cutting it to the proper length. Davis further testified that he was forced to yell to Kelly to hurry as the wood was necessary to the crew's work. On cross-examination, Davis stated that what irritated him was the fact that as an experienced carpenter, Kelly should immediately have selected the longer piece and cut it rather than needlessly searching for a piece of wood of the exact length necessary. Notwithstanding that the entire elapsed time for Kelly to find the correct length of wood was just 5 minutes, Davis insisted that time was of the essence as a concrete pour was scheduled to commence shortly thereafter. As to the significance of this incident, Davis admitted that this "one incident alone would not have resulted in [Kelly's discharge]," but averred that taken together with the prior three incidents, the 4 by 4 incident was important enough to have been a factor in the discharge.[48] Finally, I note that although he testified that Kelly did ultimately bring him a piece of wood of the correct length, Davis contradicted his pretrial affidavit in which he stated, "I recall that shortly before I discharged [Kelly] I sent him for some 4 x 4's and he didn't get them. I don't recall if I asked him about it or if he said why he didn't get them." Kelly denied the occurrence of such an incident.[49] After answering questions regarding the above four incidents during cross-examination, Davis was asked if he could recall any other incident as being a factor in his decision to terminate Kelly. He answered, no, and was immediately confronted with his pretrial affidavit in which he stated, "Some of his work we had to do over, although now I cannot recall any specific instances." Thereupon, Davis averred that he was able to recall that such, indeed, was a factor in the discharge decision but that he still could not remember any specific occasions.

Besides Davis, Respondent relied on the testimony of Foreman Dennis Jensen to establish that Kelly was a poor worker. Corroborated to this extent by Kelly, Jensen testified that Kelly worked on his crew for 1 day because another crewmember was ill. According to Jensen, he assigned Kelly to precut some plywood, but the latter did not appear to understand the assignment. Consequently, Kelly did not do the work correctly, and two other men were required to tear down and reconstruct what Kelly had previously done. Jensen further testified that he spoke to Davis that afternoon about Kelly. The latter asked how Kelly was doing, and Jensen replied, ""Piss poor."" Davis responded that Kelly was slow and that he was not pleased with him. Davis added that he did not know what he was going to do with Kelly and "in a joking way was asking, hoping I would take him." Jensen replied that he would get his own help, rather than use Kelly. Davis directly contradicted Jensen as to this conversation. Thus, not only could Davis not recall whether Jensen expressed any opinion as to Kelly's work, he specifically denied expressing his

[47] Aiton Jr. testified that prior to discharging Kelly, Davis reported the occurrence of just one work-related problem with Kelly and that such involved Kelly yelling to another employee to bring him (Kelly) a supply of nails—an act that did not please Davis. Aiton Jr. further testified that Davis reported this in one of two conversations before Davis terminated Kelly.

[48] In the regard, Davis agreed that taken individually, each of the prior incidents was also trivial.

[49] Davis asserted that after the last incident, he became convinced that Kelly was not a competent worker. Accordingly, Davis testified he approached Aiton Jr. outside the concentrator building at approximately 11 a.m. and told the latter that he should get Kelly's check because he was not "packing his weight or holding up his end of the project." The general foreman asked what he should put on Kelly's termination slip as a reason for the discharge, and after a short discussion, Davis instructed Aiton Jr. to mark whatever was necessary to note that Kelly was fired.

own opinion as to Kelly's work ability: "I don't think I stated it to Dennis, no."[50]

2. Analysis

The consolidated amended complaint alleges that Kelly was discharged by Respondent in violation of Section 8(a)(1) and (3) of the Act. In support, the General Counsel argues that by complaint about perceived contractual violations and other matters affecting employees' terms and conditions of employment to Don Davis and at the weekly safety meetings, Kelly engaged in activities that were privileged by Section 7 of the Act. Counsel further argues that Respondent terminated Kelly because of the activities inasmuch as Davis, in particular, believed all union supporters were crybabies and was not reticent about disguising his disgust at union problems on the project. Contrary to the General Counsel, Respondent argues that the former has failed to establish that Kelly ever actually engaged in protected concerted activities, asserting that Kelly's comments at various times to Davis were hardly in the nature of "complaints" about working conditions, and that there exists no evidence of unlawful animus. Respondent further argues that Kelly's discharge was motivated by, and directly resulted from, his poor job performance.

As with Randal Fansler, the record amply supports the conclusion that Kelly engaged in union and other activities privileged by Section 7 of the Act. Thus, notwithstanding Davis' denial, I have credited the testimony of Kelly that, alone among members of Davis' crew, he either complained or commented directly to Davis concerning several perceived contractual violations and working conditions generally. Regarding the former, Kelly on one occasion questioned Davis about the latter's use of his tools and on other occasions complained to his foreman about the lack of sanitary toilet facilities and properly chilled drinking water. Also, in an incident, which, the General Counsel contends, precipitated his discharge, Kelly exacerbated an already awkward situation, involving the destruction of a wall form, by intemperately complaining to Davis about the latter's refusal to permit him to take a morning break right at that moment. Inasmuch as the aforementioned matters are based on the Union's collective-bargaining agreement, Kelly's conduct in complaining to or questioning Davis about them constitutes union and protected concerted activity within the meaning of Section 7 of the Act. *Pioneer Concrete Co.*, supra; *City Disposal Systems*, supra; *Roadway Express*, supra. Even if not cognizable under the Union's collective-bargaining agreement, Kelly's foregoing complaints, as well as those relating to working conditions in general, including a shortage of necessary tools and work at excessively dangerous heights, involve matters of common and vital concern to all Respondent's employees and, therefore, must be found to constitute protected concerted activity whether or not Kelly acted on an individual basis. *Cal-Walts, Inc.*, 258 NLRB 974 (1981); *Rose's Stores*, 256 NLRB 550 (1981); *Air Surrey Corp.*, 229 NLRB 1064 (1974); *Alleluia Cushion Co.*, 221 NLRB 999 (1985). Finally, although Respondent belittles the nature of Kelly's remarks, questions, or complaints to Davis, the fact is that all such related to either contractual matters, working conditions, or both. Accordingly, I find that all such activity, no matter the form, was protected by the Act.

Regarding whether Kelly's aforementioned conduct influenced Davis in his admitted decision to terminate Kelly, for the General Counsel argues that such was the sole motivating factor. On the other hand, counsel for Respondent argues against the existence of unlawful animus, citing Kelly's own testimony that whenever he voiced a "complaint" or questioned Davis' conduct, the latter responded in measured tones and not vituperatively. The latter argument, at first glance, is appealing; however, to find it meritorious would be to ignore the ample and persuasive[51] evidence of animus. As to this, the record fully warrants the conclusion that such unlawful animus was in the nature of a personal antagonism, on Davis' part, directed toward Kelly and based on the latter's propensity to complain and to do so directly to Davis. Several factors lead me to this conclusion. Initially, not only did Davis believe that the Las Vegas carpenters as a group were nothing more than crybabies for raising what they perceived as legitimate contractual complaints but also, I believe, he harbored some sort of resentment toward the union member/-employees for deliberately "starting all this union shit" at the outset of the project when Respondent was experiencing significant job-related problems—"they expected to have when they came on the job the exact same things they had in Las Vegas, and when we were trying . . . the best that we could, all being out of state . . . but I mean, a lot of the stuff that they were crying about we were trying to work on and they just kept harping and crying about." Also, contrary to Davis' denial and expressed lack of animosity toward him or his position as a union agent, I have expressly credited the testimony of Job Steward Herndon that Davis, on at least two dozen occasions when the former brought employee complaints to his attention, called Herndon a crybaby for doing such. Specifically as to Kelly, however mild his actions may have been, I note that not only did Kelly act outside the standard communications channel by bypassing Herndon and registering his own complaints with Davis but also Kelly was the *only* member of Davis' crew to so act. That the inference is warranted that Davis, who already perceived the union employees, as a group, to be crybabies for the exact same conduct, took Kelly's conduct personally and was so motivated in terminating him, is clear when one considers Davis' admitted remark to Kelly on terminating the latter—"I got a present for you,

[50] Throughout his testimony, Dennis Jensen impressed me as being biased in Respondent's behalf and as a witness not about tailoring his testimony to fit Respondent's version of the facts. In this regard, the record discloses that Jensen was made a foreman by Respondent at the jobsite under rather questionable circumstances. I do not credit his testimony and, noting the contradictory testimony, do not credit the occurrence of either the Kelly incident or the contents of the alleged conversation between Davis and Jensen.

[51] The admonition of the Board in *Wright Line*, supra, is instructive at this point—that in analyzing whether a prima facie violation of Sec. 8(a)(1) and (3) of the Act has been proven, a quantitative analysis of the motivation evidence is not required.

Bob." I believe that such an insensate and utterly unprovoked remark is indicative of an individual who harbors unlawful animus against an employee and further believe that Davis' ludicrous explanation for his comment is not worthy of belief. In this context, finally, the events of the previous day, wherein Davis, already upset over the accidental destruction of a wall form, reacted angrily when Kelly began complaining about not being allowed to take a morning break at that time and threatening to report the matter to Mike Herndon, gain perspective as being nothing less than the precipitating cause for the discharge. In short, I must conclude that the General Counsel has established a prima facie violation of Section 8(a)(1) and (3) as to the discharge of Kelly.

Turning now to a determination as to whether Respondent has met its own *Wright Line* burden of proof and established that Kelly would have been terminated anyway for legitimate business reasons and notwithstanding the existence of unlawful animus, three factors are of crucial importance. First, Don Davis testified that just four work-related incidents—Kelly's failure to predrill holes in a sufficient period of time, Kelly's delay in working while awaiting a laborer to obtain some nails, Kelly's failure to properly tie the corners of a wall form, and, lastly, his delay in selecting a 4 by 4 piece of wood of the proper length, all occurring in the 5-day period immediately preceding the discharge—were determinative in Davis' decision to terminate Kelly. Davis further testified that each incident, considered separately, was trivial and would not have resulted in discharge but that taken together, a pattern emerged that revealed that Kelly was a poor worker who Respondent could no longer tolerate as an employee. Second, in his pretrial affidavit, which was given just 8 days after Kelly's discharge, Davis named just two incidents, Kelly's delay in working while awaiting a laborer to obtain a supply of nails and his delay in choosing a 4 by 4 piece of wood of the proper length, as contributing to his discharge decision and swore that "I cannot think of any other specific incident of Kelly's poor work." The last critical factor necessary to evaluate Respondent's defense is Kelly's own testimony regarding his job performance. Thus, he specifically denied the occurrence of the other three alleged instances of his poor work; while candidly admitting the occurrence of an incident involving the procuring of a new supply of nails—albeit a different version than that of Davis. Further, while denying the predrilling of holes incident, Kelly testified to a similar incident involving an argument between Davis and another employee.

With Respondent's economic justification for the termination of Kelly resting on Davis' testimony that four separate incidents of poor job performance by Kelly, taken as a whole, formed the basis for his decision to terminate Kelly, I specifically discredit his testimony regarding the two alleged incidents (the predrilling of holes and the failure to properly tie the corners of a wall form episodes) not mentioned in the pretrial affidavit, which was taken a scant 8 days after Kelly's discharge. In this regard, I believe Davis' failure to include the incidents as contributory factors to his decision is highly enlightening inasmuch as an individual's memory of an event is sharpest immediately after the occurrence and dulls significantly as time passes. *Flatiron Materials Co.*, 250 NLRB 554, 559 (1980). Also, I do not credit Davis' explanation for his markedly clearer memory at the hearing than at the time he gave his pretrial affidavit[52] and specifically credit Kelly's denial of the incidents.[53] Accordingly, then, if Kelly would have been terminated regardless of his protected concerted activities, the remaining incidents that must form the basis for such are the "nails" incident and the "4 x 4" incident.

Initially, I note that it would be intellectually dishonest and illogical to conclude that these latter two incidents justify the discharge of Kelly inasmuch as, by Davis' own admission, *four* separate incidents, taken together, were the basis for the discharge; as, based on my credibility resolution, at least half of Respondent's defense has been fabricated; and as, again by Davis' own admission, each incident, considered separately, was trivial and did not justify termination. More specifically, as between the conflicting testimonies of Davis and Kelly, I credit the latter's version of the nails incident. Not only did I find Kelly to be a more trustworthy witness, but also I note that his version is buttressed by the testimony of Aiton Jr. who testified that Davis reported on this incident during the first of two conversations prior to the discharge of Kelly, a report which, in effect, corroborates Kelly's version of the incident. I also note the grudging admission by Aiton Jr. that Kelly may not have done anything wrong that day. Finally, notwithstanding the admitted triviality of an incident that consumed just 5 minutes, I credit the testimony of Kelly that the 4 by 4 incident did not occur. In these circumstances, taking into account the record as a whole and in agreement with the General Counsel, I do not believe that Respondent has met its burden and establish that Robert Kelly would have been terminated notwithstanding his protected concerted activities and find that Kelly was terminated by Respondent in violation of Section 8(a)(1) and (3) of the Act. *Pioneer Concrete Co.*, supra; *City Disposal System*, supra.[54]

[52] Interestingly, Davis' memory had to be *refreshed* via his pretrial affidavit for him to recall that he also listed as a factor in Kelly's discharge the necessity to redo his work on occasion. Of course, given the time lapse, Davis was unable to recall specific instances of this assertion.

[53] I specifically credit Kelly's testimony regarding the confrontation between Davis and Don Carle and believe that Davis utilized this incident as the basis for his predrilling of holes incident and fabricated Kelly's involvement.

[54] Inasmuch as I have concluded that Respondent acted in violation of Sec. 8(a)(1) and (3) of the Act in terminating Kelly, I find it unnecessary to decide whether Respondent violated Sec. 8(a)(1) and (4) of the Act by refusing to rehire him. In this regard, I note that there is no evidence in the record that Respondent has yet offered to reinstate Kelly to his former position, that the practical remedy for the violation, which I have found, encompasses, except for the wording on the notice, the standard remedy for an 8(a)(1) and (4) violation, and that, in any event, I have grave doubts as to the credibility of the evidence, which was adduced by the General Counsel in support of the latter allegation, including the testimony of Kelly concerning events subsequent to his discharge.

D. *The Discharge of Wendell Bridges*

1. The facts

The record establishes that Wendell Bridges, who has been a carpenter for 10 years and a member of the Union since 1978, was acquainted with Robert Kelly, that the latter informed Bridges in mid-April that Respondent was continuing to hire carpenters at the Tonopah Mine project, and that one day in late April Bridges took a day off from work and drove up to the jobsite and spoke to Joe Lively about working for Respondent. Bridges informed Lively that he was capable of doing any work that Respondent required, and the latter, after taking down Bridges' name and address, said there was a possibility that he could use Bridges. Thereafter, about May 8, Respondent requested Bridges by name from the Union's hiring hall. Bridges immediately telephoned Lively at the jobsite and received permission to report for work on the following Monday.

The record further establishes that Bridges reported for work at the Tonopah Mine project at approximately 7 a.m. on Monday, May 12, and that he was assigned to work on Obie Bodiroga's crew at the crusher building. After working about 1-1/2 hours, Aiton III approached Bridges and ordered him to report to the office area and help construct forms. He did so, and at noontime Aiton III again came over to where Bridges was working and informed the latter that he was scheduled to report for work the next day at 3 p.m. and would thereafter be assigned to work on the night shift. Bridges responded that he had not been hired to work nights; Aiton III replied that Bridges' name was on the work schedule and walked away. However, Aiton III returned 10 minutes later but this time with Joe Lively. Lively asked Bridges why he would not work nights, and the latter replied that he had not been hired for that shift. Lively said that he thought he had hired Bridges with that understanding, and the latter said no. Finally, Lively asked Bridges if he would try it for a couple of weeks, and Bridges agreed to do so as an experiment.[55]

That night in the dry camp area, Bridges spoke to another carpenter, Bob Micheli, who informed Bridges that he had been appointed the union steward on the night crew and that the shift was to be 9 hours and not the 10-hour shift that Bridges believed all the other employees of Respondent were working.[56] Angered that he was going to lose anticipated wages by working nights, Bridges drove to the jobsite at 6:30 a.m. the next morning (May 13), went to Respondent's office trailer and encountered Joe Lively. Bridges told Lively that he did not mind working at night but that he now learned that the shift was to be 9 hours and that it was not fair because all the other crews were working 10-hour shifts. Lively responded that such was the way it was and that there was nothing he could do about it. Bridges asked if he could work on another crew. Lively replied, no, that the night crew was all he could give to Bridges and that if he did not want it, "I don't know what to tell you." According to the uncontroverted testimony of Bridges as to this conversation, he and Lively became more agitated as the meeting progressed.[57]

Because he was not scheduled to work until later that day, Bridges returned to the dry camp. Approximately 2 hours later, he walked to Bob Micheli's trailer. Jim Easter, the night-shift foreman, was speaking with Micheli when Bridges arrived. During the ensuing conversation, according to Bridges, Easter said that the crew was shaping up to be a good crew and that while he also did not like working and being paid for just 9 hours, he felt that eventually the crew would work a 10-hour shift. Bridges agreed, saying that it was unfair to work reduced hours and estimating a loss in wages of perhaps $200 per week. Bridges further stated that as he and Easter spoke in Micheli's trailer, Easter consumed the entire contents of a pint bottle of vodka. The latter did not deny these events.

That afternoon, the newly formed night crew[58] reported for work at 3 p.m. and was assigned to work in the crusher building area, finishing the construction of wall forms for the eventual pouring of concrete, the material of which the crusher building walls were to be constructed. Bridges testified that for the initial period of the shift, he predrilled holes in a wall form for an inside wall of the building, which work was necessary for the insertion of 6-foot long steel rods, called doaker rods, which rods tie, or hold, the wall form together while the concrete is being poured, and that for the remainder of the shift, he was involved in the actual process of tying that particular form. The record discloses that the work of tying a wall form is a laborious and at times dangerous (because of the heights at which the men are required to work) process that necessitates the utilization of no less than three carpenters, two stationed outside the opposite walls of the form and one inside. The aforementioned danger results from the requirement that, although able to rest their feet on 4 by 4 wood blocks extending from outside the form, called slim soldiers, the two outside workers, in order to freely and properly perform their work, must support themselves solely by means of their safety belts. This should be contrasted to the degree of danger faced by the inside worker, who is able to stand on a grid of the doaker rod that are spaced about 16 inches apart. The work involved in the process

[55] Bridges admitted that the nature of this complaint, concerning being scheduled on the night crew, was purely personal and involved no one else.

[56] James Easter, who was to be the night crew foreman, testified that he spoke to Bridges sometime that evening and that Bridges told him he did not want to work nights. According to Easter, he responded that he had no control over assignments and that he had nothing to do with Bridges being on his crew. The latter replied that he was going to speak to Joe Lively and that he was sorry for going over Easter's head. Although Bridges did not deny either the occurrence of or substance of this conversation, I note that, according to Bridges, he had previously agreed to work on the night shift, as an experiment, that afternoon and that what he was upset about that night was the matter of the number of hours that the crew would work.

[57] During cross-examination, Bridges testified that after meeting with Lively, he sought out Job Steward Herndon and reported on his argument with Lively over the night crew's work hours. Herndon counseled Bridges to be patient as the Union was trying to work things out with Respondent. Thereupon, Bridges returned to Lively and apologized.

[58] Besides Easter, Micheli, and Bridges, the crew consisted of journeyman carpenters Larry _____ and Dale _____, apprentice carpenter Pat Curtis, a laborer, and two crane operators.

is as follows: one outside man (the feeder) must lean backwards (completely dependent for support on the safety belt) and push with his hands or force, by banging on the end of the rod with a hammer, the 1-1/4 inch in diameter steel doaker rod through the predrilled hole in the panel; thereon, the inside man pulls the rod through that hole and guides it to the corresponding hole in the opposite panel of the form; and, next, the other outside man pulls the rod through his side and secures it by means of affixing a steel plate, termed a cat-head, over the protruding end of the doaker rod (the feeder also places a cat-head around his end of the rod). It must be borne in mind that inasmuch as the outside men, by necessity, must have their hands free in order to work with the doaker rods and to catch and tie the cat-heads, they cannot work efficiently if forced to hold onto the slim soldier, perhaps nervous at the heights at which the work must be done. On this night, according to Bridges, he, Micheli, and Pat Curtis, the apprentice, were tying the aforementioned wall form, with Bridges working as the feeder, Micehli as the opposite outside man, and Curtis working inside the form. Bridges testified further that he spoke just once to Jim Easter during work that night, that Easter simply asked if he was encountering any problems, and that Bridges answered that he was not. In this regard, however, Bridges later admitted that although he had worked at heights previously, he had done so standing on a scaffolding and had never worked solely supported by a safety belt. Further, Bridges admitted that Micheli and Curtis accused him of working too slowly that night; however, he insisted that if any delays occurred, such were caused by the crews' laborer who was slow in passing up materials to him.[59] Notwithstanding this, Bridges also insisted that he was working as fast as someone with experience in that type of work.

Contrary to Bridges, Easter testified to a far different version of the events of that night. Contradicting the former, Easter stated that he assigned Micheli to be the feeder, that Bridges was designated as the other outside man, and that the latter's work consisted only of the placing of cat-heads over the doaker rod ends that protruded from his side of the wall form.[60] Further, according to Easter, early on it became rather obvious to him that Bridges was extremely nervous working at heights while supported solely by his safety belt. Thus, Easter observed Bridges constantly trying to work while holding onto the slim soldiers, the protruding 4 by 4 blocks of wood. This, in turn, caused Bridges to be unable to catch the metal cat-heads that were being passed up to him by the laborer. The resulting work delays necessitated Easter to speak to Bridges twice: "I told him to loose of that slim soldier with his arms and hands, and lean back on the belt, and . . . catch the material the laborer was passing up to him." Bridges replied each time that he would try. Besides the latter's perceived nervousness working off the safety belt, Easter stated that he observed Bridges having difficulty with the hand signals necessary for signaling the crane operator during the "flying" of the wall form panels. Accordingly, because he allegedly believed that Bridges' nervousness at heights could possibly endanger the other crewmembers, Easter further testified that he decided to speak to Bridges during the crews' break period in the job shack. "I asked Bridges if he would transfer back to the day shift and work on the ground . . . because he was too nervous and he was a threat to my people below him."[61] Bridges said no as "he would feel like a pussy if he took a transfer . . . . He wanted to tough it out." Easter next offered Bridges the inside man job; Bridges also refused this job, saying "he wanted to tough it out and be a man . . . ." Nothing more was said. Finally, as to the content of Bridges' testimony, Easter denied both that the laborer caused any delays that night and that Bridges mentioned this to him. Called as a rebuttal witness, Bridges, for his part, denied the occurrence and the substance of the alleged break period conversation between Easter and himself, and he also denied any conversations with Easter regarding signals for the flying of panels or problems in that regard.

In any event, the night crews' shift ended at 11:30 that night, and everyone returned to the dry camp. Bridges testified that he wandered over to Micheli's trailer and that while standing outside, he heard several people speaking about him. In particular, Micheli opined that Bridges was just too slow, and the apprentice, Pat Curtis, said that if Bridges could not do the work, he should let someone else do it and leave. At that point, according to Bridges, he entered the trailer, saying that if there was talk about the crew, it should be in the presence of all of them in the open. Easter then said that the discussion was closed and that he had made a decision that because Curtis had more experience working outside off a safety belt, he was going to put Bridges inside for 2 or 3 weeks until he was familiar with the work. Bridges responded that he could do the job and that he thought he had done a good job that night. Easter agreed but said he would still put Bridges inside so that he could familiarize himself with the work. Bridges specifically denied refusing this change in work duties, and stated

[59] Bridges testified that the slow work of the laborer caused both Curtis and Micheli to yell to him from time to time, "Come on, let's go." However, according to Bridges, neither of them could observe how the laborer was working; therefore, all they could know was that there was some slowness, with someone at fault.

[60] Easter testified in a contradictory manner as to why Bridges was assigned to work as the "other" outside man this night. Initially, Easter averred that he had no idea of Bridges' capabilities and that he assigned Bridges to that position as "somebody had to do it and nobody was on the ground . . . I figured he'd be all right to do it." Later, Easter testified that he formed the opinion from observing Bridges' work the previous day that other workers were more capable. Also, Bridges allegedly told him that "he had never been around like [Respondent's]" before. Accordingly, he did not give Bridges the feeder job because "I figured I had three of four . . . people a little bit more capable than he was."

Bridges specifically denied informing Easter that he had never worked on such a job as the crusher job that night.

[61] During cross-examination, Easter altered his testimony regarding Bridges transferring to the day shift: "I believe I told him I'd help him transfer because he was good on the ground." He was also able to recall telling Bridges that "he was too scared to work above, and he was dangerous. Unless he'd get shaped up, he couldn't handle the job and I wanted him out of there."

that the meeting ended with Easter saying Aiton III was happy with the crews' work that night.[62]

Bridges next testified that as the crewmembers reported to the jobsite for work on the afternoon of May 14, it began to rain. Observing the weather Easter informed the crew that he and Aiton III were going to check on the condition of the work area. While awaiting their return, Bridges noticed Robert Kelly speaking to another carpenter in the vicinity of the office trailer.[63] Kelly came over to Bridges and informed him of his termination. After a few minutes, Easter returned and walked over to where Kelly and Bridges were standing. Bridges introduced Easter to Kelly and inquired whether Kelly could be hired for the night crew. Easter asked why, and Bridges responded that Kelly had just been laid off and Bridges thought Easter could utilize Kelly on his crew. Easter replied that he would get back to Bridges after telling the others that there would be no working that day. Ten minutes later Easter returned and said to Kelly, "I can't do nothing for you, son. . . . I'm sorry, but I've got a new crew here and I don't want any problems." Thereupon, according to Bridges, he (Bridges) asked what if he spoke to Lively. Easter replied, "I wouldn't advise going over my head." Kelly, during his testimony, recalled this conversation, stating that after he approached Bridges that afternoon and informed him of the discharge, the latter introduced him to Easter. Bridges said to Easter that Kelly was a good carpenter and that although he had been let go, he could work on another crew. Easter replied that he would return after informing the rest of the crew that they would not be working that afternoon. He soon returned and said to Kelly, "Well, sorry Bob. I'm a new foreman and I don't want to get involved." Bridges thereupon said that Kelly should speak to Lively; Easter became upset, asking whether Bridges was trying to go over his head. Bridges said no, and, Kelly recalled, the conversation ended.[64]

Bridges, who had driven himself to the jobsite that day, returned to the dry camp with Kelly. According to Bridges, he and Kelly had a conversation with Micheli in front of the latter's trailer shortly thereafter. Kelly, who was upset over his termination, announced that "'I'm going to throw a wildcat on this job.'" Bridges added that he would not cross the picket line; however, Micheli responded that he would run right over Kelly, because he wanted to keep his job. Micheli, then, left the others and walked toward his trailer. According to Bridges, he had previously noticed that Easter's car was parked outside Micheli's trailer, and he asked Kelly whether anyone else was in the vehicle. Kelly replied that Easter had entered it awhile ago.[65] Later that afternoon Bridges learned that Kelly had no means of returning to Las Vegas. Thus, at 6:30 p.m. Bridges went to Easter's trailer and said to the latter that he would be taking Kelly back to Las Vegas and would return in time for work the next day. Easter asked whether Kelly was supporting him. Bridges denied it, saying Kelly was a friend and because he did not have a car, Bridges would drive him back to Las Vegas. Easter asked, "What, are you queer for the guy or something?" Bridges repeated that Kelly was just a friend, and Easter responded, "Look son . . . . You want to work on my crew, . . . you stay out of other people's business." Bridges protested that he liked working for Easter and that all he was doing was giving Kelly a ride home. Easter said okay but that if Bridges failed to return, Easter would find someone else. Bridges replied that he would be back in time for work the next afternoon and nothing more was said.

Bridges testified that he drove Kelly to Las Vegas and that he returned early enough to report on time for work on May 15. Shortly after arriving on the jobsite, he was approached by Easter who announced that he had laid Bridges off at 7 a.m. that day. Angered, Bridges said that Easter should have telephoned him in Las Vegas so that he would not have had to return to Tonopah. Then, Bridges asked why Easter laid him off. Easter replied, "You seem to have a problem." Bridges asked Easter to explain, and the latter said, "You know what I mean . . . . And I don't want no problems on my job." Bridges responded that if the foremen continued to give such "crap" to the carpenters, there could be a wildcat strike. Easter replied, "To hell with your wildcat strike. Get the hell off my job." Easter said nothing more and did not give Bridges a termination notice. Bridges left Easter and a few moments later encountered Aiton III near the office trailer. During their conversation, which I have previously described, Bridges asked him "'Wasn't my work satisfactory?' He says, 'That's not the point. I

---

[62] Mentioning nothing during direct examination, Easter was able to recall, during cross-examination, that on returning to the dry camp that night, the entire crew met in Micheli's trailer, drinking coffee or beer, and that Bridges walked in 5 minutes after the conversation began. According to Easter, the entire crew was in the process of complaining about Bridges' job performance when the latter entered and said that he did not like people talking behind his back. After various crewmembers insisted that Bridges transfer to days, Easter renewed his offer to Bridges to work inside the form. Bridges said "he'd feel like an idiot . . . to take a transfer like that. He wanted to tough it out, if he could." No more was said.

[63] The record establishes that Kelly had been fired by Don Davis approximately an hour earlier; however, after speaking to Aiton Jr. and Jim Joy, Kelly had been given permission to seek a position on another crew. Thus, Kelly spent the remainder of the afternoon speaking to other foremen as to whether they could use him on their crews. Aiton Jr. corroborated Kelly as to this granting of permission to seek employment with other foremen.

[64] Easter testified regarding this conversation during cross-examination. While informing the crew that no work was to be done on May 14, according to Easter, he was introduced to Kelly by Bridges. Then, Bridges asked Easter to try to fit Kelly into his crew. Easter replied that he could not use Kelly as the latter had been laid off by another foreman and Easter did not want to intervene and as Easter did not want any problems on his crew. Bridges responded that Easter testified that they were going to "wobble" (strike) the job.

Asked what he meant by not wanting any problems, Easter explained, "[Kelly] had been laid by another foreman, and . . . if I hired him on my crew, [such] . . . would cause dissension between the other foremen and myself. . . ."

Bridges denied threatening Easter with a wildcat strike prior to his termination.

[65] Kelly contradicted Bridges in this regard. Thus, the former testified that on returning to the dry camp, he spoke to a group of several carpenters, including the entire night crew *and* Jim Easter, about possibly picketing the project. Bridges said that he would honor the picket line, but Micheli said that he would run over Kelly. After listening to all this, Easter walked away just as Kelly and Micheli began arguing and went into the trailer of a member of the night crew. Easter failed to deny either version of this incident.

have to back my foremen up. . . . Anyone that creates any problems from now on is going down the road.'"[66]

The record establishes that regarding the decision to terminate Bridges and the rationale for the action, Respondent's evidence is contradictory and utterly confusing. As to the former, under questioning by me during redirect examination, Easter stated that at the conclusion of the night crews' shift on May 13, he knew that something had to be done about Bridges but that "I hadn't made up my attitude." Moments later, however, Easter evidently made up his mind, as he testified that the decision to discharge Bridges was made "that first night. . . . But I wanted to talk to my supervisor." Reminded that on May 13 rather than mentioning possible discharge to Bridges, he spoke only in terms of transferring Bridges to another crew or placing him inside the wall forms and asked again whether the discharge decision was reached that night. Easter altered his testimony, stating, "Not really then. . . . The following day. . . . Around noon . . . ." The foregoing must be contrasted with Easter's admission during cross-examination that, notwithstanding Bridges' apparent refusal on the previous night to accept either of the aforementioned alternatives, on May 14, prior to work that night, Easter had no reason to believe that Bridges would not work where he was instructed to work: "I believe he would have tried it, yes." Nevertheless, and more supportive of his later testimony, according to Easter, he spoke to Aiton III, concerning Bridges, while they inspected the night crew's assigned work area that afternoon. "I approached [Aiton III] and told him I thought I was going to have to make some changes in my crew—that I couldn't use Bridges on my crew." According to Easter, Aiton III responded that the former should go ahead and terminate Bridges if that was what Easter wanted to do. Aiton III did not corroborate this conversation.

Easter testified during direct examination that, after being informed that it would not work that afternoon (May 14) and on returning to the dry camp, the members of the crew, including Bridges, and Easter met in Bob Micheli's trailer. According to Easter, every other crewmember expressed the hope that he would transfer Bridges because no one wanted to work around him as "they were scared that he would drop something." In front of the other crewmembers, Easter turned to Bridges and said "that I couldn't use him, and he would have to transfer." Bridges responded that "he would go to Las Vegas that evening and come back and think about it. And I asked him, I said, 'Well, I can get your check now.' But he proceeded to come to Las Vegas without picking up his check." Thereupon, Easter further testified, because Bridges refused all alternative jobs offered to him, he went to Jim Joy that evening and "I asked him for Mr. Bridges' check."

Later, during his aforementioned questioning by me and redirect examination, Bridges reaffirmed the crew meeting in Micheli's trailer after the crew returned from the jobsite on the afternoon of May 14 but denied any conversation with Wendell Bridges as "he was already gone. . . . Bridges wasn't there. He left for Las Vegas . . . at 3:30. As soon as I talked with him at the jobsite." Reminded of his earlier testimony, Easter quickly recalled that Bridges *had* been present and that he told Bridges to take his final check with him back to Las Vegas so that he would not have to return to Tonopah. Thereupon, Easter contradicted his prior version of the meeting, testifying that Bridges said, "I'll try to get a transfer when I get back from Las Vegas." As with this latter response, Easter had changed the circumstances, resulting from that meeting, he was asked to explain why, with Bridges now willing to leave his crew, he went to Jim Joy to request Bridges' termination—"Because when he left to go to Las Vegas, he didn't come back till after the job—we'd already been working an hour or two." Informed that this last response did not at all comport with the facts as previously developed, Easter once again changed his testimony, stating, "He didn't even give me a good response. He said, 'I'm going to Las Vegas and I'll see you later.'"

Concerning the reason for Bridges' termination, Easter testified that he instructed Jim Joy on the evening of May 14 to place "unsafe" as the reason for the discharge: "He asked me why, and I told him he was unsafe to my crew." Joy informed Easter that Bridges' final check and a termination notice would be prepared and be ready by 7 a.m. the next day (May 15). Despite these rather explicit instructions, for some reason, Respondent has never seemed to understand the real reason for Bridges' termination. Thus, the next morning when, according to Easter, he went into the office trailer and Office Manager Flinchum handed him a termination notice for Bridges which notice gave as a reason, "drunk on the job." Easter stated that he immediately returned the notice to Flinchum and asked him to issue a new termination notice, reading "for safety reasons . . . ." Contradicting Easter, Flinchum testified that either Aiton Jr. or Joe Lively instructed him on May 13 to prepare a termination notice for Bridges, reading "too slow, poor work." Accordingly, he prepared a termination notice for Bridges, which was received into the record as Respondent's Exhibit 22 and which contains a checkmark next to the notation "Too slow—poor work." Further, Flinchum specifically denied preparing any termination notice for Bridges, stating that the latter was drinking on the job. In contrast to this testimony, Easter averred, "I terminated . . . Wendell Bridges because he was . . . not too slow, but unsafe." Finally, and further confusing the exact reason for Bridges' termination, is Respondent's Exhibit 24, a document prepared by Flinchum and which is a list of all discharged employees and the reasons for such; next to his name the reason for Bridges' termination reads: "Not qualified."

Whatever the reason for his termination, Bridges was terminated by Easter on May 15. The latter testified that Bridges arrived at the jobsite at 5 p.m., 2 hours late, and that he immediately spoke to Bridges, telling the latter that he was being discharged because he was "unsafe." Bridges "got a little belligerent" and said "that he was

[66] Although he testified extensively at the hearing, Aiton III did not deny this conversation, and I previously credited Bridges as to what was said.

going to wobble the job." Easter replied, "Wobble be damned. I could care less."[67]

2. Analysis

The consolidated amended complaint alleges that Respondent terminated Wendell Bridges in violation of Section 8(a)(1) and (3) of the Act. In support, the General Counsel argues that Bridges engaged in protected concerted activities during his brief period of employment by Respondent (complaining to Lively about being assigned to the night crew and about having to work less than a 10-hour shift, attempting to gain the reinstatement of Kelly, and supporting Kelly in a threatened wildcat strike) and that Easter exhibited unlawful animus regarding Bridges' aforementioned activities. In contrast, Respondent minimizes the extent of whatever protected activities in which Bridges may have engaged and asserts that Easter exhibited no unlawful animus in his conduct toward Bridges. Further, counsel for Respondent contends that Bridges was terminated for legitimate reasons—unsafe work.

Analysis of the record discloses that not only did Bridges engage in protected concerted activities during his brief tenure of employment with Respondent but also that Respondent was well aware of the extent of and nature of Bridges' activities. Initially, although Bridges did not so testify, Easter admitted that on the night of May 12, Bridges informed him that Bridges intended to go over Easter's head and complain directly to Joe Lively about having been assigned to the night crew. In this regard, the record discloses, and it was uncontroverted, that earlier in the day Bridges had agreed to work the night crew on an experimental basis, that at some point in the evening he was informed by Bob Micheli that the night crew was to work less than a 10-hour shift, that Bridges became angered by this information, and that early the next morning (May 13) he had a heated conversation with Lively on the subject of the night crews' hours of work. Throughout his *entire* testimony, James Easter impressed me as being a contradictory and utterly dishonest witness who did not know the meaning of candor, and, except for inadvertent admissions or when corroborated by others, I do not rely on his testimony. Based on the foregoing, and the record as a whole, I believe that Bridges did, indeed, inform Easter, on the night of May 12, that he was going to complain directly to Lively the next day but that the subject matter was going to be the night crews' hours of work—not Bridges' assignment to that crew and that Easter's testimony is nothing more than a "cover-up" of the true nature of that conversation. Although not a matter covered by the Union's collective-bargaining agreement, the matter of the night crews' hours of work was a matter of urgent and common concern to all those on the crew, and when Bridges, who, I previously stated was a candid and forthright witness as to all matters, complained to Joe Lively concerning this issue, he engaged in protected concerted activities. *Cal-Walts, Inc.*, supra; *Rose's Stores*, supra; *Air Surrey Corp.*, supra.[68] Further, although there is no record evidence that Easter was aware that Bridges *actually* spoke to Lively, the record does warrant the conclusion that on May 12 Easter was aware that Bridges *intended* to go over Easter's head and do so the next day.

Next, all witnesses are in agreement that on May 14 Bridges sought Easter's consent to employ Robert Kelly on the night crew and I credit Bridges that he threatened to take the matter over Easter's head and directly to Lively. Further, by his own admission, Easter refused to employ Robert Kelly, stating that he wanted no "problems" on his crew.[69] There can be no doubt that Bridges engaged in conduct protected by Section 7 of the Act in making this request on Kelly's behalf. Thus, notwithstanding that the latter had just been terminated by Respondent, such termination was, I have previously concluded, unlawful, and Kelly, therefore, remained as an employee of Respondent. Even if *not* unlawfully discharged, Kelly must be viewed as a potential employee inasmuch as, with management's admitted assent, Kelly was diligently engaged in seeking employment on carpenter crews, supervised by all foremen, other than Don Davis. In this context, Bridges' *request* that Easter *employ* Kelly on his crew is directly analogous to an employee's *protest* to a supervisor regarding the *discharge* of a fellow employee—conduct that the Board and courts consider as within the protection of Section 7 of the Act. *NLRB v. John S. Swift Co.*, 277 F.2d 641, 645–646 (7th Cir. 1960); *Auto-Truck Federal Credit Union*, 232 NLRB 1024, 1028 (1977). Further, the definition of "employee," within the meaning of Section 2(3) of the Act, has traditionally been viewed as broad enough to encompass potential employees. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Pioneer Printers*, 201 NLRB 900 (1973). Therefore, Bridges' request, on behalf of Kelly, was protected and concerted in nature. Finally, as to this May 14 conversation, although denied by Bridges, and of import in characterizing the latter's conduct, is Easter's admission, which I credit, that Bridges threatened that "they" were going to strike the project—the comment coming immediately after Easter refused to hire Kelly on his crew. It is gainsaid that a strike, or concerted work stoppage, in protest of the discharge of a fellow employee constitutes protected concerted activity. *Go-Lightly Footwear, Inc.*, 251 NLRB 42 (1980); *Diagnostic Center Hospital Corp. of Texas*, 228 NLRB 1215 (1977). In agreement with the General Counsel, taking into account its context, the conclusion is warranted that Easter could only have taken Bridges' threat as a protest of Kelly's discharge or, at least, as a statement of support for such a

[67] I grant the General Counsel's motion to correct the transcript in this regard.

[68] I do not believe that Bridges engaged in protected concerted activities when he complained to Lively on the *afternoon* of May 12 about his assignment to the night crew. Such appears to have been, by Bridges' own admission, a personal complaint about a matter of concern only to himself. I agree with Respondent in this regard. *Inked Ribbon Corp.*, 241 NLRB 7, 12 (1979).

[69] I place no particular significance on the the reason for Easter's refusal except to the extent such reflects on his overall attitude towards Bridges.

protest—conduct protected by Section 7 of the Act. *AMP, Incorporated*, 218 NLRB 33, 36 (1975).[70]

Having established that Bridges engaged in protected concerted activities, however limited, and that Respondent, through Bridges, was aware of, or suspected, such conduct, I believe that the record establishes, and the General Counsel has proved, that Jim Easter, a newly appointed foreman and admittedly afraid of "problems" caused by his crew, harbored animus toward Bridges because the latter apparently went over his head and complained directly to Lively about the crews' hours and he supported Robert Kelly, who had recently been terminated by another foreman, and that Easter's termination of Bridges resulted from same. As to this, I initially note the ample—and well documented—evidence of Respondent's unlawful animus toward all union members, particularly those who protested perceived problems with their terms and conditions of employment. Specifically as to Bridges, as between himself and Easter, I credit the testimony of Bridges regarding the late afternoon or early evening conversation of May 14 (during which Bridges informed Easter that he was leaving in order to drive Kelly back to Las Vegas) and the discharge conversation of May 15. Further, I view Bridges' uncontroverted conversation with Aiton III, immediately after his discharge, as revealing the exact nature of Respondent's unlawful animus toward him. Thus, during their early evening, May 14 conversation, Easter accused Bridges of being "queer" for Kelly and warned him that in order to remain on his crew, Bridges should "stay out of other people's business." Clearly, this was nothing less than a thinly veiled threat of discharge if Bridges continued to support Kelly—conduct protected by Section 7 of the Act. Next, during their discharge conversation on May 15, Easter asserted that Bridges had a "problem" and that he wanted "no problems" on his crew. That Easter, who averred that he wanted to avoid conflicts with other supervisors, quite obviously was again referring to Bridges' protected concerted activities and not to the latter's job performance is clear from the subsequent comments of Aiton III, regarding the fact that Bridges' work was *not* an issue or cause of his discharge: "That's not the point . . . . Anyone that creates any *problems* from now on is going down the road." (Emphasis added.) There can be only one inference drawn from the aforementioned—that Bridges' problem was having engaged in protected concerted activity and that he was terminated for having so participated.

Turning next to whether Respondent has established that Bridges would have been terminated notwithstanding having engaged in conduct protected by Section 7 of the Act, I note that Respondent's defense rests solely on the testimony of Jim Easter and conclude, based on my belief that his demeanor was that of an untruthful witness, that this defense is nothing more than a sham and pretextual in nature. In this regard, I credit the testimony of Bridges regarding his work and the events of the night of May 13, his only work on the night crew. Thus, I believe that Bridges, Micheli, and Curtis performed that work of tying a wall form for an inside wall of the crusher building; that Bridges was assigned to, and worked, the feeder position; that although inexperienced at such work while supported only by means of a safety belt, Bridges did not cause any unnecessary delays in the rate of work that night; and that although Micheli and Curtis may have believed work was progressing more slowly than normal, such was the fault of the crews' laborer, a fact about which Micheli and Curtis were unaware. Notwithstanding Bridges' testimony, Easter insisted that his decision to terminate the former was based solely on his observation that Bridges was an "unsafe" worker. However, despite Easter's consistent testimony, the record, as a whole, is utterly contradictory on this point. Although Easter maintained that he informed both James Joy and Robert Flinchum, the office manager, that "unsafe" was the reason for Bridges' discharge, such did, and does, not appear on any of Respondent's documentation of the termination. Rather, two termination notices were prepared for Bridges; the first asserted that Bridges had been drinking on the job and the second listed as the discharge reason: "too slow—poor work." Further, in a document that was prepared expressly for the hearing, Bridges is listed as having been discharged for being "not qualified." Moreover, Flinchum's testimony directly contradicted that of Easter. Thus, although the latter says he specifically instructed Joy to list unsafe as to the discharge reason, Flinchum stated that either Joy or Aiton Jr. instructed him to list "too slow—poor work" as the rationale. Also, despite Easter's testimony to the contrary, Flinchum specifically denied ever preparing a termination notice for Bridges, which notice listed drinking while working as the reason.

Besides the aforementioned problems with the rationale for Bridges' termination, Easter's testimony concerning his decision-making process was contradictory, confusing, and uncorroborated. Thus, not only did Easter contradict himself as to when he decided that Bridges must be terminated (was that decision reached on the night of May 13, at 12 noon on May 14, or at approximately 6 p.m. on May 14) but also he was contradictory as to what Bridges supposedly said at the alleged crew meeting on May 14, which comment, according to Easter, precipitated his request to Joy for Bridges' termination (of course, at one point Easter denied the former's presence at the meeting). Also Easter contradicted himself as to exactly why he went to Joy on May 14 with the aforementioned request, at one point testifying that his rationale was that Bridges' absence left him a worker short on his crew—a reason that would place the discharge decision subsequent to 3 p.m. on May 15. Further, I credit Bridges' testimony that he never refused Easter's offer, after work on May 13, to move him inside the wall forms during the tying process, noting that Easter's admission, that prior to work on May 14, he believed Bridges would accept whatever work was assigned to him, corroborates Bridges as to that point. Bearing in mind the admission, I fail to understand Eas-

[70] I place no reliance on the alleged strike comments by Bridges, in support of Kelly, back at the dry camp on May 14. I do not do so particularly because it cannot be definitely established that Easter was present to hear, or even became aware of, anything said by Bridges. Thus, I note the contradictory testimony of Bridges and Kelly and do not believe that any conclusions may be drawn therefrom.

ter's assertion that he was forced to seek Bridges' termination because the latter refused to accept any job alternatives that Easter offered. Finally, although Easter asserted that he discussed the termination of Bridges with Aiton III prior to learning of Bridges' support for Kelly, Aiton III, despite extensive testimony, failed to corroborate Easter on this point, permitting the inference that he would not have corroborated Easter.

Accordingly, inasmuch as Respondent's defense appears to be a sham and pretextual, the inference is permissible, indeed, warranted that the true motive for the termination of Wendell Bridges is one that Respondent sought to conceal—his protected concerted activities. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *J. P. Stevens & Co.*, 247 NLRB 420 (1980). In these circumstances, I conclude that the termination of Bridges was violative of Section 8(a)(1) of the Act.[71]

E. *The Discharges of David M. Doran and John R. Angle*

1. The facts

David Doran, who is a carpenter by trade and a member of the Union, was among the initial group of carpenters hired by Respondent for work at the mine project in Tonopah—starting to work about April 1. Initially, Doran was assigned to work in the yard area where he constructed wall forms under the direct supervision of Joe Lively. While under the latter's supervision, Doran and another carpenter, Don Jackson, continually complained about Lively's propensity to perform carpenter work despite a contractual prohibition against such. These complaints culminated in Lively threatening to terminate both Doran and Jackson if they continued to complain in that regard.[72] At some point in April, Jackson was promoted to a foreman position, and Doran was assigned to his crew. After Jackson resigned his position in early May, Doran was assigned to work on the carpenter crew at the reclaim tunnels, under the supervision of Bruce Alford. According to Doran, the reclaim tunnels crew consisted of himself, John Angle, Mitchel Getz, Bob Steadman, and John Steadman.

The record establishes that Aiton III was appointed to the position of superintendent, in overall charge of the reclaim tunnels area, on approximately May 1. According to Doran, from the day of his own assignment to Alford's crew until his termination on May 30, he observed Aiton III, in violation of the Union's collective-bargaining agreement, giving work orders directly to carpenters on eight or nine different occasions. Doran further testified that he complained to Mike Herndon regarding the conduct of Aiton III "a couple of times." Unable to recall specifically who, Herndon testified that "the whole crew down at the reclaim area" on various occasions complained about direct supervision by Aiton III. Thereafter, without identifying the source of the complaints, Herndon had two separate conversations with Aiton III regarding that subject. During one conversation, according to Herndon, Aiton III asked why he could not directly supervise the carpenters at the reclaim tunnels as by doing so, he would avoid wasting time searching for Bruce Alford. Although not disputing this logic, Herndon explained that Aiton III was wrong, that the chain of command, as set forth in the contract, would be broken, and that the crewmembers worked for their foremen.

Notwithstanding Herndon's admonition, the record discloses that on May 28, Aiton III assumed supervision of the reclaim tunnels crew from Alford and directed its work for the entire day. According to Aiton III, after having observed the work of that crew for a 2-week period, he believed that its production was not at an acceptable level; however, he was not sure whether this production failure was the fault of the crew or of the foreman. Accordingly, "I then spent one full day actually supervising the crew on my own and giving them orders." Concluding that the carpenters on the crew were working "in a very efficient manner," he decided that Alford was at fault and that he should be replaced. That he acted in violation of the Union's collective-bargaining agreement does not appear to have been a concern to Aiton III.

In any event, according to Doran, he reported for work on May 29 at 6 p.m. at which time Aiton III "gave a little speech before we went to work. He apologized. He said, 'Guys, I'm sorry I had to take over for the day, but I had to find out who was screwing up, you or your boss.'" After commending the crew on doing a good job, Aiton III announced that a new foreman would be transferred to the reclaim tunnels area. As the short meeting concluded, Doran testified, "I confronted him and told him that there was no excuse for breaking our union rules, because our union's weak enough the way it is. And he just stormed off." John Angle, who is a member of the Union and had been working on the Tonopah jobsite since May 1 (at all times on the reclaim tunnels crew),[73] testified that on the day after he supervised the

[71] Although he clearly engaged in protected concerted activities and was discharged for same, there is no evidence that Bridges engaged in union activities. Accordingly, I shall dismiss that portion of the consolidated amended complaint, alleging that Respondent violated Sec. 8(a)(3) of the Act by that conduct.

[72] The exact wording of Lively's threat to Doran and Jackson and the surrounding circumstances were more fully set forth and analyzed earlier in the instant decision.

[73] Angle testified that on the morning of May 21, Aiton III asked for volunteers from the reclaim tunnels crew to help in an emergency situation at the crusher building work area at which, with a concrete pour scheduled to occur that day, problems arose with the wall forms. Aiton III told the employees that "if we would come with him right then, he would pay us for our break." Angle, who believed that the union contract requires payment whenever members are forced to work through the normal break period, Getz and John Steadman volunteered to help, and the record discloses that they worked without morning or lunch breaks, bracing a wall form while the concrete pour progressed. After completing their work and taking lunch breaks, Angle and the others returned to the reclaim tunnels area where, in the presence of the entire crew, according to Angle, he complained about the conditions under which the three employees worked and demanded extra wages for working through the morning and lunch breaks. Bruce Alford replied that he would check with management.

Angle further testified that he spoke to Alford that night in the dry camp and on, at least, three or four other occasions regarding his demand for payment for the missed morning and lunch breaks on May 21. He fur-

Continued

crew, Aiton III spoke to the carpenters prior to work and apologized for what he did the day before. Aiton III said there been trouble at the reclaim tunnels; that, at first, he believed the problem was the fault of the crew; but that now he realized that the problem resulted from Alford being a "poor" foreman. After instructing the men to commence working, Aiton III was approached by Doran, who said that the crew was not supposed to take orders from Aiton III because he was a superintendent. That latter replied "that he would get a foreman." According to Angle, Aiton III "wasn't happy" inasmuch as he abruptly broke off the conversation and walked away. Recalling that he spoke to each crewmember individually rather than to the reclaim tunnels crew as a whole, Aiton III testified that he explained to each carpenter what the problem was and what he intended to do as a solution. According to Aiton III, he so spoke to Doran, and the latter replied, "I don't feel you have any business running the crew." He responded "that I had to do it to make sure that the crew itself was not at fault." Aiton III further testified that Doran indicated his agreement, and Aiton III walked away. The record further discloses that John P. Hendershot Jr. assumed the role of foreman over the reclaim tunnels carpenter crew that day at approximately noontime.

The record reveals that on the next day (May 30) Doran and Angle were assigned to "pour watch" duty and that such required them to work through the normal lunch hour. The concrete pour was not completed until approximately 12:45 p.m., at which time both employees took their lunch breaks, eating together in back of the reclaim tunnels job shack.[74] Doran testified that for lunch, he ate a hamburger and drank A & W root beer from a can but that he did not observe whatever Angle ate or drank. According to Doran, 10 or 15 minutes into the break period, Aiton III approached and asked what they were doing. Doran replied that they were eating lunch as their pour watch had been completed. Aiton III asked where they were supposed to go after lunch, and after both men responded that they did not know, the superintendent replied that he would send Hendershot over with instructions.[75] Aiton III then left where Doran and Angle were eating, and 10 minutes later, Hendershot came over to them and ordered them to help construct a scaffolding, which was necessary for work on a footing of the radial arm stacker. Regarding the lunch break that day, Doran denied drinking any sort of alcoholic beverage. Regarding what he consumed for lunch, John Angle testified that he ate a hamburger and drank Gatorade from a can, which was enclosed in a styrofoam cooler. Angle stated that although he noticed that Doran also ate a hamburger, he had no idea what beverage Doran drank. According to Angle, Hendershot was the first supervisor to come over to them. He told Doran and Angle to help construct the scaffolding at the radial arm stacker after they finished eating lunch, saying nothing about Doran and Angle drinking beer or any other alcoholic beverage. Hendershot left them, and, Angle further testified, 15 minutes later, Aiton III walked over to where the two employees were seated. Angle continued, testifying that Aiton III spoke directly to Doran, that Angle could not hear what was said because of the loud equipment noise, and that by the time of this conversation, he and Doran had finished eating and returned all the luncheon materials to their respective lunchboxes. Like Doran, Angle specifically denied drinking any alcoholic beverage with his lunch.

Both Doran and Angle testified that after lunch and pursuant to Hendershot's instructions, they helped work on the wood scaffolding at the radial arm stacker.[76] According to Doran, no more than 15 minutes after finishing lunch and while both he and Angle were working high on it, Aiton III drove up to the base of the structure in a pickup truck and yelled up to them, "Guys, I'm going to have to let you go." After instructing the two employees to go back to the office and to pick up their final checks, Doran asked Aiton III why he was discharging them. The superintendent replied "Drinking on the job," and he said that supervisory witnesses who were on the hill saw them drinking. Thereupon, Aiton III drove off in the pickup truck. Doran further testified that he did not deny this accusation, averring, first, that he had not time to do so as Aiton III drove off so quickly and, later, because "I figured it wouldn't do any good anyway." Doran added that he left the jobsite at approximately 1:30 p.m., after Jim Joy gave him his final check. As with the lunch events, John Angle's recollection of the scaffolding incident contradicts that of Doran. Thus, Angle testified that 15 minutes after lunch and while he and Doran were working on the scaffolding, Aiton III drove up to the work area in a pickup truck and motioned to Doran and Angle to come over to him. They did so, and "[Aiton III] was upset. He just got out of the truck and said 'We are going to have to let you go; get your tools.'" He then told the two employees to get into the truck; they did so and were taken to the office trailer, where Angle received his final check. According to Angle, while angry, Doran said nothing when

ther characterized Alford as not only never appearing upset at Angle's complaints but also as agreeing with the validity of Angle's demand. Finally, approximately 5 days prior to Angle's termination on May 30, Alford informed Angle that Aiton III had decided that "we would get paid for the lunch but we wouldn't get paid extra for the break." As far as can be determined from the record, the incident was closed.

[74] The record establishes that this job shack is located between the two reclaim tunnels and that it was regularly used by the members of the crew for their luncheon breaks. Neither Doran nor Angle explained why each chose to eat lunch behind rather than inside the job shack this day.

[75] Doran stated that while Aiton III spoke to them, both had their luncheon food and drinks on the ground between them and that Aiton III said nothing about alcoholic beverages.

[76] The record establishes that in May 1980 the radial arm stacker, which rests on a series of concrete footings, was located on a hill, 10 to 15 feet above the reclaim tunnels job shack and facing the rear of the building. David Doran testified that the particular footing, at which the crew was constructing the scaffolding, was located 50 feet from the back of the job shack. Dennis Jensen, the foremen who was supervising the construction of the scaffolding, testified that the footing was located in the middle of the radial arm stacker, was directly above the job shack, and was 50 to 60 feet from the building. Aiton III corroborated Jensen as to the placement of the footing, estimating that such was 80 feet from the job shack. The foregoing must be contrasted with the testimony of carpenter employee Mitchell Getz who stated that the footing, on which the crew was working on May 30, was the second or third from the end (to the left of center as one faced the job shack) and was 50 *yards* from the back of the job shack.

Aiton III terminated them, and he did not learn the reason for their terminations until told by Doran, while driving back to the dry camp, that they had been observed drinking on the job.[77]

Respondent's defense, and justification for the termination of Doran and Angle, is that both were observed drinking beer with their lunch on May 30, and, as such is directly prohibited by Respondent, the two employees were immediately terminated.[78] Dennis Jensen, the foreman over work on the radial arm stacker at that time, testified that on May 29, he ate his lunch in the reclaim tunnels job shack and that present and also eating lunch were Doran, Angle, Mitchell Getz, Bob and John Steadman, and John Hendershot. He further testified that both Doran and Angle were drinking beer with their respective lunches, that Doran was drinking Coors light beer (the "Silver Bullet"), and that Angle drank Pabst Blue Ribbon beer. According to Jensen, neither he nor Hendershot commented on what he observed. However, Hendershot, who is a member of the Union, had worked on the jobsite since early May and had just been appointed a foreman that day by Aiton III, and who admittedly did not think beer with lunch was particularly harmful, testified that not only did he observe Doran and Angle drinking beer during the lunch, but also he said right then to both, "Look don't do it in front of me. I just got up here. It's company policy, you know. Any other time . . . you're going to be sent down the road."[79] As to whether either employee consumed beer with his lunch that day, Angle admitted eating his lunch in the job shack, stated that he ate a hamburger and drank a 7-Up, but had "no idea" who else was in the shack, what Doran drank with his lunch, or whether anyone had beer with his lunch that day. Doran could not recall whether he drank beer with his lunch and did not know what, if anything, Angle consumed during lunch.[80]

In any event, Jensen testified that immediately after lunch he pulled Hendershot aside "and told him that I knew that we were working for; and if they would not only fire them, they would also fire us for letting them drink . . . . [Hendershot] said he would take care of it." According to Hendershot, Jensen did, indeed, speak to him after lunch regarding beer drinking—"He said this was part of the problem that had been going on." Whatever, having just been appointed as the reclaim tunnels crew foreman and cognizant of work-related problems in that area,[81] Hendershot attempted to solve the perceived problem of beer drinking on that crew by speaking to Mike Herndon later that afternoon. "And I told him, 'Go up and say something to them. If they're going to do it, at least have sense to hide it because we've got a company policy; and the instant they're caught, they're going to be fired.'"[82] That evening, Hendershot also reported the beer drinking incident to Aiton III. Although not identifying the employees involved, Hendershot told Aiton III "just that the conversation happened, an incident had happened, and what transpired of it." He concluded, "And if its [sic] caught again, that's all there is to it, then they're fired." Aiton III replied, "'Well, O.K., that's fair . . . . you know next time, its you or them.'" Aiton III corroborated the occurrence of such a conversation, placing it late in the afternoon of May 29 and stating that Hendershot accused the entire crew of drinking beer during lunch that day. According to Aiton III, Hendershot informed him that Hendershot warned the crew not to be caught drinking again; Aiton III replied that in those circumstances, he would not become involved.

Notwithstanding his pledge, Aiton III testified that on May 30 at the exact time Doran and Angle were eating their lunch behind the reclaim tunnels job shack, he was standing at the radial arm stacker footing, on which

[77] Admitting that he received a termination notice, Angle testified that he was not interested in its contents as he was such a great distance from Las Vegas.

[78] The record disclosed that on being hired each individual, employed by Respondent at the Tonopah Mine project, was given by Respondent a sheet of paper that set forth various work-related and safety information and that required the employee's signature at the bottom. Regarding the consumption of alcoholic beverages, the document states: "*A WORD OF WARNING*—A man must be completely sober to *STAY ALIVE* around construction equipment. We will not tolerate drinking on the jobsite; don't plan to sober up at work. We will not risk the lives of our men on the retarded reflexes of the man who has 'had a couple.'" Both Doran and Angle admitted knowledge of this rule. In this regard, Doran identified R. Exh. 14, which is a copy of the aforementioned document and which bears his signature. Angle was shown a similar document, which bears what was alleged as his signature but, he testified, was his name but not his signature. Comparison of this alleged signature with a sample of Angle's handwriting by me disclosed that the writing of Angle's name on Respondent's document was not done by Angle.

[79] During cross-examination, John Angle testified to a similar conversation but under entirely different circumstances. According to Angle, Hendershot was introduced as the new foreman to the entire crew *after* lunch on May 29 and that later in the afternoon, Angle was standing next to Mitchell Getz in the reclaim tunnels area while the latter had a conversation with Hendershot. "[Hendershot] said he . . . likes to drink a beer at lunch and he didn't see anything wrong with it, but we shouldn't make it publicized or get caught with it." Hendershot also said that "he didn't want to lose his position by somebody seeing us drink." Under further questioning, Angle changed his version of Hendershot's warning to, "If you are going to drink beer, keep out of sight" and, finally, to, "He said he didn't want anybody seeing us drinking beer during lunch; it might hinder his job." Mitchell Getz, a carpenter by trade and a member of the Union, who had been employed by Respondent since May 1, testified to a third version of this conversation. According to Getz, early in the morning on the day he assumed the position of foreman, while the crewmembers were preparing for work, Hendershot spoke on a variety of subjects, among them drinking on the job. He said "that there was a company policy that there should be no drinking on the job; that he didn't mind, personally; and so that, if we were going to, we would have to be very discreet and police the area—get rid of the empties . . . ."

[80] Another alleged luncheon participant, Mitchell Getz, who "exhibited" a detailed memory as to other incidents, testified, "I've forgotton [sic] what I was doing on May 29."

[81] According to Hendershot, at the time Aiton III promoted him, the former told him that "the job just wasn't going right, and he needed production . . . ."

[82] Herndon corroborated Hendershot, testifying that one day at the end of May, the latter came to him and explained that he had just been appointed as the foreman at the reclaim tunnels and that some members of his crew had been drinking beer during lunch. Hendershot then asked Herndon to speak to the crewmembers and tell them that such was against the company's rules and that they should not do it. Herndon further testified that the next day, he went over to the reclaim tunnels area and spoke to the two employees who were on pour watch duty. "I just explained to them that the foreman had notified me that some of the men were drinking, and it was illegal, and we'd signed a paper . . . that we wouldn't drink on the job, and that they could be fired if they were caught." Herndon identified the two carpenters as Dave Doran and Bob Steadman and said that he could not recall speaking to John Angle.

Doran and Angle specifically denied speaking to Herndon on May 30.

Dennis Jensen's crew was working.[83] Jensen approached and asked whether Aiton III was aware of what was happening behind the job shack. The latter, who had been observing the work, turned toward the job shack and saw Doran and Angle, sitting with their backs up against the shack and drinking beer.[84] After Jensen suggested that if he wanted a better look, he should go down to the job shack, Aiton III walked down the hill to the left of the job shack, through the reclaim tunnels, and around the front of the job shack, and came up to where Doran and Angle were seated from behind them.[85] According to Aiton III, as he came around the side of the building, both employees were holding beer cans in their right hands; then, as each noticed Aiton III, he placed the can behind his legs.[86] Also, both Doran and Angle were sitting, with Doran closest to Aiton III and Angle no more than 6 feet away. Confronting the two men, Aiton III further testified, "I said, 'Gentlemen, we can't go for this drinking . . . . I know you've been warned yesterday by . . . Hendershot, and we can't go for it' . . . Doran replied, 'Yeah, we were warned about drinking in the job shack, so we figured we'd get out back here where we couldn't get caught.'"[87] Denying that he instructed the two employees to start working at the radial arm stacker and testifying that he assumed Doran and Angle would follow him, Aiton III turned and walked away.

Respondent's other alleged eyewitness to this incident, Dennis Jensen, testified that while he was directing work that day at the footing of the radial arm stacker,[88] he noticed that both Doran and Angle were sitting at the back of the job shack and that each was drinking a can of beer.[89] At that point, Aiton III approached him and, pointing to where Doran and Angle were sitting, said they would work with him the remainder of the day. While Aiton III looked toward the two employees, he asked "if they were doing what he thought they were doing." Jensen replied, "It looks like it." Thereupon, according to Jensen, Aiton III, on his own initiative, said that he was going to go down to the job shack and come up behind Doran and Angle. Jensen further testified that Aiton III then walked down the hill and around the job shack and came on Doran and Angle from behind and that Aiton III had a conversation with them. Next, Jensen testified, Aiton III walked back up the hill to where he stood, instructed Jensen to keep Doran and Angle on the ground, and asked if Jensen knew where Hendershot was. A moment later, the latter walked over to Aiton III and Jensen. Hendershot and the superintendent spoke about Doran and Angle drinking that afternoon. Hendershot stated that they had been warned the day before, and both men agreed that Doran and Angle would "get their checks." Jensen also testified that the two discriminatees worked for him for just 15 minutes that afternoon and that he did not assign either one to work up on the scaffolding.

Denying that he spoke to Jensen after confronting Doran and Angle that afternoon, Aiton III testified that he met Hendershot on the road between the reclaim tunnels. "I told him that I had caught [Doran and Angle] drinking again . . . and told [him] that I was going to

---

[83] The exact positions of Aiton III and Jensen are crucial to Respondent's defense. Thus, Angle testified that while he and Doran ate lunch, the remainder of the crew was, at least, 300 yards away and the closest persons to them were some surveyors, who were standing 75 yards away. Also, Hendershot testified that at approximately the same time that Doran and Angle were eating lunch, he observed Aiton III with "a whole bunch of company officials . . . . up on top of the hill there, looking over the project out in our area." Hendershot stated that the group of officials had just completed an inspection of the concrete pour at the radial arm stacker and were "just standing there looking the site over." Hendershot further testified that the footings of this structure were at the bottom of this hill and that the job shack was at essentially the same level as that of the radial arm stacker footings. Also, he testified that he was on the hill but the others were higher up than he; that there was an unobstructed view of the job shack from this hill; and that inasmuch as he was working at the time, Hendershot did not spend any significant amount of time observing the company officials. Finally, Hendershot could not recall seeing either Jensen or Aiton III at the footing of the radial arm stacker.

Mitchell Getz also testified regarding the positions of Jensen and Aiton III while Doran and Angle ate lunch on May 30. According to Getz, he was working up on the scaffolding at the footings of the radial arm stacker and that he observed Doran and Angle eating lunch behing the job shack. At this time, Getz further testified, Aiton III was "on the hill between the stacker and the crusher." As to whether he observed Aiton III at the base of the footings, Getz averred that "I don't remember" and that "I did not see it." He was more specific as to Jensen, asserting that the latter was not, at that time, directing work at the footing and that Getz did not even see Jensen at that location while Doran and Angle ate lunch.

[84] Asked how he knew what Doran and Angle were drinking from a distance away, Aiton III responded, "We could see the cans." When questioned further by me, Aiton III identified the beer brand that Doran was drinking as Coors Regular. Asked how he could be so sure, Aiton III averred that the brand of beer is contained in a distinctive yellow can. As to Angle, Aiton III admitted, "I never did see Angle clearly."

[85] Asked on cross-examination why he chose to have a closer look at what Doran and Angle were doing, Aiton III said, "Basically to actually catch them, say, red-handed," and "I needed to make sure, yes, before I discharged them." Pressed as to why it was necessary to catch Doran and Angle "red-handed," Aiton III responded, "For basically what we're going through now. It's not a matter of whether Mr. Joy believed me. It's other persons that might get involved." Asked the same question again, he answered, "Because I'm not in the habit of viewing something from a distance, not letting the individuals in question know anything and just show up with their checks . . . . I obviously had to make it apparent to them . . . let them know I caught them." Finally, Aiton III denied that it was his desire to catch Doran and Angle red-handed.

[86] Aiton III testified that prior to both Doran and Angle hiding the cans behind their legs, he confirmed, in his mind, that Doran was drinking from a Coors Regular beer can, recognizing "its color" and "the general configurations" on the label. However, as to Angle, Aiton III noticed only that he was holding a "blue can," at the hearing admitting that he did *not* know it was a beer can but that he just assumed the can was, in fact, a beer can as "the . . . can I saw in his hand resembled a Pabst can." Further, Aiton III denied that Angle's can was within a styrofoam container. Later, during cross-examination, Aiton III became more positive regarding the can from which Angle drank: "I saw Mr. Angle drinking out a beer can that I knew at that time was a beer can . . . ."

[87] According to Aiton III, he believed that Angle heard what he said as there was no loud noise interference (while a crane was operating, it was over 200 feet away).

[88] Jensen testified that Mitchell Getz was working up on the scaffolding at that time.

[89] Jensen averred, "I could see vividly what they were drinking at that distance." As to Doran, he was drinking Coors Light beer—"a lot of people call it the Silver Bullet. And you can spot that can a mile away. It['s] a distinct can." As to Angle, Jensen identified his can as a Pabst Blue Ribbon beer can and denied that the can was wrapped within a styrofoam container. According to Jensen, "Frankly, because I never thought Pabst was a very good beer, that's one reason I noticed [Angle] drinking Pabst—because I figure he probably got it on sale. And the Silver Bullet, it['s] just a distinct beer. Matter of fact, it's the beer I drink."

have to fire them." Hendershot replied, "Oh, shit," and shrugged his shoulders; Aiton III turned and walked away.[90] Hendershot testified that he was unaware that Doran and Angle had been observed drinking that day until so informed by Aiton III. According to Hendershot, Aiton III came over to him and said that his pep talk did not work because Aiton III caught Doran and Angle drinking again. Hendershot states that he replied, "Well, you caught them. What the hell do you want me to do." He further testified that as he knew where Doran and Angle were eating their lunches, he went and informed them that they had been caught drinking.

After speaking to Hendershot, according to Aiton III, he went to the office trailer and instructed Office Manager Flinchum to prepare final checks and termination notices for the two discharged employees. Aiton III then walked out of the office and encountered Mike Herndon just outside the trailer. According to the former, he asked Herndon if he knew what had happened and said that he had to fire Doran and Angle. Herndon replied, "That's all you can do." Next, Aiton III testified that he drove back toward the radial arm stacker and was surprised to find Doran and Angle working there. He instructed the two employees to go to the office saying, "'I'm going to have to let you go for drinking.'" Neither denied the accusation, and Doran responded that he should go ahead and fire them and threatened that the job would be struck the next day. Aiton III then offered to give Doran and Angle rides, but they refused.

Mike Herndon testified that he first learned that Doran and Angle had been terminated during a conversation with Aiton III and Hendershot that afternoon in the yard near the office trailer. Aiton III said that he had just caught the employees drinking beer and was going to terminate them. Later, according to Herndon, he noticed Doran and Angle preparing to leave the jobsite, and he spoke to them. Doran seemed angry but neither employee denied having consumed beer that afternoon. "The only thing [Doran] said to me was that it was his word against theirs."[91]

The General Counsel contends that, assuming Doran and Angle were, in fact, drinking beer on May 30, such was not a valid reason for discharge inasmuch as not only was the rule prohibiting the consumption of alcoholic beverages on the jobsite not strictly enforced but also the practice was actually condoned by Respondent. In support, he points out, and the record establishes, that beer cans, on occasion, could be found in the employee parking area near the jobsite[92] and that it was the custom of union members to drink beer with their lunches. He further points to the testimony of Wendell Bridges that the night crew foreman, Jim Easter, openly consumed the contents of a one pint bottle of vodka just a few hours prior to work on May 13. Next, counsel relies on the testimony of carpenter Mitchell Getz on cross-examination that on one occasion he observed Foreman Obie Bodiroga sitting in a truck, parked between the crusher building and the radial arm stacker, and drinking whiskey. Getz averred that he knew the foreman was drinking whiskey because "it was in a whiskey bottle." However, under intensive questioning, Getz admitted that he did not see a brand name and that "I don't know that it was a whiskey bottle. It was a flat pocket flask, that I have identified with a pint bottle of liquor." Getz further admitted that he only assumed the "flask" contained whiskey as "that is the only thing I have seen in bottles that look like that." Specifically pertaining to the carpenter crew at the reclaim tunnels, Doran, Angle, and Getz all testified that the practice of drinking beer with lunch was common on that crew and was openly permitted by Foreman Bruce Alford. In this regard although there is no evidence that Aiton III or other upper level managerial officials were aware, Doran testified that Bruce Alford brought beer to the jobsite one day and informed the crewmembers that he had no objection to the crew drinking beer with lunch as long as cans were put back in the lunchboxes and not left lying on the ground and that, thereafter, all crewmembers had beer with their respective lunches, with the drinking normally confined to the job shack. Both Angle and Getz corroborated Doran in this regard; however, Getz added that there was much beer can litter around the reclaim tunnels area, with as many as "a couple of cases of cans" lying around. This latter assertion is open to doubt in light of the above testimony of Doran, the testimony of Mike Herndon that he never saw empty beer cans on the jobsite, and the testimony of Angle, who gave as the reason why he put the can, from which he had been drinking during lunch on May 30, back in his lunchbox—"We never threw trash out. That was one of the things Bruce always was after us about . . . . He didn't want garbage, or trash, or anything." Getz testified further that beer drinking during lunch continued on Hendershot's crew after the terminations of Doran and Angle, with Getz drinking beer approximately three times a week and in Hendershot's presence in the job shack—a practice that the latter specifically denied. Finally, the General Counsel points to the content of Hendershot's comments to the crew on May 29 as establishing that Hendershot, who saw nothing wrong with a beer for lunch, did not mind beer drinking as long as the people left no beer can litter on the project. In this regard, Angle interpreted Hendershot's comment as follows: "I took that to mean that you better not drink any beer on the job when he was there."

2. Analysis

The consolidated amended complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by terminating employee David Doran and John Angle. In support, the General Counsel argues that each engaged in protected concerted activity, that the individual who effectuated the terminations, Aiton III, harbored animus against all employees who created "problems" on the

[90] On cross-examination, Aiton III changed Hendershot's reply to, "Oh, shit . . . . And I had warned both those guys yesterday."

[91] At the hearing, both Doran and Angle denied drinking any sort of alcoholic beverage on the afternoon of May 30. Regarding which brand of beer each favors, Doran stated that he normally drinks Coors Regular beer but, on occasion, he drinks Coors Light, and Angle stated that he normally drinks Pabst Blue Ribbon beer.

[92] The parking area was utilized by employees of all subcontractors, including Respondent, on the jobsite.

project, and that the discharges occurred just 1 day after Doran angered Aiton III by accusing the latter, in the presence of the entire reclaim tunnels crew, of acting in violation of the union contract by directly supervising the crew. Contrary to this, counsel for Respondent argues that Doran and Angle were terminated for violating Respondent's express prohibition against the consumption of alcoholic beverages on the jobsite. As to this, the General Counsel asserts that Respondent's defense is wholly fabricated and, even if Doran and Angle were drinking on May 30, that Respondent's "prohibition" was openly violated by its own foremen and that drinking on the jobsite was condoned.

At the outset, I believe that the General Counsel has made a prima facie showing that David Doran's union activities were a motivating factor in Respondent's decision to terminate him. Initially, Respondent's witnesses, Lively and Aiton III, admit that Doran, on at least two occasions, raised contract-based complaints regarding their conduct—to Lively for performing bargaining unit work and to Aiton III for having directly supervised the work of the reclaim tunnels crew. That Lively reacted adversely to Doran's conduct is clear, for he admittedly threatened to terminate both Doran and Don Jackson because of the complaints. As to Aiton III, he did not deny the testimony of Wendell Bridges that on the afternoon of May 15 Aiton III warned, "Anyone that creates any problems from now on is going down the road." I have previously drawn the inference that, based on Respondent's conduct herein, by "problems," Aiton III was referring to "union problems" or employees engaging in protected concerted activities. In the ensuing 15-day period not only did Mike Herndon do so on two occasions but also Doran directly complained to Aiton III regarding assuming supervisory authority over the reclaim tunnels crew. The next day after so complaining, Doran was terminated by Aiton III. Clearly, then, the inference is warranted, indeed, mandated that Doran's union activities may have been a motivating factor in his discharge.

As to John Angle, whether a prima facie showing of unlawful animus has been established is less certain. Thus, notwithstanding the aforementioned animus exhibited by Aiton III toward union adherents, the fact is that Angle's sole instance of having engaged in union or other protected concerted activities concerns his demand to Respondent for payment for having worked through his morning break and lunch break periods on May 21. In this regard, Angle admits that he raised the matter only to Bruce Alford and that Alford not only agreed but also exhibited no anger over Angle's demands. Further, there is no evidence that Aiton III reacted negatively to Angle's demand or that after Aiton III responded, Angle continued to insist on increased compensation. In fact, Angle seems to have accepted Respondent's answer to his demand. Accordingly, although Angle may have engaged in union and/or other protected concerted activities, I will not draw the inference that such was a motivating factor in his discharge. However, I do find merit in the General Counsel's alternative argument that, if Doran was unlawfully terminated by Respondent, Angle was an unoffending victim of the conduct. In concluding that the discharge of employees, along with clearly, unlawfully terminated workers, is likewise unlawful, the Board often adopts the rationale that "it is clear that their layoff was essential to give colorable support to the claim [that the discharges were lawfully motivated]. As the claim has been found to lack merit, their layoff was also unlawful." *Hall of Mississippi, Inc.*, 249 NLRB 775, 778 fn. 7 (1980). Accordingly, inasmuch as Respondent's defense is identical for both Doran and Angle (with each discharge intertwined in the other), if Doran was unlawfully discharged, the same conclusion must be drawn as to that of Angle.

As with all the instant discharges, the question is has Respondent established that the discharges of Doran and Angle would have occurred notwithstanding the union and/or protected concerted activities of David Doran. Put another way, has Respondent established that these two employees were discharged for having violated a work rule, of which both were admittedly aware—a rule prohibiting the comsumption of alcoholic beverages on the jobsite. In this regard, I must initially determine whether Doran and Angle were, in fact, drinking beer with their respective lunches on May 30, and I note that such involves essentially a matter of credibility—do I believe Aiton III and Jensen that they observed the foregoing, prohibited conduct or do I credit the explicit denials of same by Doran and Angle. Both the General Counsel and counsel for Respondent have set forth cogent and convincing arguments that not one of the above individuals should be credited and, indeed, I did not find either Aiton III, Jensen, Doran, or Angle to be a particularly convincing witness. Thus, as to the former pair, their testimony as to what they observed, said, and did on May 30 was utterly contradictory. Likewise, Doran and Angle, besides contradicting each other as to the events of May 30, were directly contradicted on significant points by other witnesses, who testified on behalf of the General Counsel. Additionally, I found utterly unpersuasive their respective lapses of memory with regard to important events and conversations. Yet, they either were or were not drinking beer with lunch that day.

With credibility problems as to each of the four main witnesses, I look to the other witnesses and the record, as a whole, in order to resolve this matter. Two witnesses, in particular, impressed me as being honest and candid in their respective testimony—Mike Herndon, the job steward, and John Hendershot, the replacement foreman. Based on their testimonies, I conclude that on May 29, Hendershot observed Doran and Angle drinking beer with their lunches; that he warned and threatened each with termination if caught doing so in the future; that Hendershot informed both Herndon and Aiton III of the events of that afternoon;[93] that on the morning of May 30, Herndon warned Doran, and perhaps Angle, about the consequences of drinking beer on the jobsite; and that when Herndon confronted Doran after the terminations, the latter did not deny the stated reason for such averring only, "it was his word against theirs." As to the record itself, two facts, regarding the events of May 30,

[93] In so doing, I credit Hendershot that he did not identify the individuals to either Herndon or Aiton III.

are of utmost significance. First, by their own admissions, neither Doran nor Angle, at any time, denied that he had been drinking beer with lunch that afternoon. The General Counsel sought to minimize the adverse consequences of this fact by asserting that Doran believed that it would be useless to argue with Respondent and that Angle deemed it of little utility to contest the issue when he was so far from home. I cannot accept such explanations; rather, I believe that discharge for cause, especially for arguably spurious reasons, is—or should be—of sufficiently serious magnitude to warrant some sort of a protest—even if limited to a denial. But, assuming the uselessness of a protest to Respondent, surely, if Respondent's allegations were untrue, one would think that Doran and Angle would immediately lodge a protest with the Union, the entity most likely to be supportive. Yet, when Herndon spoke to Doran as the latter was leaving the jobsite, Doran still did not deny the allegation, choosing to plead that it was his word against Respondent's. But, of even more significance to a determination of credibility than the foregoing factor is the related fact that, contrary to Doran's assertion to Herndon, *Doran and Angle were carrying with them the proof of their innocence—the cans from which they drank during lunch.* This must be the case inasmuch as Angle testified that after he finished eating, he placed his empty can of Gatorade *back* in his lunchbox. Presumably, Doran did the same, for Angle further testified, "We never threw trash out. That was one of the things Bruce always was after us about." He continued, stating that all luncheon refuse was carried away from the jobsite by the employees in their lunchboxes as there were no trash barrels located on the jobsite. In these circumstances, it is not accurate to say that whether Doran and Angle drank beer with lunch on May 30 was a matter of their word against that of Jensen and Aiton III. Rather, when in their view, wrongly accused of such that afternoon, all that was required of either Doran or Angle was to exhibit the proof of his innocence, which, as far as can be determined from the record, was stowed in his lunchbox. Yet, neither discriminatee thought to do so. The reasons for this and the failure of both to, at least, deny the accusation of drinking beer on the jobsite were, I must conclude, that not only were both drinking beer with lunch but also that each, presumably, was carrying an empty beer can in his lunchbox on leaving the jobsite that afternoon. Based on the foregoing, and the record as a whole, I credit the testimony of Aiton III[94] as to the fact that on the afternoon of May 30, initially while standing at the base of the footing of the radial arm stacker and later as he confronted the two employees at the back of the job shack, he observed David Doran and John Angle, sitting side by side behind the job shack and each drinking beer with his lunch, and as to his subsequent movements and conversations that day.[95]

The General Counsel argues that, notwithstanding my aforementioned conclusions, Doran and Angle were terminated for having engaged in protected concerted activities as Respondent condoned the practice of drinking alcoholic beverages on the jobsite. Insofar as this argument bears on the motivation of Aiton III, on whose observation and decision the discharges were based, I find it to be without merit. Regarding the presence of a few beer cans in the employee parking area, inasmuch as the location was utilized by many different construction craft workers, employed by several jobsite subcontractors, it could hardly be said that such represents condonation by Respondent of violations of its drinking while on the jobsite prohibition. As to the conduct of James Easter in drinking vodka before work on May 13, while perhaps in contravention of the rule, as there is no evidence that Aiton III was aware or permitted this, I fail to see how this bears on the motivation of Aiton III in terminating Doran and Angle. Next, I do not credit the testimony of Mitchell Getz that he once observed Obie Bodiroga drinking "whiskey" from some sort of a container on the jobsite. Not only was his testimony as to this alleged incident contradictory and apparently based on assumptions, but also Getz' demeanor while testifying was that of one biased on behalf of the Charging Parties. He impressed me as testifying to whatever would advance the causes of the discriminatees and as willing to embellish his testimony to accomplish this goal. Perhaps the most pertinent example of this was his utterly incredible assertion that as many as a couple of cases of beer can litter could be found around the reclaim tunnels area. No other witness corroborated this, and both Doran and Angle insisted that Alford instructed the crew *never* to leave empty beer cans in the work area and that they complied with this.

The most troubling aspect of counsel's contention concerns the alleged granting, by Bruce Alford, of permission to the members of his crew to drink beer with lunch. I note initially that the occurrence of such rests on the less than credible testimonies of Doran, Angle, and Getz. There is not a scintilla of corroborating evidence except for the fact that Doran and Angle were observed having beer with lunch on May 29. Presumably, they would not have acted in such blatant disregard of Respondent's prohibition against such conduct unless they had previously been permitted to do so. In any event, the fact is that if such permission had been granted, such was done by a *prior* supervisor. Their new supervisor, John Hendershot, specifically warned them against drinking beer on the project and can, in no way, be considered to have also permitted such. This is clear from Angle's admission that he interpreted what Hendershot said as prohibiting the drinking of beer in the latter's presence. Moreover, Mike Herndon explicitly repeated

[94] I do so notwithstanding the utterly conflicting testimony of Dennis Jensen, on whose testimony I do not, at all, rely. I reiterate that Jensen impressed me as being a biased witness who tailored his testimony to fit Respondent's view of the facts. I can find no explanation—or justification—for Respondent's use of him as a witness.

[95] Noting that Aiton III and other witnesses, including Herndon and Hendershot, are contradictory regarding what was said during conversations that afternoon, I do not think that such detracts from the credibility of any witness, believing that honest men may honestly differ as to their recollection of past events. Finally, as to whether Aiton III was in a position to observe Doran and Angle prior to walking down to the job shack, I note that neither Hendershot nor Mitchell Getz, who, in any event, I do not credit herein, denied that Aiton III may, at some point, have been at the footing of the radial arm stacker.

this warning certainly to Doran and perhaps to Angle the next day. Accordingly, contrary to the General Counsel, there was no practice, as of May 30, on the reclaim tunnels carpenter crew permitting the drinking of beer with lunch and, at least, Doran was well aware of this.[96] Finally, as between Hendershot and Getz, I rely on the denial, by the former, that any drinking occurred on his crew subsequent to the discharges of Doran and Angle.

I shall, therefore, recommend that the paragraphs of the consolidated amended complaint, pertaining to the discharges of Doran and Angle, be dismissed.

F. *Other Alleged Violations of the Act*

I have previously concluded that in order to inhibit union and other protected concerted activities at the Tonopah Mine jobsite, Respondent's management officials, often taking advantage of the Union's insecurity with regard to its collective-bargaining relationship with Respondent, engaged in blatantly coercive tactics. Thus, I have credited Mike Herndon and Cliff Kahle that on two occasions Project Manager Jim Joy "predicted" that Respondent would lose its construction contract for the project and that such would be awarded to Brown and Root, a nonunion contractor, if union member/employees caused "union problems" or otherwise engaged in protected concerted activities. The record establishes that Joy never offered Respondent's employees or the Union any supporting evidence necessary to establish that the consequences, of which he spoke, were beyond Respondent's control. Absent such, the law is clear that Joy's predictions constitute nothing more than veiled threats to close the business if employees engaged in conduct protected by Section 7 of the Act and that this conduct is violative of Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *George C. Shearer Exhibitors Delivery Service*, 246 NLRB 416, 419 (1979); *El Rancho Market*, 235 NLRB 468, 472 (1978); *Yellow Cab Co.*, 229 NLRB 643 (1977). Next, I have credited Don Jackson, as corroborated by David Doran, that Joe Lively threatened to terminate them unless they stopped complaining about his propensity to perform unit work—in violation of the collective-bargaining agreement. There is no question that both Jackson and Doran engaged in conduct protected by Section 7 of the Act and that, therefore, Lively's threat, in response to the activities, was in violation of Section 8(a)(1) of the Act. *Cal-Walts, Inc.*, supra; *Rose's Stores*, supra. Also, I have credited Herndon that on one occasion Joy interrogated him regarding his duties as job steward and threatened future adverse consequences because of the conduct. I agree with the contention of the General Counsel that such constitutes harassment of an employee engaged in activities protected by Section 7 of the Act and, thus, conduct violative of Section 8(a)(1) of the Act. *Blount Bros. Corp.*, 230 NLRB 586 (1977). Further, the uncontroverted threat of Aiton III to Wendell Bridges on May 15, that those creating "union problems" from that point on would be fired, clearly constitutes a threat of termination for engaging in union activities and is violative of Section 8(a)(1) of the Act. *Stewart-Warner Corp.*, 253 NLRB 136 (1980). Further, I believe that Easter's statement to Bridges on learning that the latter intended to take Robert Kelly to Las Vegas ("Look son. . . . You want to work on my crew . . . you stay out of other people's business.") constitutes the same type of threat of adverse consequences for engaging in protected concerted activities and is, likewise, violative of Section 8(a)(1) of the Act. Finally, Lively's interrogation of Randal Fansler as to why he spoke to Job Steward Herndon on April 24 constitutes unlawful interrogation in violation of Section 8(a)(1) of the Act. *Morton's IGA Foodliner*, 237 NLRB 667 (1978).

[96] I give no credence to Doran's self-serving statement that had he known, he would never have violated such an express prohibition. Rather, I credit Aiton III that Doran did not believe that anyone could see him drinking beer in back of the job shack that afternoon.

Also, there is no evidence that Aiton III was aware of any beer drinking by the reclaim tunnels crew during the month of May. Thus, notwithstanding whatever Alford may have permitted, I believe Aiton III was ignorant of such.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. I have found that Respondent discharged employees Randal Fansler and Robert Kelly on May 6 and 14, 1980, respectively, in violation of Section 8(a)(1) and (3) of the Act and that Respondent discharged employee Wendell Bridges on May 15, 1980, in violation of Section 8(a)(1) of the Act. Accordingly, I shall recommend that Respondent be ordered to offer each employee immediate and full reinstatement to his former position of employment or, if the position no longer exists, to a substantially equivalent position, without prejudice to any rights and privileges to which he may be entitled. I shall further recommend that Respondent be ordered to make each employee whole for any loss of earnings he may have suffered as a result of his discharge by payment to him of the amount he normally would have earned from the date of his termination, with backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *Isis Plumbing Co.*, 318 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977). Furthermore, it shall be recommended that Respondent be ordered to post a notice, setting forth its obligations herein.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employees Randal Fansler and Robert Kelly on May 6 and 14, 1980, respectively, based on their union and other protected concerted activities, Respondent engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act.

4. By discharging employee Wendell Bridges on May 15, 1980, based on his protected concerted activities, Respondent interfered with, coerced, and restrained its em-

ployees in the exercise of the rights guaranteed them by Section 7 of the Act and, thereby, engaged in unfair labor practices violative of Section 8(a)(1) of the Act.

5. By threatening that Respondent could lose its construction contract because employees engage in union or other protected concerted activities; by threatening to terminate employees because they engage in union or other protected concerted activities; by threatening to adversely affect the job steward's ability to perform the duties and responsibilities of his position because of his activities on behalf of the Union; and by interrogating employees with regard to their union activities, Respondent interfered with, coerced, and restrained its employees in the exercise of the rights guaranteed them by Section 7 of the Act and, thereby, engaged in unfair labor practices violative of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Unless specified above, Respondent engaged in no other unfair labor practices.

[Recommended Order omitted from publication.]

The W. G. Diehl Distributing Company *and* Teamsters Union No. 348, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Lynn Stovall. Cases 8–CA–17626–1 and 8–CA–18294

31 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 9 September 1986 Administrative Law Judge Walter J. Alprin issued the attached decision. The Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs, and the Respondent and the General Counsel filed answering briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent herewith.[3]

ORDER

The National Labor Relations Board orders that the complaint in Case 8–CA–17626–1 is dismissed.

[1] On 23 December 1986 the Board issued an Order granting the General Counsel's motion to sever and remand Case 8–CA–18294, which had been consolidated with the above-captioned case, to the Regional Director because the parties had arrived at a non-Board settlement in that case. Thus, this decision is limited to resolution of the issues in Case 8–CA–17626–1.

[2] The Respondent, the Charging Party, and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge recommended dismissal of that portion of the complaint which is presently before us in Case 8–CA–17626–1. We are adopting that dismissal and, accordingly, our Order is limited to that case.

Steven D. Wilson, Esq., for the General Counsel.
Harry A. Tipping, Esq. (Roderick, Myers & Linton), of Akron, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge. On charges filed 19 June 1984[1] by Teamsters Union 348 (the Union), and on charges filed 23 May 1985 and amended 30 July 1985 by Lynn Stovall, the General Counsel issued complaints on 30 July and 2 August 1985. A hearing on the first charges was begun at Akron, Ohio, on 17 April 1985 but was adjourned for 8 months while the parties discussed settlement of these and additional cases in litigation. The complaints were consolidated on 23 October 1985, and were heard at Akron, Ohio, from 4 through 6 December and on 13 December 1985. Briefs were thereafter filed on behalf of the General Counsel and the Respondent.

The issues are whether John Jaber and Frank Cutright were refused employment in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) and whether the employment of Lynn Stovall was terminated in violation of Section 8(a)(1) of the Act.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The W. G. Diehl Distributing Company (Respondent) of Akron, Ohio, operates as a wholesale beer distributor. It is stipulated and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Kohn Beverage Company (Kohn) was a wholesale beer distributor in Akron. It was owned and operated by members of the Kohn family, including Gary W. Diehl (Diehl), who joined the Company in 1970 and became vice president and general manager at some later date. Kohn warehousemen, driver-salesmen, and helpers had been represented by the Union since at least 1957, and there was a bargaining agreement in effect from 1 June 1980 through 31 May 1983, providing for a union shop.

Kohn's union employees engaged in what has been described as a "wildcat strike," and all unit employees who refused to report to work on 9 October 1981 were discharged on that date and subsequently replaced by new employees who were not members of the Union. Diehl advised the new employees that under the existing bargaining agreement they were required to become union members, and even physically took them to the office of the Union to see that they joined. The Union, however, for purposes not pertinent to this proceeding, refused to permit the new employees to join the Union.

Jaber and Cutright were employed by Kohn as driver-salesmen at the time of the wildcat strike, both since 1957, and both were members of the Union. At the time of the strike Cutright was on sick leave and Jaber was on vacation. Mailgrams were sent to them as to other employees, terminating their employment for failure to return to work on 9 October 1981. However, they presumably later demanded the right to return to work because their failure to report to work was due to proper absence for illness or vacation. Jaber apparently went on sick leave prior to the end of his vacation leave. Kohn

[1] All dates are in 1984 unless indicated otherwise.

permitted them to return to work after examination by a company-appointed doctor. Cutright returned to work in late October or early November 1981, and Jaber returned in March 1982. On their return they were Kohn's only union employees.

B. *Failure to Rehire Jaber and Cutright*

Diehl caused the incorporation of Respondent in May or June 1983 with no specific plan to engage in the wholesale distribution of beer, but in the fall of that year decided to assume Kohn's operations, which he did in February as sole owner and operator. Applications for employment were distributed to and returned by all of Kohn's employees and all were employed by Diehl for Respondent but for one Stanley Knepper, Jaber, and Cutright. Knepper had been hired by Kohn after the wildcat strike and had not been a member of the Union.

1. Diehl's union animus

a. *Antiunion meetings*

Although Kohn was still in operation there was an election held to decertify the Union. Knepper, then a Kohn employee not later hired by Respondent, testified that about five monthly meetings were held among Kohn employees prior to the election, with notice only by word of mouth and, "on rare occasions," by notes left on the timeclock, at which the subject matter was, without further description, "antiunion." Diehl was present at most of these meetings and the speakers were "a select group of people that were very close to Gary Diehl." Jaber and Cutright testified they were never given notice of these meetings. Knepper also testified that Kohn removed from the bulletin board a union notice of a pizza-and-beer "prounion" meeting.

Cutright testified that early one morning, about a week prior to the decertification vote, he unexpectedly walked into a meeting and heard Diehl "mention something about the Union," that when the other employees saw him there was "dead silence," and that Diehl merely said, "Remember what we talked about," and the meeting broke up. Jaber testified he arrived immediately afterwards and, in response to his question of what was going on, Cutright responded that he did not know. Knepper was at the meeting and testified that it was the "usual" statements by employees, that it was "antiunion, don't vote for the union because if you do your money is going to end up with the Mafia, and so on and so forth," and that when Cutright appeared the unidentified speaker changed the topic to "sales." Knepper also identified this as an evening, rather than a morning, meeting.

Brian Ross, at various times a warehouseman, driver-helper, and driver-salesman for Kohn, was later hired by Respondent as a warehouseman, but he was discharged about a month prior to giving testimony. He testified that at an employee meeting attended by Diehl, Dave Weaver, a driver salesman for Kohn since 1981 who was hired by Respondent to take over Cutright's route, said that it was a "bad idea to hang around with" Jaber and Cutright "and if they get their jobs back or if we go union they'd—we'd lose our jobs and the other guys would come back, things like that."[2] Ross also testified that Weaver stated Jaber and Cutright were coming back to Kohn to cause trouble "and stuff like that." Weaver testified there were no "antiunion" meetings at Kohn, but he was not questioned as to the alleged statements described by Ross. Ross also testified that Kohn's employee meetings before decertification were at first arranged by word of mouth and later by notices on the bulleting board. He also testified that Cutright walked into one such morning meeting in 1981 and that Jaber also came in, "and everything got quiet and then the meeting just came to a halt and we all went back to work." He could not recall the topic of that meeting.

Diehl specifically denied holding any antiunion meeting or barring Jaber and Cutright from any meeting. He admitted that when employees in groups asked questions he would attempt to address them.

As later discussed, there were a number of sales meetings held for driver-salesmen and driver-helpers during this period which Jaber and Cutright did not attend.

b. *Exclusion from social affairs*

Kohn held Christmas parties annually for its employees. Jaber and Cutright testified that prior to the wildcat strike of 1981 notices of the parties were posted on the bulletin board and they would attend, but that from then on they were not notified of and hence could not attend such parties. Knepper testified that in 1981 and 1982 notification of the parties was "verbal,"[3] but that in 1983 it was by a mailed, written invitation.

Diehl testified that starting in 1981 notices of the parties were posted on the bulletin board, and in the last year they were distributed to employees, including Jaber and Cutright, by hand. He stated that Jaber and Cutright were never excluded from the parties. James Stanford, a driver-salesman hired by Kohn after the wildcat strike and later hired by Respondent, testified that he believed notices of the 1981–1983 parties were distributed along with paychecks, and that posters and maps were displayed on the bulletin board. Gary E. Maddy, also a driver-salesman for Kohn since 1981 and then hired by Respondent, testified that invitations were by word of mouth from Diehl, and that posters and maps also were placed on the bulletin board.

c. *Prejudicial assignment of vehicles*

Kohn had several different types of vehicles available for assignment to driver-salesmen. Knepper testified that Kohn's general manager, and Diehl, told warehousemen to use trucks 27, 28, and 29, "obsolete" vehicles without power steering and with nonstandard storage bins, for Jaber and Cutright. He further testified that these vehicles were assigned to Jaber and Cutright regularly though other, newer and better vehicles were available. Cutright testified that from the time of his return after the wildcat strike he was never assigned one of the

[2] The "other guys" referred to apparently were the Kohn employees fired during the wildcat strike, who had grieved their discharges.

[3] I assume the witness meant that notification was oral, i.e., by word of mouth, rather than verbal, by means of words.

newer vehicles, and Jaber testified that he "mostly had the old trucks," which were harder to work with. The record does not clarify whether Jaber and Cutright were also assigned those vehicles prior to the wildcat strike.

James Morrison, sales supervisor for both Kohn and Respondent, testified that vehicles were assigned to drivers on the basis of capacity, to match quantities sold by the driver-salesman, and that trucks 28 and 29 were still in use. He stated that diesel trucks were not assigned to city routes, such as Jaber's and Cutright's, because the advantage in using them was over greater distances out of town. Diehl denied that the assignments to Jaber and Cutright were "intentional," pointing out that there were six vehicles in all without power steering, and that because of an increased chance of mechanical breakdown the older vehicles were rotated among the driver-salesmen whose routes, like those of Jaber and Cutright, were closer to the warehouse.

2. Respondent's grounds for not hiring

Decisions on hiring for Respondent were made solely by Diehl, who testified that his criteria were "eagerness, competency . . . [and] aggressive salesmanship" as he observed them while the applicants had worked for Kohn.

a. *Failure to attend sales meetings*

Kohn had regular monthly as well as special sales meetings for driver-salesmen, which driver-helpers also sometimes attended. Attendees were not paid for attendance, and though attendance was expected it was not a requirement and no one was discharged or disciplined for failure to attend.

Cutright testified that prior to the 1981 wildcat strike notices of the meetings were always posted and he usually attended, but that after his return to work after the strike the notices were never posted and he never attended the meetings because he "knew nothing about them until after they was [sic] over."[4] Jaber also testified that prior to the wildcat strike meeting notices were posted and the general manager would ask "whether you were coming,"[5] and that he attended "some of them." After the wildcat strike the meetings continued, but Jaber did not attend because "nobody mentioned it, there was nothing put on the bulletin board."[6] Knepper, a warehouseman until shortly before his discharge, testified that he attended "a couple" of sales meetings, learning of them by word of mouth except for "very rare occasion[s]" on which a notice was posted.

Sales Manager Morrison testified that he posted notices of all sales meetings on the bulletin board. Mark Bonchu and Michael George, driver-salesmen and helper for Kohn and Respondent, testified that notices of meetings were posted, and that attendance was necessary. Michael George attended the meetings even when working as Jaber's helper, and testified that when he tried to get Jaber to also attend Jaber told him he had gone to such meetings when he was paid for attendance, and intimated he would do so again only if paid.[7]

b. *Failure to participate in contests*

Among the means fostered by individual brewers and conducted by Kohn as sales aids were contests awarding prizes to driver-salesmen, and sometimes to their helpers, over and above normal commissions or salary. Diehl, General Manager Granata, and driver salesmen Bonchu and Weaver testified that participation by driver-salesmen in such contests was required, but the admitted failure of Jaber[8] and of Cutright[9] to participate did not result in their censure, discipline, or discharge. Knepper specifically testified that the salesman for whom he worked as helper also failed to participate in at least one contest.

c. *Poor job performance*

Respondent declared that the alleged discriminatees did not properly perform their work at Kohn by failing to build "displays," which are generally attractive, customer-convenient physical placements of merchandise, at retail outlets, by "turning in stops," which are notations of failure to make service calls on the route, and by failing to make special deliveries after completing their routes when requested to do so.

Displays are built by a driver-salesman, by his sales supervisor, or by both. In some stores, particularly chain outlets, permission to build displays had to be obtained at higher management levels and was beyond the power of a driver-salesman to obtain. At other such stores bargaining agreements with employees restricted a driver-salesman from performing such work in the retail outlet. There is nothing in the record to indicate warnings to or discipline of the alleged discriminatees, other driver salesmen, or any sales supervisors for failure to build displays.

Stops are turned in by all driver-salesmen, and can be caused by any number of circumstances beyond the control of the driver-salesman, such as vehicle malfunction, excess time required by other customers, or the stop not being open when called on. The record does not disclose specific instances, the number, frequency, or reasons for stops turned in by the alleged discriminatees nor the relationship of these instances compared to other drivers.[10]

[4] Two exceptions were one meeting he was told about in advance because brewery representatives were coming and the meeting referred to earlier on which he and Jaber unexpectedly walked in.

[5] I am not certain whether Jaber here referred to being asked about attending a regular sales meeting on the premises or an off-premise party sponsored by a brewer, but the point is not determinative.

[6] An exception was Jaber's stumbling into a meeting right after Cutright did, described above.

[7] George had given the same testimony at a hearing on Jaber's complaint to the Ohio Civil Rights Commission of age discrimination, discussed below.

[8] Jaber explained that his failure to participate was first the result of not being advised of the contests. There is sufficient contrary evidence to overcome the assertion, but because Jaber admits he did not participate even after learning of the contests a credibility determination is not called for.

[9] By the testimony of Yoder, his helper.

[10] Except that former driver-salesman Knepper testified that the driver-salesman with the worst record, who was not one of the alleged discriminatees, turned in three times as many stops as anyone else.

The record also reveals no discipline of any driver-salesmen for turning in stops.

Customer complaints regarding the alleged discriminatees existed, some actual and at least one refuted by customer testimony. There are also instances of proven customer satisfaction. The record again contains no method of judging customer complaints in terms of number, frequency, or services or of comparing the records of the alleged discriminatees with those of other driver salesmen. There is no record of any discipline of driver-salesmen due to such complaints. General Manager Granata testified regarding some complaints, but added, "It's kind of hard for anybody to have a rapport with every customer."

3. Other proceedings

Though the charge on their behalf in this proceeding was filed by the Union, Cutright and Jaber themselves had filed complaints with the Ohio Civil Rights Commission on 17 February 1984[11] charging age discrimination. Both complaints state: "I believe I have been unlawfully discriminated against due to my age (57) because . . . [d]espite my years of experience, Mr. Diehl refused to hire me opting instead for younger, less experienced workers. At the present time all of the driver salesmen working for the company are in their twenties or early thirties. I believe my age was a factor in the company's refusal to hire me."

Discussion

Section 8(a)(3) of the Act proscribes "discrimination in regard to hire . . . to encourage or discourage membership in any labor organization" and it is clear that any refusal to hire based on union affiliation constitutes violation of both that section and of Section 8(a)(1) of the Act as well.

The General Counsel proved that Cutright and Jaber were the only union members to be retrained by Kohn after the wildcat strike and two of the only three Kohn employees not hired by Diehl for Respondent. I consider that a prima facie case has been made by such showing alone that the failure to hire was based on union membership.

I do not credit inferences that Respondent conducted meetings which were unlawfully "antiunion" in nature. Knepper was an obviously prejudiced witness, having been, though not a union member, also not rehired by Diehl for Respondent. I do not credit his testimony that meetings were held without general notice, particularly in view of the contrary testimony by Morrison, Bonchu, and George, even though the alleged discriminatees supported Knepper's statements as to a general lack of notice of meetings. The only evidence of antiunion sentiment expressed at such meetings is Knepper's bare statement that they were antiunion. When Cutright unexpectedly walked into a meeting, all he could testify to was that Diehl "said something about the union." Particularly because this was during the period prior to the decertification election it is clear that there would be nothing per se improper in a meeting at which "something" is said about the Union.

I do not credit testimony by Cutright and Jaber that they were purposely excluded from Christmas parties as an indication of union animus. Contrary testimony was presented that notice was posted and/or written invitations extended. It is much more in the nature of the attitude, discussed below, of Cutright and Jaber not to participate in contacts with fellow empoyees, that they knew of such functions and voluntarily absented themselves.

Although I credit testimony by Cutright and Jaber that the equipment assigned for their use did not have automatic transmissions or power steering, that per se is insufficient to draw any inference of union animus. It was proven that other, similar equipment was assigned to other driver-salesmen who were not union members.

Having determined that there does, however, exist a minimal showing that the alleged discriminatees were refused employment because of their union membership, it is necessary to consider whether Respondent has demonstrated by a preponderance of the evidence that it would have failed to rehire Cutright and Jaber even had they not been union members.

I do not credit testimony of Respondent's witnesses that Cutright and Jaber did not successfully complete the work functions of overall sales, of covering their routes, of turning in excessive stops, of failing to make special deliveries, of failing to build displays or engage in contests, or of improperly servicing or improperly dissatisfying customers. The testimony presented on such points, all contested, is completely lacking in sufficient detail to consider it, if at all, as more than vague feelings or subjective attitudes, rather than as demonstrated fact.

As to the activities and attitudes of the alleged discriminatees regarding interacting with other personnel in the employer-sponsored sales meetings and activities, I fail to credit the testimony of Knepper, Cutright, or Jaber that prior notice of the meetings was withheld. Even Knepper, a witness clearly prejudiced against Respondent for not being rehired, testified that on at least "rare" occasions notice of meetings was posted. Of greater weight is the fact that the alleged discriminatees knew by long experience in the field and with the Employer that sales meetings and programs would be held. Jaber even discussed with his helper his reason for not attending meetings. The helpers attended sales meetings and were aware when and where they were to be held. Still, Cutright and Jaber, if they are to be believed, made no effort to learn of the meetings and programs or to participate in them.

In failing to credit the testimony on these points of the alleged discriminatees, I must credit Diehl's uncontradicted testimony that he made his hiring decisions on the basis of eagerness and aggressive salesmanship in addition to competency, and that he did not hire the alleged discriminatees because of a perceived lack of eagerness

[11] Knepper, then age 41, also filed a similar charge on 30 March 1984.

and aggressiveness, and not because they were members of the Charging Party Union.[12]

C. Stovall's Discharge

Stovall was employed by Kohn as a sales supervisor, and was not a member of the bargaining unit represented by the Union. He was hired by Respondent in the same position, but after later being placed on probation for 60 days, about May 1984, was moved to the position of warehouseman and, at times, driver-helper.

On 11 April 1985 Diehl gave Stovall a "warning letter" referring to three alleged instances of negligent damage occurring on 18 February and 3 and 8 April 1985. The letter concluded with the following:

> These incidents of repeated negligence resulting in damage to company property will not be tolerated. You are hereby warned that any further occurances [sic] of negligence and disregard of company property will not be tolerated and will result in your termination of employment with this company.

Stovall testified that while working in the warehouse he became aware of the lack of power Respondent's employees had in dealing with management. He discussed common work problems with fellow employees Brinley, Ross, Sigman, and others. With their approval he went to the offices of the Union to inquire about getting their representation and was given authorization cards which, however, he had not attempted to distribute. There was an elected "committee" of employees, one function of which was to help employees take care of grievances, but Stovall did not approach them. In addition to having the committee, Diehl also conducted "issue meetings" on request, during which employees could raise work complaints either directly or, if they preferred anonymity, by putting a note into a hat that was passed around. Stovall suggested to fellow employees that they raise their complaints in an "issue" meeting, and they agreed.

There was a sales meeting scheduled for 6 May 1985 and Stovall decided to ask at that time for an issue meeting. He decided to make the request at that meeting because, first, he wanted the assembled employees to know that an issue meeting was to be held at a specific time and place, and, second, because he was afraid that Diehl would refuse to hold a meeting if asked privately. Precisely what happened at that meeting is the subject of some dispute.

The meeting was scheduled by Sales Manager Morrison for 7 a.m., though due to tardiness it did not begin until about 7:10 a.m. The regular workday began at 7:30 a.m., and employees were not paid for attending sales meetings. Morrison described this meeting as one of the two most important of the year as it began the summer sales season. Morrison's highlight of the meeting was a promotion for Stroh's beer.

Stovall testified that about 7:30 a.m., Morrison was "summing up" and called for questions. Stovall determined that there were no questions, and then raised his hand. When Morrison acknowledged him, Stovall rose and said to Morrison, "We have some issues that we would like to talk about." Morrison responded that the meeting was for sales, not for issues, and Diehl stated that he would get together with Stovall and the three committee members. Morrison then "spoke a little bit more," and, thinking the meeting was over, Stovall raised his hand and was recognized by Morrison a second time. Without rising, Stovall queried when the issue meeting would be held, to which Diehl responded that he would "get in touch with" him. Stovall did not raise his voice during either period, and the meeting concluded about 7:40 a.m.

Morrison's testimony was that Stovall's first statement came early in the meeting when he had covered the aspects of pricing, job duties, and displays of Stroh's and was looking for questions as to those topics before going on to other brands. Stovall stated that "he had some issues to discuss" and Morrison responded that this was a sales meeting and that "[i]f you have any questions or grievances, I'm sure that Mr. Diehl will be more than glad to meet with you after the meeting or at a later date, as soon as possible." Stovall kept going on about having issues to discuss and wanting "to discuss them now" and refused to sit down though Morrison again assured him that Diehl would meet with him later. Stovall repeated his message two or three times, and then "finally did sit down." Morrison attempted to continue the meeting, but first again asked for questions on Stroh's products. Stovall again rose, turned to face Diehl, and said, "Mr. Diehl, we have to talk about these issues now. I want a date now when we can meet, and all you're doing is putting this off." Morrison again asked him to sit down, and Diehl said to him, "Lynn, I'll be glad to meet with you after the meeting or later in the day after the job is done and discuss any problems you have." Stovall remained standing and in a loud voice stated, "I want to discuss them now." Feeling that the meeting was entirely disrupted Morrison decided to adjourn and to speak to the driver-salesmen individually.

Diehl's testimony regarding the meeting was that as Morrison was into his presentation Stovall raised his hand and, when recognized by Morrison, said while seated, "I have some issues I would like to address." Morrison told him it was a sales meeting, "And if you have any issues you should get with Mr. Diehl, and he'll talk and discuss those with you at that time." The meeting continued for 5 minutes, when Stovall "jumped up [and] . . . said 'I want a date and time, right now, to discuss these issues.'" Diehl told him that he "would get with the committee, and we will set up a date and time, and we will do that. But this is a sales meeting and it's for sales matters." Stovall, however, remained standing, though Morrison attempted to continue his presentation. Finally, Morrison adjourned the meeting.

Other of Respondent's employees at the meeting also testified. Yakovazzi testified that Stovall asked, near the end of the meeting when the floor was open to questions, "if he could address some issues at this time"; that on being told by Morrison that the meeting was only for

[12] Allegations by Jaber and Cutright to the Ohio Civil Rights Commission that their not being hired was due to age are not considered relevant, as claimants are free to make alternative and even conflicting claims in different forums.

sales Stovall sat down, but after a short time, when the meeting was nearly over, he raised his hand again and when recognized asked "if a date could be given as far as scheduling a meeting where the issues could be addressed"; and that Stovall did not raise his voice during the meeting, but Yakovazzi's attention was diverted from the sales aspect of the meeting. Weaver testified that it was a motivational sales meeting, "And Lynn stood up I think, I don't know, approximately three times, you know, and interrupted the meeting to bring a point across to Gary about something. I don't really know what he was talking about." Weaver did not recall Morrison speaking to him later about the Stroh's promotion. The interruption of the meeting was, in Weaver's opinion, disruptive. Stanford testified that during the sales presentation the floor was opened to questions, "And Lynn stood up and said he had a couple of things he wanted to settle and he wanted to get them off his chest. And it was told that it was not the time, that it was a sales meeting . . . and that it would be handled at a later date, to get with someone and they'd set up some kind of meeting." They attempted to get back into the sales meeting, "And Lynn stood up and said he wanted it settled now and a time set now for the hearing." They attempted again to get back to sales, "and Lynn stood up for the third time and, you know, said that he wanted this settled or a time that it would be settled." Stovall's voice at these time was firm but not really loud. Gary Maddy testified that Stovall "stood up, like, two or three times and [Morrison] kept telling him [Stovall], you know we'd do it [have an issues meeting] at a later date." Maddy had no idea what Stovall was talking about, and Diehl also did not know. Mark Bonchu testified that during the meeting Stovall "raised his hand and stood up and told Gary that he wanted—that a meeting should be called to discuss the issues"; that Diehl responded "he would set something up and that it would be up to the committee to set up a date that they would try to work something out"; that Stovall remained standing for a while, and then said that he wanted a definite date right then as to a meeting and "he was, you know, persistent about getting a date and it sort of went back and forth a little bit, as far as I recall." Bonchu considered that the meeting had been disrupted.

After the meeting was concluded Stovall returned to the warehouse to load the truck to which he was assigned. Diehl approached him there, and precisely what happened is also subject to some dispute. Stovall testified that Diehl asked if he had a problem, and he responded that he had issues, not a problem; that Diehl insisted, "getting louder and louder," that Stovall had a problem; and that Diehl finally stepped back "and yelled at me to get back to work in a very loud voice." Diehl testified that he merely said to Stovall, "Lynn, what is your urgent problem here?" and that Stovall replied, "I don't have a problem. You have a problem. . . . I don't have a problem. I have issues. You have a problem." Diehl then told Stovall to "just go about your job" and went into his office. Yakovazzi testified that he saw Stovall working and Diehl following him, that their attitudes appeared confrontational, and that though he could not hear what was said both appeared to be speaking excitedly and loudly.

At the end of the workday the members of the employee committee, and Stovall, were called into Diehl's office. With no objection from the committee, Stovall was given the following dismissal letter:

> Your continued disruption of the scheduled sales meeting held on 5-6-85 was inappropriate, uncalled for and inexcusable.
>
> That meeting was a scheduled sales meeting for sales matters. You were told by Jim Morrison that another meeting would be arranged to discuss any other matters. You again interrupted the meeting and thus caused considerable attention to be taken away from important sales presentations.
>
> This type of behavior and disregard for company scheduled meetings will not be tolerated. As a result of these actions and those which occurred within the previous months, you are terminated, effective immediately, as an employee with this company.

Stovall filed his charge with this Board on 23 May 1985. On 6 June 1985 he also filed a complaint with the Ohio Civil Rights Commission stating that he believed the reason given for his discharge to be pretextual and retaliatory for his having testified in March 1985 in Jaber's complaint to that Commission. Stovall's complaint to that Commission was found to be without merit.

Discussion

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by discharging Stovall for engaging in a concerted and protected activity. Respondent denies the allegation, and argues that the activity was not concerted and was not protected under the Act. It is undenied that Stovall was discharged, and that the cause of discharge, together with allegations of prior negligence, was Stovall's actions at the meeting of 6 May 1985.

Both parties recognize that the issue of concert is governed by the relatively recent decision in *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), which overruled the prior Board policy as enunciated in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), and its "progeny." Although the prior policy was issue oriented, determining whether an issue addressed by a single employee "ought" to have been of concerted interest to a number of employees, the current policy is factually oriented and considers whether other employees had indeed expressed their concerted interest to the single employee who took the action. As expressed in *Meyers*, supra at 497, we must determine whether an objective review shows the conduct of the single employee to actually have been "engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself."

Whether Diehl or other individuals were aware of it, it is uncontroverted that Stovall discussed both union affiliation and complaints regarding the conditions of employment with several other employees, and obtained their agreement to raising these complaints at an issues meeting. Both management, represented by Diehl and

others, and the employees recognized that issues meetings related to labor disputes involving a number of employees, and not the complaints of a single employee. I find that though Diehl may not have known the specific issues which were to have been raised, as in fact we do not know from the record the exact nature of those issues, he recognized the call for an issues meeting as a demand to consider concerted complaints. In addition, Stovall made the demand before an assemblage of employees so that all would be advised of the time and place of such meeting. As stated by the appellate court, "The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity."[13]

To satisfy the test set out in *Meyers*, supra at 479, it must also be shown that the concerted activity was also protected under the Act. Although we are not aware of the precise complaints sought to be raised at the issues meetings, it is clear that they arose from the concerted discussions of Stovall with the others regarding terms and conditions of employment, and hence fall within the purview of the Act. It can also be argued that the appeal to fellow workers to meet for support, mutual aid, and protection, as enunciated in *Owens-Corning*, in addition to being concerted must have related to such matters of mutual employment as to be protected by Section 7 of the Act.

Respondent argues that the manner in which Stovall conducted himself at the sales meeting stripped his actions from the protection of the Act in that he used intemperate language, disturbed the efficient operation of Respondent's business, and was insubordinate. The Board has certainly held that conduct or language can be so offensive, defamatory, or opprobrious as to forfeit the protection of law. However, I find no such language or action present in the record. Indeed, Stovall's language was sufficiently temperate to be repeated in any Sunday school without alarm, a distinct difference from the language ordinarily heard during labor disputes.

The manner of Stovall's actions also bespeaks a calm reasonableness. I credit his testimony, supported by the testimony of current employees of Respondent, that he sought and received recognition, without interrupting others, before he spoke out, and that while his voice was "firm" it was not overly loud nor his manner overly argumentative. Although the later meeting between Diehl and Stovall was described as confrontational, with loud and excited voices, it was Diehl who followed Stovall to the latter's workplace and initiated the exchange, and not Stovall leaving his work to confront Diehl.

There remains the question of whether Stovall's choice of time and place in making the demand for an issues meeting forfeited the protection afforded such action by the Act. The sales meeting at which the demand was made was planned for and conducted during a period prior to the start of the workday. Although the unpaid attendance at such meetings was expected by management, there is nothing in the record to indicate that failure to attend ever resulted in discipline. On the other hand, sales meetings were normal in Respondent's business, and current employees testified that Stovall's interruption of the sales theme for a nonsales function interfered with the purpose of the meeting. It is clear, though, that absent egregious harm to the employer's business operations or damage to its premises, which I find not to have here occurred, the time, place, and even the manner of conducting concerted and protected activities will not alienate the employees from the protection of law. As the scholarly decision of Administrative Law Judge Brandon in the matter of *Johnnie Johnson Tire Co.*, 271 NLRB 293, 294–295 (1984), phrased it:[14]

> It has long been recognized that employees have a legitimate interest under the Act in acting concertedly in making known their views to management without being discharged for that interest. . . . Even the reasonableness of the method of protest adopted does not decide the protected nature of the concerted activity. . . . Accordingly, concerted activity by nonrepresented employees to protest their working conditions is normally held to be protected regardless of the time of day it occurs or the impact of such activity on production.

I find that Stovall's statements and actions during the sales meeting, although interrupting the planned purpose of the meeting, were orderly, not overly damaging to Respondent's business or premises, and did not result in the loss of the Act's protection. They did, however, pinpoint Stovall as a speaker for concerted and protected activities, and motivated his discharge, in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By discharging Lynn Stovall, an individual, because of his engaging in concerted activity protected under the Act, Respondent engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having unlawfully discharged Lynn Stovall, I find it necessary to order it to offer him immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings that he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned

[13] *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969), enfg. 172 NLRB 148 (1968), cited by the Board in *Hancor, Inc.*, 278 NLRB 208, 216 (1986).

[14] Citations not included, typographical error corrected.

from the date of his discharge to the date of a bona fide offer of reinstatement, less net interim earnings during such period. Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).[18] Moreover, consistent with the Board's decision in *Sterling Sugars*, 261 NLRB 472 (1982), I shall recommend that Respondent be required to remove from its records any references to the unlawful discharge of Lynn Stovall, provide written notice to him of such action, and inform him that Respondent's unlawful conduct will not be used as a basis for future disciplinary action against him.

The General Counsel has requested a visitatorial clause authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure. Because establishment of the rate of pay to which the discriminatee would have been entitled at various times from 6 May 1985 until compliance is finally achieved may be difficult without Respondent's cooperation, I grant the request.

[Recommended Order omitted from publication.]

[18] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Upstate Coca Cola, Inc. *and* **Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers of Albany and Vicinity Local 669, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America**

Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers of Albany and Vicinity Local 669, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* **Richard Lindheimer.** Cases 3–CA–13133 and 3–CB–4858

31 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 21 October 1986 Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent Union filed a letter opposing the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, brief, and letter and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Robert A. Ellison, for the General Counsel.
Joseph H. McClure Jr., Esq., of Atlanta, Georgia, for Respondent.
Dominick Tocci, Esq., of Albany, New York, for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in Albany, New York, on 3, 4, and 9 June 1986. The initial charge in this proceeding was filed by Richard Lindheimer against the Union on 3 February 1986. The charge alleged that since 1 December 1985 the Union has unlawfully altered his seniority date and has improperly refused to process a grievance over this change. Lindheimer amended this charge on 10 March 1980 and the Regional Director issued a complaint against the Union on 11 March 1986.

On 6 March 1980 the Union, no doubt being advised that a complaint was going to be issued against it, filed an unfair labor practice charge against the Employer in Case 3–CA–13133. This charge alleges that the Employer discriminated against Lindheimer by changing his seniority date. At the same time, the Union averred that it nevertheless believed that the change in Lindheimer's seniority date was proper. In effect, the Union's intention in filing this charge was to assert (rather cleverly I must say), that if it is held to have violated the law because of the alleged change in Lindheimer's seniority, then the Employer should also be held liable because the Employer and the Union agreed to the change.

As a result of the charge in Case 3–CA–13133 the Regional Director issued, on 27 March 1986, an order consolidating cases, and an amended consolidated complaint against both the Union and the Employer. This amended consolidated complaint alleges:

(1) The Employer and the Union for many years have maintained a series of collective-bargaining agreements, the most recent of which runs from 1 November 1984 to 31 October 1987.

(2) In July 1985 the Employer and the Union made an oral agreement whereby Lindheimer (who had previously left the bargaining unit to work as a supervisor) would be allowed to return to a bargaining unit job with a 1961 seniority date, and/or with protection against any possible future layoffs.

(3) In reliance on the oral agreement, Lindheimer returned to the bargaining unit in August 1986 as a working foreman.

(4) In December 1985 the Union by its secretary-treasurer, Leo Lester, reneged on the oral agreement described in paragraph 2 by insisting that Lindheimer's seniority date be 26 August 1985 (i.e., when he returned to the bargaining unit).

(5) As a result, the Company on 11 December 1985 changed Lindheimer's seniority date to 26 August 1985.

(6) In January 1986 the Union caused the layoff of Lindheimer by insisting that his seniority date was August 1985 and by insisting that he should therefore be laid off before employees hired before August 1985.

(7) In February 1986 the Company acceded to the Union's demands and laid off Lindheimer.

(8) In December 1985 and February 1986 the Union refused to process Lindheimer's grievances relating to the change in his seniority date and his layoff in February 1986.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is agreed and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.[1]

II. OPERATIVE FACTS

Lindheimer initially began working at the Company about 1958 or 1959. He then left for a short time to work with his brother and returned in 1960. Thereafter, he continued to work continuously in jobs covered by the collective-bargaining agreement until July 1984 when he was asked to become the head of the maintenance department, a supervisory position. At the time, Lindheimer spoke to Bob Herman, another supervisor, who told him that if he did not like the new job, he could always return to the bargaining unit within 2 years. Nothing was said, however, about retaining or losing seniority on such a return. After his discussion with Herman, Lindheimer decided to accept the promotion and he began working as a supervisor. Simultaneously, he obtained a withdrawal card from the Union.

For one reason or another, Lindheimer found that he did not like his new job and about June 1985 he asked the Company's director of operations, Walter Munroe, if he could return to the bargaining unit. Munroe, who had himself just recently arrived at the Albany facility, replied that he would check with his superiors and get back to Lindheimer. When Munroe did check, his superiors told him to do what he thought best. The next week Munroe told Lindheimer that he could go back to a unit job, whereupon Lindheimer expressed some concern that if he went back into the bargaining unit, his seniority might begin again at zero. Munroe states that he then contacted Morse who worked in the personnel department (in Syracuse) because he did not know what Lindheimer's seniority should be if he returned to the bargaining unit.[2] Morse told him that she would get back to him, but apparently did not. Because Munroe was not certain about the interpretation of the contract in connection with Lindheimer's seniority question and because he was desirous of protecting Lindheimer from any possible seasonal layoff, Munroe arranged for a meeting with the Union in July 1985.

Before discussing the meeting of July, I note the following relevant provisions of the collective-bargaining agreement:

(1) Article XI—Seniority

> The principle of seniority shall prevail at all times except as otherwise specified herein. After working 30 days a new employee shall be placed on the appropriate seniority list as of his first day of employment. When it becomes necessary to reduce the working force, the last man hired shall be laid off first, and when the force is again increased, the men are to be returned to work in the reverse order in which they are laid off. Seniority shall be broken only by discharge, voluntary quit, or more than a two year layoff.

(2) At Article VII, the last paragraph states:

> The Company has discretion to select employees for the position of working foreman. A working foreman will be paid $.40 more per hour than the rate of his classification.

(3) Article XX Leave of Absence states:

> If the Company grants a leave of absence not to exceed six months, to any employee, the Company, on request of the employee, will furnish such employee in writing confirmation of such leave of absence. The employee assumes the responsibility of requesting such confirmation of leave in writing and filing same with the Union. The Union shall not be required to recognize such leave of absence unless the employee shall file such written confirmation thereof, with the Union within one week from the date the same is granted.
>
> Any employee absent without leave for any reason other than for sickness, or other legitimate or excusable reason, or any employee absent beyond the period of approved leave of absence, shall be considered as having left the employ of the Employer.
>
> The Company and the Union must jointly agree upon all leaves of absence prior to being granted. Prior to leaving, the employee must deposit with the Company monies to cover his pension contributions for the period of the leave of absence.[3]

In early July 1985 a meeting was held to discuss the return of Lindheimer to the bargaining unit. In addition to Lindheimer's presence, the Company was represented by Walter Munroe and Bob Herman and the Union was represented by Leo Lester and Irv Wood, its president.[4] It was at this meeting, according to the General Counsel, that the Union and the Company made an agreement whereby, (1) Lindheimer would go back into the bargaining unit as a working foreman, (2) he would have a seniority date of 1961 (i.e., his date of hire minus the 13 months that he was a supervisor), and (3) he would be protected from layoff in the event of possible future layoffs. In reviewing this record, and considering all the evidence in conjunction with the demeanor of the witnesses, I am convinced, contrary to the General Counsel, that no such agreement was made. Rather, what I think transpired is set forth below.

There is no doubt that the Company and the Union recognized that Lindheimer was an extremely valuable employee who, because of his ability to fix and maintain a wide variety of machinery, had almost a unique value to the Company. As such, the Company was anxious not only to accommodate the wishes of a long-term and loyal employee, but also was desirous of protecting him

[1] The contract in this case was jointly negotiated by several Teamsters Union locals with respect to several plants located in different cities. The particular contract with Local 669 covers Coca-Cola employees in Albany and in Glen Falls, New York.

[2] According to Munroe, when he arrived at the Albany plant he received his training relative to the collective-bargaining agreement by being given the union contract and told to read it.

[3] There is also at art. XXI a grievance-arbitration clause.

[4] Leo Lester is the person in the Union with the highest authority.

from the possibility of being laid off if future layoffs occurred. I also believe that the Union acknowledged Lindheimer's skills and was likewise desirous of accommodating him to the extent possible within the limits of the collective-bargaining agreement.

I conclude that at the July meeting the Company by Munroe expressed the desire to protect Lindheimer from layoffs because Munroe feared that the seniority clause might very well be interpreted as requiring Lindheimer to start at zero seniority on his return to the bargaining unit. I also conclude that Lester, although indicating his view that Lindheimer would lose his prior seniority, expressed the opinion that Lindheimer might be afforded some protection if the Company made him a working foreman. In this regard, I think that Lester had in mind the idea that if Lindheimer was designated as a working foreman, other employees who were hired before his return to the unit might not attempt to bump him in the event that regular employees were laid off.[5] The evidence shows that Lester said at this meeting that the Company could make Lindheimer a working foreman so as to afford him some protection, but that if other employees were laid off and if they filed grievances alleging that they had greater seniority than Lindheimer, Lester would have to take such grievances to the Union's executive board for consideration. In effect, therefore, I conclude that Lester merely suggested that a possible way to protect Lindheimer from layoff was for the Company to make him a working foreman. I do not believe that he agreed Lindheimer could have a 1960 or 1961 seniority date or that the Union would consent to guarantee Lindheimer absolute protection from layoff. Rather, I think that Lester essentially hoped that a layoff-seniority problem would simply not arise either because (a) no regular employees would be laid off in 1985–1986, or (b) if regular employees were laid off, they would not think to file grievances because of Lindheimer's working foreman's position and/or his unique skills. It is clear to me that Lester expressly reserved the right to process grievances in the event that future layoffs occurred and if other employees did assert they had greater contractual seniority than Lindheimer.

After Lindheimer returned to the bargaining unit in early August, the Company and the Union had a meeting in August to discuss the updating of the seniority list. When the Company proposed that Lindheimer should be assigned a seniority date of 1961, Lester objected and stated that Lindheimer's seniority date should be the date that he returned to the bargaining unit in August 1985.

Lindheimer's wife also works at the Albany plant. She is, as far as I can see, an intelligent and determined woman who is not afraid to assert her "rights." In 1984 she was fired when she became involved in a personality conflict with the plant manager. At that time, Lester processed a grievance on her behalf and succeeded in convincing the Company, without going to arbitration, that Lindheimer should be reinstated with backpay.

During the summer of 1985, Lindheimer's son had a summer job with the Company. After he was laid off in September, the Company needed a replacement and called the Union to send a man, which it did. When Mrs. Lindheimer discovered this, she called Lester and accused him of sending up a crony instead of having her son recalled for a week so that he would be eligible for unemployment benefits. Lester hung up on her, and after she called back and spoke to Wood, Lester went up to the Company, spoke to Robert Herman, and arranged for Mrs. Lindheimer's son to be recalled for a week.

On 18 November 1985 the Union held a nomination meeting for the purpose of selecting candidates for office. The incumbent officers, Leo Lester and Irv Wood were nominated for another term. Also nominated was Tony Jesmaine for secretary-treasurer. Right after the nominations, Lester and Wood held a party at a nearby restaurant where the local's members were invited. According to Mrs. Lindheimer, while at the party she told Lester that although she was supporting Irv Wood for reelection, she had not made up her mind between Lester and Jesmaine. She contends that Lester thereupon angrily told her to leave his party. This is denied by Lester.

Regarding the relationship between Mrs. Lindheimer and Lester, Munroe recalled one occasion, sometime in July 1985, when Lester referred to Mrs. Lindheimer as "that bitch." Munroe, who overheard this remark, could not relate the context that this remark was made. Also, Ken Richardson (the Company's production manager), recalled that on one occasion he overheard Lester remark that if it was not for his wife, Lindheimer would not have these problems.

At a meeting on 9 December 1985, the Company and the Union discussed a new proposed seniority list. When Lindheimer's name came up, Richardson agreed with the Union's position that having left the bargaining unit in 1984, Lindheimer had lost his seniority status under the terms of the contract. Further, he agreed that as neither shop stewards nor working foremen had contractual superseniority, Lindheimer's seniority began when he returned to the unit in August 1985. Thereafter on 11 December, a seniority list was posted and on 12 December Lindheimer presented a grievance to Leo Lester at the Union's office. This grievance read:

> Loss of 25 years seniority. I grieve that employer lists starting date as of 8/26/85 when starting time was in fact 6/29/60.

Present at the meeting on 12 December were Leo Lester, the Lindheimers, and their friend Pat Franklin who also was a shop steward. The Lindheimers argued that there had been an agreement back in August between the Company and the Union whereby Lindheimer retained most of his seniority. Pat Franklin took up Lindheimer's case and said that if there had been an agreement, then the Union should live up to it. Lester denied, however, that he had ever made such an agreement and said that the contract was controlling. He said that he neither could nor would alter the contract for Lindheimer's benefit or for the benefit of any other person.

[5] During the summer the Company hires college students who are laid off before regular employees are laid off. In some years no regular employees are laid off at all, while in other years some are. In July 1985 there was no way for anyone to predict to what extent, if any, there would be layoffs of regular employees in the autumn or winter.

These positions by the respective parties were repeated over and over again with greater and greater heat.

On 12 December Mrs. Lindheimer wrote a letter to Jesmaine expressing her support for his candidacy. For the most part she set forth the situation regarding Lindheimer's seniority status from the Lindheimer point of view. She also expressed the opinion that Lester was not to be trusted because he had reneged on the alleged agreement to allow Lindheimer to return to the bargaining unit while retaining most of his previous seniority. She gave permission for the letter to circulate as part of Jesmaine's election campaign. Despite its publication it did not harm Lester who won on 18 December.

In late December 1985 or early January 1986, a number of bargaining unit employees were temporarily laid off. Thereafter, in January some grievances were filed alleging that employees with greater seniority than Lindheimer had been laid off while he remained at work. These grievances were responded to by Herman, after consulting Munroe (Munroe was ill). The responses to the grievances of Conradt and Robbins were (1) the Union and the Company had agreed to give Lindheimer a seniority date of August 1961, and (2) they also agreed that Lindheimer would be classified as a working foreman. It should be noted that these letters of Herman were written despite the fact that he was aware that the Company's position as expressed by his superior, Richardson, in December 1985 was that Lindheimer's seniority date was August 1985 and that Lindheimer did not have any type of superseniority. As stated by Herman, he and Munroe drafted these replies because they disagreed with the Company's position. I also note that the response to Robbin's grievance was never sent to the Union because it was intercepted by Richardson who countermanded it.

A meeting was held between the Union and the Company on 28 January 1986. The spokesman for the Company was Richardson and the spokesman for the Union was Lester. The purpose of the meeting was to discuss the various pending seniority grievances. At this meeting Lindheimer was told by Richardson that the Company agreed with the Union's position. Lindheimer was also told that he was going to be laid off commencing on the first week of February.

On 30 January 1986 and 3 February 1986 Lindheimer filed three related grievances concerning his seniority status and his "layoff." These grievances were denied by the Company both orally and in writing.

I should note that in actuality Lindheimer was never really laid off because he used some of his accumulated vacation time for the period that he was scheduled for layoff. Also the Company, without objection from the Union, gave work to Lindheimer during his "layoff" period as a subcontractor because his skills were needed. Lindheimer returned to work on 1 March 1986 and has worked continuously since that date.

III. DISCUSSION

The General Counsel's theory in this case is based on a number of factual premises which, in my opinion, cannot be sustained. As I understand his theory, it is based on the hypothesis that (1) an agreement was made in July and/or August 1985 whereby the Company and the Union agreed to allow Lindheimer to return to a bargaining unit job with the retention of almost all the seniority that he had earned prior to his promotion to management and/or with a guarantee of job protection as a working foreman; (2) the Union reneged on this alleged agreement thereby ultimately causing Lindheimer's layoff in February 1986; and (3) the Union's reneging on the agreement was motivated by Lester's retaliation against Mrs. Lindheimer's support of his rival for union office.

As to motivation, the evidence may show a degree of hostility between Mrs. Lindheimer and Lester, two strong-willed individuals. But the facts show that whatever differences they may have had, Lester has assisted either her (when she was fired in 1984), or her son, when he was laid off in September 1985. The evidence simply cannot support the claim that Lester "reneged" on an alleged agreement in July 1985 concerning Lindheimer's seniority status because of his wife's intraunion activities, because it is clear that such a "reneging," if it occurred at all, occurred before his wife expressed her support for the rival candidate, Jesmaine.

Further, it is my opinion that Lester never entered into an agreement whereby Lindheimer would, on his return to the bargaining unit, retain his old seniority status minus the 13 months that he spent in management. Nor do I find that Lester agreed to any kind of arrangement guaranteeing Lindheimer job protection in the event that layoffs occurred in the future. Rather, I conclude that the credible evidence establishes that Lester, at the July 1985 meeting, merely suggested that if the Company, as was its contractual right, designated Lindheimer as a working foreman, this might give him some degree of protection because of his special skills. Thus, at most, it is my opinion that Lester made this suggestion because he hoped that layoffs of regular employees would not occur and that if they did, other employees might be dissuaded from filing grievances because of Lindheimer's "special skills." In this regard, it seems to me that Lester basically was hoping that the problem would simply not come up. Moreover, despite making the working foreman suggestion, Lester protected his flanks by explicitly reserving the right to take to his executive board any grievances which might arise in the event layoffs did occur and if employees did claim greater seniority than Lindheimer.

The evidence further establishes to my satisfaction that at the August 1985 meeting Lester specifically took the position that Lindheimer's seniority status began on the date that he returned to the bargaining unit. This position was ultimately agreed to by the Company's representative, Richardson, on 9 December 1985 when the Union and the Company were in the process of drawing up a new seniority list.

Having found that there never was any agreement as alleged by the General Counsel and having found an absence of unlawful motivation in connection with the Union's alleged "reneging," I must conclude that the allegations of the complaint have no merit. In my opinion the existing labor agreement is ambiguous concerning

what should happen to a person's seniority when he or she is promoted to management and thereafter returns to the bargaining unit. As such, it seems to me that the Union's interpretation of the contract (to the effect that such a person starts over again with zero seniority) is not unreasonable. It is, at the very least, a contractual interpretation which it could legitimately argue before an arbitrator.

As the question of Lindheimer's seniority status is to my mind one which solely concerns the interpretation of the existing contract, it properly was decided during the grievance meetings established by the contract's grievance procedure. As I am convinced that neither the Union nor the Company engaged in any acts motivated by the Lindheimers' protected concerted activity and as I am equally convinced that the Union's actions were not arbitrarily, capriciously or invidiously motivated, it is concluded that the allegations of the amended consolidated complaint should be dismissed.

CONCLUSIONS OF LAW

1. Upstate Coca Cola, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers of Albany and Vicinity, Local No. 669, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Neither the Union nor the Company has violated the Act in any manner as alleged in the amended consolidated complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

It is recommended that the complaint be dismissed in its entirety.

---

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Coos-Bend, Incorporated, d/b/a The Sawmill Restaurant & Lounge *and* Culinary, Bartenders, Hotel & Motel Union Local 828, affiliated with Hotel and Restaurant Employees and Bartenders International Union, Cases 36–CA–4857 and 36–CA–4860

31 March 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 21 October 1986 Administrative Law Judge Jerrold H. Shapiro issued the attached supplemental decision. The Respondent filed an exception and a supporting brief and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The Respondent contends that it is obligated to make contributions to the Union Trust for employees only when they become eligible to receive benefits from the Trust, rather than from the beginning of their employment. Its contention is based on its interpretation of the phrase "eligible for benefits" in the following pertinent contract provision:

> The employer agrees to pay the Hotel, Restaurant and Beverage Employees Trust or its successor the sum of fifty (.50) cents per compensible [sic] hour for employees covered by this Agreement and eligible for benefits hereunder exceptions therefore [sic] all supervisory employees, (part-time being defined as either less than 30 hours per week of 60 hours per month, the Employer agrees, however not to replace any full-time employee with such part-time employees.)

The judge found that pursuant to the language of an addendum to the contract—"The Employer shall pay the [Trust] . . . for each employee covered by the terms of the labor agreement"—the Respondent agreed to contribute to the Trust on behalf of all the employees covered by the contract without regard to their eligibility to receive benefits from the Trust. He concluded that the addendum was intended to supersede the contract provision, the parties recognizing that the contract phrase, "eligible for benefits," was incompatible with the parties' intent to provide trust fund benefits. This incompatibility existed because the Trust would not pay benefits to any employee for whom 1000 hours of employer-paid fund contributions had not been made, and under the Respondent's reading of the contract provision (a reading which the judge appeared to accept, at least for the sake of argument), the Respondent would never make contributions on behalf of an employee who was not *already* eligible for benefits. Hence, virtually no employees would ever qualify for benefits.

In its sole exception, the Respondent argues that the judge's finding—that the Respondent's interpretation of the contract language "eligible for benefits" would result in an "impossible situation" because most employees would not receive benefits—requires application of the contract law doctrine of mutual mistake. For the reasons stated by the judge and for the following reason, we find no merit to the Respondent's claim. The judge found the language of the provision and of the addendum to be incompatible, the latter being clear and unambiguous and the former leading to an untenable result in this situation. However, there is another reasonable interpretation of the phrase "eligible for benefits" that is consonant with the language of the addendum: that it refers to that kind of employee who will, at the appropriate time, become eligible to receive benefits from the Trust, as opposed to certain ineligible part-time employees, apprentices or supervisors, who will never become eligible to receive benefits. Under either view of the meaning of the phrase, the contract, read as a whole, requires Trust contributions for all employees otherwise covered by the terms of the contract, except those specifically excluded.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Coos-Bend, Incorporated, d/b/a The Sawmill Restaurant and Lounge, North Bend, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Gail M. Streicker, for the General Counsel.
Patrick M. Kilby, for the Respondent.
Darrell L. Cornelius, for the Union.

SUPPLEMENTAL DECISION

JERROLD H. SHAPIRO, Administrative Law Judge. On 5 November 1985 the National Labor Relations Board (Board) issued an unpublished Order in this proceeding adopting the findings and conclusions of its administrative law judge contained in his decision issued 4 October 1985 in which the judge concluded that Respondent Coos-Bend, Incorporated, d/b/a The Sawmill Restaurant & Lounge (Respondent) violated Section 8(a)(1) and (5)

of the National Labor Relations Act (Act) by, among other things, failing and refusing to execute a written collective-bargaining contract containing terms which had been verbally agreed to by Respondent and Culinary, Bartenders, Hotel & Motel Union Local 828 (Union). On 5 March 1986 the Court of Appeals for the Ninth Circuit issued an unpublished judgment enforcing the Board's Order.[1]

The Board's Order, as enforced by the court, remedied Respondent's unlawful refusal to execute the collective-bargaining contract it had reached with the Union by, among other things, requiring Respondent to make the contractually required payments to the Hotel, Restaurant & Beverage Employees Trust (Trust) on behalf of the union-represented employees. A dispute having arisen over the amount of contributions owed by Respondent to the Trust under the Board's Order, the Regional Director for Region 19 of the Board, on 21 May 1986, issued a backpay specification, which was amended at the hearing, alleging the amount of Trust contributions due under the Board's Order. On 5 June 1986 Respondent filed its answer to the backpay specification, and on 2 July 1986 filed a supplemental answer. The issues presented by the pleadings are twofold: (1) whether Respondent's contract with the Union obligates Respondent to make contributions to the Trust on behalf of all employees covered by the contract, except apprentices and part-time employees, from the moment of their employment, as contended by the General Counsel and Union or, as contended by Respondent, whether the contract obligates Respondent to make these contributions on behalf of employees only when employees become eligible to receive health and welfare benefits from the Trust; and, (2) whether the part-time employees on whose behalf Respondent is *not* obligated to contribute to the Trust are limited to three who work no more than 60 hours a month, as contended by the General Counsel and Union, or constitute all employees who work less than either 30 hours a week or 60 hours a month, as contended by Respondent.

On 17 July 1986 I conducted a hearing in this proceeding.

On the entire record, from my observation of the demeanor of the witnesses, and having considered the parties' posthearing briefs, I make the following

FINDINGS AND CONCLUSIONS

A. *The Facts*

Respondent operates a restaurant and lounge. The Union represents a unit of Respondent's employees. Immediately prior to the time material herein, the Respondent and Union were parties to a collective-bargaining contract covering these employees. Under the terms of the contract, which was effective from 1 June 1983 to 1 June 1984, Respondent was obligated to contribute to the Trust on behalf of the unit employees. The sole provision in the contract dealing with this subject was entitled "Health and Welfare" and read, in pertinent part, as follows:[2]

> 1. The employer agrees to pay the Hotel, Restaurant and Beverage Employees Trust or its successor the sum of 38 cents per compensible [sic] hour effective with May 1, 1983 hours for all employees covered by this Agreement. The Employer shall increase its contribution rate by 12 cents per compensible [sic] hour commencing with hours worked on or after August 1, 1983. The Employer's contribution shall not be increased above 50 cents per compensible [sic] hour during the term of the Agreement.

Under the terms of this provision Respondent contributed to the Trust on behalf of the employees covered by the contract as soon as they were employed, i.e., from their first compensable hour, even though they were not eligible under the Trust's eligibility rules to receive contractual health insurance benefits until they worked 1000 compensable hours, hours for which an employer contributed to the Trust.

In April 1984 the negotiators for Respondent and the Union commenced bargaining for a contract to succeed the 1983–1984 contract which was scheduled to expire 1 June 1984. Respondent's president, Bruce Brandt, was Respondent's negotiator and the Union's financial secretary/business representative, Phyllis Wright, who was accompanied by an employee committee, was the Union's negotiator. In the underlying unfair labor practice proceeding the Board affirmed the judge's conclusion that these negotiations resulted in the parties reaching a verbal agreement on all the terms of collective-bargaining contraction
8(a)(5) and (1) of the Act by failing and refusing since December 1984 to execute a written collective-bargaining contract containing the terms of this verbal agreement. In the instant supplemental proceeding the parties agreed that General Counsel's Exhibit 2 is the written collective-bargaining contract that the Board found contained the terms that had been verbally agreed to by Respondent and the Union and that Respondent was obligated, under the Board's Order, to execute and give effect to retroactively.

General Counsel's Exhibit 2, which for the sake of convenience is referred to herein as the 1984–1985 contract, consists of eight pages and two addenda. The 1984–1985 contract is effective from 1 June 1984 to 1 June 1985[3] and covers a bargaining unit consisting of chefs, cooks, cooks' helpers, dishwashers, hostesses, waiters, waitresses, bus persons, bartenders, and banquet waiters/waitresses; but excluding persons employed as a kitchen supervisor, waiter/waitress supervisor, bar supervisor, banquet supervisor, and cocktail supervisor.

[1] No. 85-7110.

[2] Unlike the 1984–1985 contract, which is described infra, the 1983–1984 contract, R. Exh. 1, does not include an addendum which deals with Respondent's obligation to contribute to the Trust on behalf of its employees.

[3] The contract is subject to being automatically renewed for an additional period of 1 year if notice of modification or termination is not given prior to 1 June 1985.

The 1984–1985 contract contains three separate provisions dealing with Respondent's obligation to contribute to the Trust; one provision at page 8 and the other two are attached to the contract as addenda. The provision at page 8 of the contract has no title and reads as follows:

> The employer agrees to pay the Hotel, Restaurant and Beverage Employees Trust or its successor the sum of fifty (.50) cents per compensible [sic] hour for employees covered by this Agreement and eligible for benefits hereunder exceptions therefore all supervisory employees, all apprentices and the part-time employees (part-time being defined as either less than 30 hours per week or 60 hours per month, the Employer agrees, however not to replace any full-time employee with such part-time employees).

The first addendum, entitled "Part-Time Employees," reads as follows:

> Three Employees To Work Not More Than Sixty (60) Hours Per Month Without Paying Health And Welfare Payments On Such Employees. Part-Time Employees Shall Not Replace Existing Union Represented Positions.

The second addendum, entitled "Agreement," is a printed form which in pertinent part reads as follows:

> I
>
> The Employer shall pay to the Hotel, Restaurant & Beverage Employees trust, or its successor, the sum of *(50) Fifty cents per compensable hour* xxxxxxx for each employee covered by the terms of the Labor Agreement, said payments to become effective on the first day of *August 1984* for employees who worked or were paid for xxxxxxxxxxx hours in the previous of *August 1984*. The undersigned employer agrees to be bound by all of the terms and conditions of the trust agreement establishing said Trust Fund or its successor, together with any amendments thereto.[4]
>
> II
>
> The Employer hereby grants Power of Attorney to the Employer Trustees or their successors of said Trust, or its successor, to administer said fund as their representatives in the administration of said funds.

General Counsel's Exhibit 8, the "trust agreement" in effect during the time material, referred to in the above-described second addendum, reads in pertinent part, as follows:

> Each Employer shall have an obligation to contribute to the Fund the amount of benefit contributions specified in its applicable Collective Bargaining Agreement or such other written agreement adopted pursuant to regulations of the Board of Trustees. [art. IV, sec. 4.1.]
>
> The Trustees shall have the power to construe the provisions of this Trust Agreement and the eligibility requirements established by the Trustees and any such construction adopted by it in good faith shall be binding upon any and all parties and persons affected thereby subject to the appeal procedure set forth herein. [art. V, sec. 5.2.]

Pursuant to the authority granted to them in the above-described Trust Agreement, the Trust's trustees promulgated eligibility requirements which were in effect during the time material and which were printed for distribution in the form of a booklet. The eligibility requirements pertinent to this case, which are set forth in the booklet, General Counsel's Exhibit 9, read as follows:

> INITIAL ELIGIBILITY for benefits will be attained on the first day of the month following accumulation of at least 1000 hours of paid contributions as reported by one or more employers within NOT MORE than 12 consecutive months AND with NOT LESS than 62 hours in any month during accumulation of the 1000 hours of paid contributions. If less than 62 hours of paid contributions is reported by your employer(s) in one or more months of the initial qualifying period you will start a new initial qualifying period when you once again are reported for 62 hours or more of paid contributions.[5] You will remain eligible during each succeeding calendar month if your employment for one or more participating employers totaled at least 62 hours during the preceding calendar month and contributions are paid for those hours.
>
> If you cease to be eligible and fail to re-establish your eligibility within 6 months, the initial eligibility will again be imposed.

It is undisputed that Respondent's negotiator, Brandt, was not shown and was not given a copy of the above-described trust agreement either prior to or during the contract negotiations. In dispute, however, is whether Union Negotiator Wright during the negotiations gave Brandt the booklet containing a description of the above-described eligibility requirements. Brandt testified he was not given the booklet during the negotiations. Wright testified that during the time material she had a stack of the booklets, that it was her practice to distribute booklets to the several employers whom she was negotiating with, and that pursuant to this practice she gave a booklet to Brandt at the start of the negotiations for the 1984–1985 agreement. I credit Wright's testimony and reject Brandt's because of Wright's testimonial demeanor which was better than Brandt's.

[4] The italicized language refers to either handwritten or typed notations which were inserted in blank spaces on the printed form. The series of x's refers to where language on the printed form has been x'd out by a typewriter.

[5] G.C. Exh. 10 shows that effective 1 May 1985 the Trust's trustees amended the above-described eligibility requirements so that "qualifying hours for eligibility shall be reduced to 500 hours over, not more than, an eight-month period and no less than 62 hours in any one month."

It is undisputed that Brandt, during the negotiations for the 1984–1985 contract, on more than one occasion stated emphatically that he did not want to continue making contributions to the Trust on behalf of employees who were not eligible to receive benefits and stated that he wanted to contribute only on behalf of the employees who were eligible to receive benefits. Brandt testified that in response Wright replied by stating she did not think Brandt should have to make contributions on behalf of employees who were not eligible to receive benefits. Wright, on the other hand, testified she responded by telling Brandt that virtually every employer she negotiated with complained about having to contribute on behalf of employees who were not eligible to receive benefits, and also informed Brandt that when Wright had worked in the trade that Wright, herself, had problems with this system, but explained to Brandt that the way the Union's health and welfare program operated, was that an employee had to work a certain number of hours before he or she became eligible to receive health insurance benefits and that the employer was required to contribute to the trust for those hours even if the employee was not at the time eligible to receive benefits. I have credited Wright's testimony because her testimonial demeanor was better than Brandt's.

Regarding the language set forth at page 8 of the 1984–1985 contract which states in substance that Respondent agrees to pay the Trust the sum of 50 cents per compensable hour for employees covered by the Agreement and eligible for benefits, neither Brandt nor Wright were able to remember the circumstances surrounding the drafting of this language. When asked whether he was responsible for it, Brandt testified: "It was a combination. You know, Ms. Wright drafted some; I drafted some; and I don't remember exactly who drafted this paragraph." Wright testified she felt she would never have worded the paragraph the way it was set forth in the 1984–1985 contract, but testified she had no independent recollection of who was responsible for its wording.

Regarding the language set forth at page 8 of the 1984–1985 contract which refers to part-time employees and defines them as employees employed for less than 40 hours a week or 60 hours a month and states that Respondent agrees not to replace full-time employees with part-time employees, Brandt testified that this language was negotiated under the following circumstances. Brandt and Wright were attempting to draft contractual language to excuse Respondent from paying trust contributions on behalf of part-time employees who were not eligible to receive benefits. Wright informed Brandt that she thought that if employees worked less than 30 hours per week or less than 60 hours per month that they would not be eligible to receive health insurance benefits. Wright, however, accepted the language with respect to part-time employees only after Brandt agreed to the addition of the proviso whereby Respondent agreed not to replace any full-time employees with part-time employees, which Wright told Brandt she felt was needed to make sure Respondent did not replace all of its full-time employees with part-time employees in an effort to avoid making contributions to the Trust.

No evidence was presented during the instant hearing about the circumstances surrounding the addition of the first addendum to the 1984–1985 contract, the addendum which states Respondent may employ three part-time employees to work not more than 60 hours a month without contributing to the Trust. However, in the underlying unfair labor practice proceeding the administrative law judge, whose findings were adopted by the Board, found that with respect to the Respondent's health and welfare contributions that the "main focus of bargaining" during the contract negotiations "was the employer's proposal to exclude three part-time employees from coverage" and further found that during the negotiations Brandt explained to Wright that he wanted this addendum to be a part of the contract because "he did not feel he wanted to pay into [the trust for] these employees that did not work [but] only a few hours a month."

No evidence was presented during the instant hearing nor were any findings made by the judge in the underlying unfair labor practice proceeding about the circumstances surrounding the addition of the second addendum to the 1984–1985 contract, the one dealing generally with Respondent's obligation to contribute to the Trust.

B. *Discussion and Conclusionary Findings*

The General Counsel's position is that under the terms of the 1984–1985 contract the employees covered by the contract on whose behalf Respondent does not have to contribute to the Trust are the apprentices and three part-time employees who work not more than 60 hours per month.[6] Respondent's position is that the employees covered by the contract on whose behalf Respondent does not have to contribute to the Trust are apprentices, part-time employees who work less than 30 hours per week or 60 hours per month, and employees who have not completed "1000 hour of uninterrupted non part-time employment." I am of the opinion, for the reasons set forth hereinafter, that the position of the General Counsel has merit.

Pursuant to the plain and unambiguous language of an addendum to the 1984–1985 contract—"The Employer shall pay to the [Trust] the sum of (50) fifty cents for compensable hour for each employee covered by the terms of the Labor Agreement"—Respondent agreed to contribute to the Trust on behalf of all of the employees covered by the contract, without exception. Also, as described in detail supra, the language of this addendum requires Respondent to abide by the terms of the Trust Agreement, any amendments to the Trust Agreement, and to designate the Trust's trustees as Respondent's representative in the administration of the Trust. The trustees, pursuant to the authority vested in them by the Trust Agreement, promulgated certain "eligibility for benefit" requirements which employees must meet to qualify for benefits, including the requirement that, "INI-

[6] All the parties to this proceeding agree that employees employed as kitchen supervisor, waiter/waitress supervisor, bar supervisor, banquet supervisor, and cocktail supervisor are not covered by the contract and that Respondent is not obligated to contribute to the Trust on their behalf.

TIAL ELIGIBILITY for benefits will be attained on the first day of the month following accumulation of at least 1000 hours of paid contributions as reported by one or more employers . . . ." Respondent, when it reached agreement with the Union on the terms of the 1984–1985 contract, knew about this eligibility requirement inasmuch as it was in effect during the term of the parties' previous agreement and, at the start of the negotiations for the 1984–1985 contract, Respondent's negotiator was given a booklet by the Union's negotiator which set forth the eligibility requirements promulgated by the trustees.

In other words, when they reached agreement on the terms of the 1984–1985 contract, the Respondent and the Union added to the contract an addendum dealing solely with the subject of Respondent's obligation to contribute to the Trust. The addendum obligated Respondent to abide by the terms of the Trust agreement and any amendments thereto, designated the Trust's trustees as Respondent's representatives, and obligated Respondent to contribute 50 cents per compensable hour to the Trust on behalf of each employee covered by the contract, commencing with the employee's first compensable hour of employment. This latter obligation is consistent with the eligibility rules promulgated by the Trust's trustees which required "at least 1000 hours of paid contributions" before an employee was eligible to receive benefits. Thus, under the terms of the eligibility rules, which Respondent knew about when it reached agreement on the terms of the 1984–1985 contract, virtually no one would ever become eligible to receive health insurance benefits from the Trust, if, as Respondent urges, Respondent was only obligated to contribute to the Trust on behalf of those employees who had completed "1000 hours of uninterrupted non part-time employment."[7] For, the only employees who would receive health insurance benefits under Respondent's interpretation of the contract are those who before coming to work for Respondent had already met the eligibility requirements by virtue of their employment with another employer or employers. The aforesaid circumstances, viewed in their entirety, warrant the inference that when Respondent and the Union reached agreement on the terms of the 1984–1985 contract that their intent was for Respondent to contribute to the Trust on behalf of employees covered by the contract and for the contributions to begin from an employee's first compensable hour of employment and not, as Respondent contends, only after the employee became eligible to receive health insurance benefits.

All the parties to this supplemental proceeding agree that Respondent is not obligated to contribute to the Trust on behalf of employees covered by the contract who are classified as apprentices, inasmuch as contributions for this class of workers have been unambiguously and specifically excluded by the contractual provision dealing with Trust contributions located at page 8 of the contract, which provision has been set out in detail supra. Respondent contends that by virtue of certain additional language in this provision, Respondent, despite the above-described addendum to the contract, was obligated to contribute to the Trust on behalf of only those employees eligible to receive benefits, namely, those who completed 1000 hours of uninterrupted part-time employment. However, the language relied on by Respondent—"[t]he employer agrees to pay [the Trust] the sum of 50 cents per compensable hour for employees covered by this agreement and eligible for benefits hereunder"—does not plainly and unambiguously state this. Respondent's attorney concedes that the language is ambiguous (Tr. 134, LL. 2–10, and p. 135, LL. 5–10). Respondent's attorney in fact describes this language as "idiotic, it means nothing; it creates an impossible situation" (Tr. 135, LL. 5–10). The "impossible situation" referred to by Respondent's attorney is that if the language, "eligible for benefits hereunder," is interpreted to mean Respondent's obligation to contribute to the Trust is limited solely to employees who are eligible to receive benefits, the effect would be that virtually none of Respondent's employees would ever become eligible to receive benefits because virtually none of them would be able to accumulate the 1000 hours of paid employer contributions necessary to obtain eligibility. In other words, if this language is interpreted to limit Respondent's obligation to contribute to the Trust only on behalf of employees who are eligible to receive the health insurance benefits provided by the Trust, it would defeat the principal purpose for which the provision was included in the contract; the furnishing of health insurance benefits to employees covered by the contract.[8] It is for all these reasons that I am persuaded the phraseology, "and eligible for benefits hereunder," is meaningless and that when Respondent and the Union agreed to add the above-described addendum to their 1984–1985 contract, that their intent was to have the language of the addendum supersede this meaningless, or as Respondent puts it, this "idiotic" phraseology.

Likewise, I am persuaded that by adding to their agreement an addendum dealing solely and specifically with Respondent's obligation to contribute to the Trust on behalf of part-time employees, the Respondent and Union intended to repudiate or supersede the previous reference to this subject located at page 8 of the agree-

[7] See Restatement 2d, *Contracts*, sec. 203(a) ("an interpretation which gives a reasonable . . . and effective meaning to all the terms [of a contract] is preferred to an interpretation which leaves a part unreasonable . . . or of no effect"); see also 3 Corbin, *Contracts*, sec. 552 at 210 (1960) ("It is quite possible for two parties to make a valid contract that seems unfair or unreasonable or even absurd to other people. If, however, the words of agreement can be interpreted so that the contract will be fair and reasonable, the court will prefer that interpretation."); 4 Williston, *Contracts*, sec. 620 at 748–749 (3d ed. 1961) ("an interpretation which renders the contract or agreement valid and its performance possible will be preferred to one which makes it void or its performance impossible or meaningless; an interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh or unreasonable results.").

[8] See Restatement 2d, *Contracts*, sec. 202(1)(1979) ("Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.") See also 4 Williston, *Contracts*, sec. 619 at 732–733 (3d ed. 1961). (If it is impossible to read together all of the provisions of an agreement so as to give them a reasonable meaning, "an interpretation which gives effect to the main apparent purpose of the contract is favored.")

ment.[9] The language of the addendum—"[t]hree Employees to work not more than sixty (60) hours per week without paying health and welfare payments on such employees"—is part of a contractual provision which deals solely with the subject of Respondent's obligation to make Trust contributions for part-time employees, whereas, the language at page 8 of the contract—"exceptions therefore . . . the part-time employees, (part-time being defined as either less than 30 hours per week or 60 hours per month . . .)"—is part of a provision dealing with other matters besides Respondent's obligation toward the part-time employees. Moreover, the language of the addendum, in a significant respect, is in harmony with the part-time employee language set forth at page 8 of the contract. The language of page 8 of the contract does not deliniate the number of part-time employees involved, whereas, the addendum deliniates the exact number of part-time employees that the parties intended to be encompassed by the limitation upon Respondent's obligation to contribute to the Trust on behalf of part-time employees.[10] It is for all these reasons that I find when the Respondent and Union agreed to add to the 1984–1985 contract the addendum dealing with the subject of part-time employees, it was their intent to have the language of this addendum supersede the previous reference to part-time employees in the agreement.

Based on the foregoing, I find Respondent's obligation to make the contractually required payments to the Trust, as required by the Board's Order, will be satisfied by paying to the Trust 50 cents per compensable hour for all employees covered by the 1984–1985 contract who have been employed by Respondent at any time since 1 August 1984, except for apprentices and three part-time employees who work not more than 60 hours per month. I further find that in addition to the aforesaid Trust contributions that Respondent is obligated to make on behalf of the employees, Respondent is also obligated pursuant to the terms of the Trust agreement to pay to the Trust liquidated damages of 10 percent of the delinquent contributions, plus interest thereon at the rate of 12 percent per annum.

The amended backpay specification alleges that for the period from 1 August 1984, the start of the backpay period, through 31 March 1984, the last completed quarter prior to the issuance of the backpay specification, that Respondent's obligation herein will be discharged by payments to the Trust of the sums of money set forth aside of the names of the employees named in Appendix A of the specification, and further alleges that this obligation will be discharged by payments on behalf of these employees to the Trust of $21,470 and liquidated damages of $2147, plus interest accumulated to the date of payment. The specification, as amended, is accurate in all respects except one,[11] namely, it does not exclude from Appendix A the three part-time employees employed not more than 60 hours per month (Tr. 33, LL. 2–6), on whose behalf Respondent is not obligated to contribute to the Trust. In view of this it is impossible for me to accurately compute the amount of contributions Respondent was obligated to make to the Trust during the backpay period. I therefore shall recommend that the parties resolve this matter by themselves, but if they are unable to agree within a reasonable period of time about the amount of trust contributions owed by Respondent to the Trust from 1 August 1984 to the present date, the Board's Regional Director should submit to me a revised specification consistent with this Supplemental Decision and Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

SUPPLEMENTAL ORDER

The Respondent, Coos-Bend, Incorporated, d/b/a The Sawmill Restaurant & Lounge, North Bend, Oregon, its officers, agents, successors, and assigns, shall consistent with this supplemental decision make the required payments to the Hotel, Restaurant and Beverage Employees Trust on behalf of the employees named in Appendix A of the backpay specification[13] and any other employees who since 31 March 1986 have been employed by Respondent on whose behalf Respondent is obligated to contribute, plus liquidated damages of 10 percent of delinquent contributions and interest thereon at 12 percent per annum.

---

[9] See Restatement 2d, *Contracts*, sec. 203(d)(1979) ("separately negotiated or added terms are given greater weight than . . . other terms not separately negotiated").

[10] See 4 Williston, *Contracts*, Sec. 624 at 820–821 (1961):

> The better rule, and the one recognized by the weight of authority, where the clauses present irreconcilable inconsistencies, has been well stated in these words:
>
> > When one intention appears in one clause in an instrument and a different, conflicting intention appears in another clause in the same instrument, that intention should be given effect which appears in the principal or more important clause [case cited].
>
> *If, however, the first clause is general in terms, and the latter is particular, or if the latter clause is repugnant only to part of the earlier, it seems that the latter clause would be given full effect, and the earlier subjected to such qualifications as the latter might make necessary.* [*Emphasis added.*]

[11] The specification alleges that due to illegible records and other reasons, the number of compensable hours worked during the time material by 11 of the employees named in App. A of the specification has been estimated. Respondent concedes that the estimated number of compensable hours worked by these 11 employees, as set forth in App. A, was a "good estimate." (Tr. 16, LL. 14–18.)

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] No contributions are required on behalf of any of these employees who are part of the group of three part-time employees on whose behalf Respondent does not have to contribute.

Southwest Gas Corporation *and* Construction, Building Materials and Miscellaneous Drivers Local Union No. 83, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 28–CA–8446

31 March 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On 6 November 1986 Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a brief and an answering brief. The General Counsel filed cross-exceptions and a brief and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Southwest Gas Corporation, Tucson, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We deny as unnecessary the General Counsel's request for a visitatorial provision.

Hector O. Nava, Esq., for the General Counsel.
Roy E. Potts, Esq (Overton, Lyman & Prince), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried in Phoenix, Arizona, on 9 and 10 September 1986.[1] The charge was filed on 5 May 1986 by Construction, Building Materials and Miscellaneous Drivers Local Union No. 83, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union). The resulting complaint issued on 13 June, was amended during the trial, and alleges that Southwest Gas Corporation (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act) about 1 May 1986 by "promulgat[ing], maintain[ing] and enforc[ing] a rule prohibiting union solicitation during working hours," and by "issu[ing] a verbal warning to its employee, Edwin S. Fine," pursuant to that rule and because of Fine's union activities.[2]

I conclude below, after an examination of the relevant evidence and applicable legal principles, that Respondent violated the Act substantially as alleged.

I. JURISDICTION

Respondent is a public utility engaged in the distribution and sale of natural gas. That it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act is undisputed.

II. LABOR ORGANIZATION

The Union is a labor organization within Section 2(5) of the Act.

III. THE ALLEGED MISCONDUCT

A. *Evidence*

Fine is one of about 60 customer service technicians working out of Respondent's Tucson operations center. He has been with Respondent for about 8 years, the last 5 in his present position.

In March and April 1986, Fine approached several labor organizations about seeking to represent the customer service technicians in Respondent's Apache Division.[3] The Apache Division covers southern Arizona, and includes the Tucson facility and those in such other localities as Bisbee, Casa Grande, Douglas, and Globe. The Union was receptive to Fine's overtures, mounting an organizational drive in April with him as chairman of the organizing committee.

The morning of 23 April, while walking from the parking lot to the service technicians' ready room at the Tucson operations center, Fine crossed paths with Ed Morgan, a service technician out of Globe. The two once had worked together and, in Fine's view, were friends. Morgan was attending a line locater school at the Tucson facility, and was on his way to the parking lot preliminary to going out for field instruction. Fine told him about the aborning organizational effort and asked for his telephone number, explaining that organizers were needed in the "outlying areas." Globe is about 100 miles from Tucson. Morgan gave his number, then

[1] This manner of setting forth dates comports with the wishes of the Board.

[2] Sec. 8(a)(1) prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Section 7" of the Act. Sec. 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

[3] The service technicians had been represented by Local 1116, International Brotherhood of Electrical Workers, until that union was decertified in 1982—a result Fine had worked to achieve.

the two went their separate ways. The encounter lasted no more than a minute or two.

A day or two later, according to Morgan, he mentioned the encounter to his supervisor in Globe, Riley Doss. Doss told him, so Morgan recounted, that he "couldn't discuss it with [Morgan] at all," but that, if Morgan "wanted to make a memo as to what happened . . . that was up to [him]." Morgan's purpose in talking to Doss, he testified, "was . . . more trying to find out what was going on than anything. . . . [A]ll I did was simply make the statement that there was some talk about a union, and I wanted to know about what was going on."

Morgan continued that he did not feel he had been "harassed" by Fine, and that he had no "intention at all" of complaining about Fine or causing him to receive a warning.

Following his conversation with Doss, and after discussing the matter with "the wife," Morgan supplied Doss with this memorandum:

> I was in Tucson, attending a school for line location at the Operation Center. On April 23, at approximately 8:50 a.m., I was going to my vehicle when I was confronted by Ed Fine, a service tech. He explained that he was currently involved with organizing a union at Southwest Gas (The Teamsters) and that he would like my home phone number so that he and a union rep could contact me because it was necessary to get the support of the other districts. I gave him the office number and he said he need[ed] my home phone. About this time, Jeff Layton walked by and said he needed to see me and Ed Fine walked away saying he would see me later. I have not seen or talked to Ed since.

The document, undated, is in Morgan's writing and, he testified, was prepared at home. The Jeff Layton mentioned in it is a Tucson customer service supervisor and Fine's immediate superior.

Morgan's memo to the contrary, Fine testified that their meeting occurred several minutes before the 8 a.m. start of his workday and that Layton was nowhere to be seen. Two others, Mike McGuire, a service technician, and Mark McLaughlin, a construction technician attending class with Morgan, likewise testified that they saw Fine with Morgan before 8 a.m., and that they did not see Layton. Morgan testified consistently with his memo, and Layton's testimony concerning his presence and the timing of the incident mirrored Morgan's.

Whatever Fine's status, Morgan technically was "on the clock" at the time of their encounter, his class having convened about 7 a.m. The record contains no evidence, however, that the encounter interfered even slightly with Morgan's school activities, or that it caused any other kind of work-related disruption.

On 29 April, according to Blake Down, Apache Division vice president, he had a telephone conversation with T. N. (Burr) Brackeen, superintendent of customer service, in which.

> Mr. Brackeen relayed all the particulars of the incident to me and said that they intended to have Mr. Layton . . . administer a verbal warning [to Fine] because of union activities on working time; and I concurred.

Brackeen particularized. per Down, that Morgan "had been approached by Mr. Fine, who had solicited matters pertaining to union organization"; and that Morgan,

> When he got back to Globe, indicated to his supervisors that this had happened to him and [he] was not particularly happy about it, and he was told, if you will put your complaint down in writing, which he did.

Down testified that his conversation with Brackeen lasted "probably five minutes"; and that, before concurring in the warning, he took pains to determine when the incident occurred, "to be sure that it was during working time and not before work, during coffee break, lunch hour, and so forth." Brackeen "indicated there was no question about [the time] whatsoever," according to Down.

Down testified that he is "involved pretty much in any disciplinary procedures." He enlarged: "[I]n most cases, it's more of an informational type thing, but I have the option to say, 'Wait a minute, let's take a second look.'"

On 30 April, Layton recounted, Brackeen showed him Morgan's memo and directed him "to have a meeting with Mr. Fine and tell him that this is a verbal warning for soliciting the union during company working time." This, according to Layton, was his first "intimation" that Fine "had been complained about." Asked if he had perceived Fine to be doing anything improper when he came upon the underlying encounter, Layton testified:

> At that time, I could not perceive anything that was more than a greeting. That's not something that warrants a verbal warning at all, sir. It would be like saying hello to the employee as he went by.

Next asked if he mentioned to Brackeen that he had been a bystander during a portion of the encounter, Layton first testified that he "possibly did say that [he] had saw them greeting each other," later averring that he was "pretty certain that [he] did."

On 1 May, shortly before 8 a.m., Layton told Fine that he and Brackeen wanted to meet with him before he began his "daily routine." Fine asked why, to which Layton said he thought Fine knew "what it was about." When Fine appeared at Layton's desk about 8 a.m., Fine repeated the question and Layton said the meeting was "due to [Fine's] union activities." Fine asked if he could have "another representative" with him in that event. Layton replied that that was not necessary; that "it was just a verbal-warning meeting" and not "any big deal." Fine then said he was going to bring in a tape recorder from his truck, which he did. after which the two, without Brackeen, met in Brackeen's office. Layton told Fine that Brackeen was absent because of a "miscommunication."

Layton announced at the start that "the NLRB has regulations that govern" the conduct of employees as well as employers, and that "it has been brought to our

attention that we have got . . . a complaint from a technician that you were soliciting for the union during company hours."

Layton continued that "it is against the NLRB rules to do it during company hours." Fine protested that he "didn't do it." Layton countered: "I've got a written complaint. OK?" Fine presently remarked that he was "extremely aware of the law," to which Layton rejoined, "Then tell me what the law is, then, so I can . . . understand what you heard." Fine answered: "Like you say, I cannot solicit for the union on company time nor on company property. I cannot pass propaganda on company time nor on company property. In other words, when I'm at work, I'm at work." Layton said, "That's correct."

Layton shortly acknowledged that he is "not an expert" on the law in the area, but that he did know union solicitation "can't be done on company time" and that he "need[ed] to make sure that" Fine realized that. Fine said that he did, but that he wanted to know the identity of his "accuser." Layton replied that Respondent's human resources coordinator, Susan Henning, had that information.

Fine repeated that he had not solicited "on company time." Layton came back that Respondent had

> . . . to make sure that you work during working hours . . . and that the union activities are done on your time and the person that you are soliciting, you know, their own time, not during company time, not interrupting work schedules.

Fine interjected that he "agreed wholeheartedly," and Layton went on: "[I]t's kind of like a verbal information warning situation or whatever, however you want to call it. . . . It's to the point it could get into disciplinary action if we get more complaints."

Fine again proclaimed his innocence—"[I]f somebody has said that I have solicited them on company time on company property, they are totally incorrect." The only thing he had done "on company time," he went on, was to inform employees of union meetings, and that was not done "in such a manner to let it interfere with [his] work schedule, either." Layton said he did not "know even if that is a violation"; Fine said he did not know, either, but would "like to find out"; and Layton iterated that the NLRB "has strict guidelines as to what can be done, not only by the company but by the employee."

Later in the exchange, Layton remarked:

> We might have to take disciplinary action . . . if this is a justified complaint. And . . . if it's a justified complaint, then we need to, you know . . . . If it continues from this point on . . . . We might have to take further disciplinary action, and I don't think that you're really into that, as well as us.

Layton took notes during the meeting, even asking Fine to repeat certain remarks, "to try to get as much of what his feelings were about it . . ., so that that could also be conveyed to management or to [himself] later."

After the meeting, relying on his notes, Layton prepared this memorandum:

> To: FILE
> From: Jeffrey O. Layton
> Date: May 1, 1986
> Subject: Verbal Warning and Advisory Meeting/Ed Fine
>
> I had a meeting with Edwin Fine on May 1, 1986 at 8:40 a.m. to advise him that management has received a written complaint from a Service Technician. This complaint stated that Ed was soliciting for the teamsters union during working hours.
>
> I advised Ed that the National Labor Relations Board has rules which govern both the company and union actions; and solicitations for the union during working hours violates those rules. I explained to Ed this was a verbal warning, but further disciplinary action would be taken if he continued solicitations during workings hours.
>
> Ed explained that he was very aware of the N.L.R.B. requirements and he did not want to jeopardize his job. He said the only thing he has done during working hours is to advise other employees of union meetings, not realizing he was doing anything wrong. That if advising fellow employees of union meetings was a violation he would like to know.
>
> Ed stated that he still thinks Southwest Gas is a good company; but in the past when complaints were made about management people the problem improved for a while, then the problem management figure returned to their old ways.
>
> Ed feels that employee human rights are being violated and the union may be able to correct the problems if the company can not. He hates to see the situation come to this-with the union; but has very strong feelings about what is happening to employees. He stated many are afraid they will lose their jobs if they complain.

Layton testified that this memo was placed in a desk file, but not in Fine's personnel file. It was not shown to Fine.

Respondent has no generally announced prohibition against solicitation.[4] Indeed, it long has tolerated, even encouraged, a multitude of solicitation activities on its premises during worktime—charitable fund raising (Junior Achievement, Girl Scouts, United Way), sports pools, the selling of wares by employee to employee, etc. Conceding that Respondent is "more restrictive" of union activity than of these others, Down testified that the latter "engender a spirit of cooperation within the company" and that support of charitable causes "bring[s]

[4] By memorandum dated 3 March 1981, Respondent rescinded a rule entitled "Solicitation on Company Premises" out of concern that it "unlawfully restrict[ed] employees' rights to discuss and distribute information on organizational or representational matters." The memo stated in part: "The Company never intended to enforce, and never has enforced the rule in such a way as to prevent solicitation on non-working time (for instance, during breaks and lunch time, or before or after starting or quitting time), or to interfere with distribution of literature in non-working areas[, but] . . . to remove any ambiguity or confusion which [the rule] may have inadvertently caused, that rule is rescinded in its entirety . . . ."

the company a tremendous amount of credibility in the community," whereas "union organizing activities [are] the exact opposite," breaking down "all the cooperative feelings that you have between employees, between departments."

Under Respondent's four-step disciplinary system, Fine would be subject to a written warning should he transgress again within a year of the first offense, and to probation and then discharge in the event of third and fourth offenses within that year.

Brackeen, although the decision-maker as concerns the warning, did not testify. Neither did Morgan's Globe supervisor, Doss.

B. *Conclusions and Reasons*

Whether Fine's encounter with Morgan happened after Fine's clock-in time, Respondent's later-communicated rule curtailing union solicitation by Fine violated Section 8(a)(1) as alleged, necessarily tainting the concomitant verbal warning, as well.

The bases for these conclusions are:

1. The limits on solicitation, as articulated by Layton, are invalidly broad.

"[A] rule is presumptively invalid if it prohibits solicitation on the employees' own time," and a ban against soliciting during "working hours," as distinguished from "working time," comes within the adverse presumption. *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983). See also *Consolidated Edison Co.*, 280 NLRB 338 (1986); *Perth Amboy Hospital*, 279 NLRB 52 (1986); *Essex International*, 211 NLRB 749 (1974). Layton couched Respondent's prohibition in terms not only of "working hours," but two equivalents, "company hours" and "company time." Additionally, he endorsed Fine's formulation that he was not to solicit "on company time nor on company premises." The adverse presumption thus obtains, and the record contains no overriding evidence that such a rule is necessary to maintain production or discipline, or serves some other legitimate interest. See *Brigadier Industries Corp.*, 271 NLRB 656, 657 (1984); *Wm. H. Block Co.*, 150 NLRB 341, 342–343 (1964).

2. Apart from its excessive breadth, the rule is "invalid on its face because it is directed solely against union solicitation." *C.O.W. Industries*, 276 NLRB 960 (1985). See also *Montgomery Ward*, 269 NLRB 598, 599 (1984); *Paceco*, 237 NLRB 399, 401 (1978).

3. Beyond the rule's unwarranted breadth and facial infirmities, Respondent's warning of Fine over the fleeting exchange with Morgan, while allowing and even encouraging a plethora of other, far more intrusive solicitation activities during worktime, demonstrates that the rule is disparately and hence unlawfully enforced against union solicitation. *Brigadier Industries Corp.*, supra at 657; *Wm. H. Block Co.*, supra at 343.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) about 1 May 1986, as alleged, by communicating a rule that curtails union solicitation in an overly broad and discriminatory manner, and by issuing a verbal warning to Edwin S. Fine to enforce that unlawful rule.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Southwest Gas Corporation, Tucson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Communicating, maintaining, or enforcing a rule that discriminatorily prohibits any employee from talking about or soliciting on behalf of Construction, Building Materials and Miscellaneous Drivers Local Union No. 83, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, during "working hours," "company hours," or "company time," or on "company premises."

(b) Issuing a verbal warning to, or otherwise disciplining or discriminating against, any employee to enforce such a rule.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its records, wherever situated, all evidence of and reference to the unlawful verbal warning given to Edwin S. Fine about 1 May 1986, and notify him in writing that this has been done and that the warning will not be used as a basis, in whole or part, for future personnel action against him.

(b) Rescind the rule communicated about 1 May 1986 that discriminatorily prohibits employees from soliciting on behalf of Local Union No. 83 during "working hours," "company hours," or "company time," or on "company premises."

(c) Post at its operations center in Tucson, Arizona, and at each of the other facilities in its Apache Division, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respond-

[5] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] Divisionwide posting is appropriate inasmuch as one of the parties to the encounter precipitating Respondent's misconduct, Morgan, is employed elsewhere than in Tucson; and because the organizing drive being divisionwide, the unlawful curtailment of solicitation presumably envisions corresponding application.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT communicate, maintain, or enforce a rule which discriminatorily prohibits any employee from talking about or soliciting on behalf of Construction, Building Materials and Miscellaneous Drivers Local Union No. 83, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, during "working hours," "company hours," or "company time," or on "company premises."

WE WILL NOT issue a verbal warning to, or otherwise discipline or discriminate against, any employee to enforce such a rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our records, wherever situated, all evidence of and reference to the unlawful verbal warning given to Edwin S. Fine about 1 May 1986, and WE WILL notify him in writing that this has been done and that the warning will not be used as a basis, in whole or part, for future personnel action against him.

WE WILL rescind the rule communicated about 1 May 1986 that discriminatorily prohibits employees from soliciting on behalf of Local Union No. 83 during "working hours," "company hours," or "company time," or on "company premises."

SOUTHWEST GAS CORPORATION

Teamsters Local Union No. 579, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (L.C.L. Transit Company) *and* **Robert B. Fischbach.** Case 30–CB–2403

31 March 1987

DECISION AND ORDER

BY MEMBERS BABSON, STEPHENS, AND CRACRAFT

On 10 December 1986 Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified[2] and to adopt the recommended Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In concluding that the complaint should be dismissed, we rely solely on the judge's conclusion that the Respondent's refusal to issue Fischbach a withdrawal card did not violate Sec. 8(b)(1)(A) of the Act, and find it unnecessary to decide whether the complaint is time-barred by Sec. 10(b). We agree with the judge that *Teamsters Local 579 (Northern Conveyor)*, 274 NLRB 100 (1985), is distinguishable from the instant situation. In that case, the Board found that the Respondent's discipline of an individual, who had obtained a withdrawal card, for crossing a picket line violated Sec. 8(b)(1)(A). In so finding, the Board noted, inter alia, that the language of the Respondent's withdrawal card and its bylaws on its face equated withdrawal status with resignation, that nothing in the bylaws or card informed an employee on withdrawal status of possible discipline for crossing a picket line, and that any ambiguity created in this situation was construed against the Union. *Northern Conveyor* did not find, however, that an employee on withdrawal status was, in fact, in all situations to be considered a resigned employee. It found, rather, that when certain union documents appeared to equate withdrawal with resignation and could reasonably lead an employee on withdrawal status to believe that he could cross a picket line free from union discipline, then any ambiguity whether the union might lawfully discipline the employee for engaging in such conduct subsequent to withdrawal would be resolved against the union, the author of the documents. But here there is no ambiguity and Fischbach did not rely on the language in the documents to his detriment. He was simply denied a withdrawal card; he was not denied the opportunity to resign. Indeed, in seeking the withdrawal card he had no intention of resigning. He wanted the card so that he could work in another locality and join another local of the International without paying a new initiation fee. We find no Sec. 7 rights were restrained by the Respondent's refusal to give him such a card. In sum, we find the Respondent's actions did not violate Sec. 8(b)(1)(A).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

Paul Bosanac, Esq., for the General Counsel.
Frederick Perillo, Esq. (Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, S.C.), of Milwaukee, Wisconsin, for Respondent.
Robert B. Fischbach, of Gages Lake, Illinois, Charging Party, pro se.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. Charging Party Robert B. Fischbach attempted to obtain a withdrawal card from his union, Respondent Teamsters Local Union No. 579, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.[1] Respondent's refusal to give him one prompted the issuance of a complaint alleging that Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 151 et seq.[2]

Jurisdiction is conceded. Fischbach was employed by L.C.L. Transit Company (Employer), which is an interstate freight carrier in Elkhorn, Wisconsin. During the year preceding 20 February 1986, the Employer derived gross revenues in excess of $50,000 from the transportation of freight and commodities from Wisconsin to points located outside Wisconsin. I conclude, as Respondent admits, that the Employer is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent admits, that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

The Essence of the Dispute

Fischbach had been a member of Respondent from 6 February 1973 and had served as a steward from 1979–1984. On 1 August 1984 he engaged in an argument with Brendan Kaiser, Respondent's secretary-treasurer and business agent, about the transfer of coverage of medical benefits to a different insurance carrier, causing Fischbach to pay more for dental care for his daughter. Fischbach also complained that the officers of another local of the International had "robbed" him of 3 years of pension credit with one of his former employers. The argument became heated; Fischbach lost his temper and, among other things, he charged that "all Teamsters are crooked bastards," and he told Kaiser in vile terms where he could put his "fucking insurance."

Just as Fischbach lost his temper, so did Kaiser, who sent a letter to all the Employer's employees about 2 August 1984, complaining of Fischbach's defamatory statements; advising the employees to quit their jobs and

[1] The caption of this proceeding was amended at the hearing.

[2] The relevant docket entries are as follows: The unfair labor practice charge was filed 26 September 1985; the complaint issued 20 February 1986; and the hearing was held in Janesville, Wisconsin, 11 June 1986.

find out what it was like to work in a nonwork shop ("The bitchers won't have a complaint about health insurance, the changing of health insurance, pension plans, etc., because there won't be any, and if there is any, it will be solely at the discretion of the Employer"); and accusing Fischbach of making "derogatory, disrespectful remarks about me, my predecessors and other Local Union officials where he had been a Teamster member," of being insubordinate, and of failing to "render full allegiance," in violation of Respondent's bylaws.

Kaiser asked the employees to choose between Respondent and Fischbach. If the majority of employees was dissatisfied with Respondent, it would file a disclaimer of representation with the Board. ("This will remove the Union from the obligation to represent you. Yes, you will be *without a union, a contract, a health insurance plan* that you now are in (paid for by the Company), and a *pension plan*.") "After that you are on your own," he wrote, *or* the employees could "[f]ile charges against the dissident members for violation of the Teamsters Local Union No. 579 By-Laws and the International Brotherhood of Teamsters Constitution, Article 19." If they are found quilty, they can be "reprimanded, fined, suspended for a period of time or expulsion'"; and "[w]ithout membership either through suspension or expulsion the member is unable to work . . . on this job because" the Employer could employ only Respondent's members.

So the choice, Kaiser wrote, was up to the employees:

> If the *majority* are pleased with the way your Local Union has represented you, then I suggest that you reply as previously requested. Further, that if the *majority* is satisfied then I suggest that you talk to the dissidents and urge them to make written retraction and apologize to the Secretary-Treasurer of this Local Union. If the dissidents fail to take this opportunity, there will be charges filed against the problem members.

On receipt of this letter, Fischbach called Kaiser twice, but Kaiser failed to answer his calls. Fischbach then retained an attorney, William A. Pangman, who, on 8 October 1984, with Fischbach, filed internal union charges against Kaiser for his alleged interference with Fischbach's right to "express any views, arguments, or opinions," as guaranteed by Respondent's bylaws and the Landrum-Griffin Act. Kaiser countered with his own internal union charges against Fischbach, dated 10 October 1984, alleging that he was "disrespectful in words and actions" to Kaiser and made "defamatory statements."

A number of the Employer's employees grew weary of this dispute and requested Kaiser to come to the Employer's premises and resolve his differences with Fischbach. Kaiser came about 12 November and met with Fischbach, who said that he was contemplating another job in Illinois, that he "would get out of [Kaiser's] hair [and] settle our differences so [Fischbach] could have [his] withdrawal card." Kaiser said that Fischbach did not have to leave and that the dispute could be resolved if he would write an apology. As a result, Fischbach sent the following letter to Kaiser that evening:

> This is a letter of apology to Brendan F. Kaiser and Teamsters Local Union No. 579, the board of directors and other brothers members of the Union, Local Number 200, Southeast area pension fund for any disrespectful words and action that I had said. There will be no more in the future.

That apology, handwritten by Fischbach's daughter, but signed by Fischbach, did not satisfy Kaiser, who wrote Fischbach on 18 December 1984, as follows:

> I am writing you in response to the Executive Baord of Teamsters Local Union No. 579 position on December 15, 1984.
> The Executive Board agreed with my request to rescind and expunge the pending charges if the following steps are followed without exception:
>
> 1. That a typed letter, which is notarized, from you to Teamsters Local Union No. 579 making the same apology as you did in the handwritten one. (Copy enclosed).
> 2. That a letter of retraction and apology is sent to Teamsters "General" Local No. 200's Secretary-Treasurer, Raymond "Red" Fularczyk, typed and notarized by you.
> 3. That a letter of retraction and apology of any misstatements (because of lack of facts) by you about the Central States, Southeast and Southwest Areas Pension Fund be sent to the Fund, typed and notarized by you.
> 4. That your attorney, Pangman, send a letter of retraction on the charges against Secretary-Treasurer Brendan F. Kaiser to Secretary-Treasurer Brendan F. Kaiser and to Joint Council No. 39 Secretary-Treasurer Raymond "Red" Fularczyk, and that the case is settled.
> 5. A carbon copy of all correspondence sent to all of the above-mentioned parties also to be sent to Teamsters Local Union No. 579 Secretary-Treasurer Brendan F. Kaiser.
> 6. Upon receipt of all requested correspondence Secretary-Treasurer Brendan F. Kaiser will rescind and expunge all charges against Brother Robert Fischbach.
>
> We all must work together with due respect for each other, in order for our organization to survive the elements of today.

On receipt, Fischbach telephoned Kaiser and complained that his letter did not reflect what Kaiser had previously asked Fischbach to write. Fischbach said that he had carried out his part of the agreement and Kaiser had reneged. Fischbach further stated that he had already obtained his job in Illinois, that he was leaving, and that he refused to engage in any more writing or arguing. In the first week of January 1985[3] he gave notice

[3] All dates hereafter refer to the year 1985, unless otherwise stated.

to the Employer that his last day of employment would be 15 February. On 28 January, Fischbach went to the credit union, withdrew his money, and closed his account; and then went next door to the Respondent's office and asked for the forms necessary to obtain a withdrawal card. After he filled them out, Kaiser walked by. Fischbach told him that he was leaving and had just completed the application for a withdrawal card. Kaiser said that the card was not going to be given to him because "you didn't do what I said," and because Fischbach was still employed and was not eligible for withdrawal until he left his employment.

On 16 February, Fischbach mailed the following letter to Respondent:

> This is a formal request for my withdrawal card from Local 579. It was denied by you and I was also told by my steward, Bob Achilli, that you would not give it to me. My request was filled out in January, 1985, in writing and my dues are paid to date in full.

He received no reply; indeed, Kaiser denied that he ever received it. Fischbach then retained Pangman to obtain the withdrawal card. Pangman called Kaiser on 4 June and told him that Fischbach was no longer working for the Employer, that he had received notices about arrearages of dues,[4] and that he was entitled to receive his withdrawal card. Kaiser replied that Fischbach knew what he had to do, that it was all set forth in his letter of 18 December. Pangman said that he had understood that Fischbach had already apologized and had delivered his request for a withdrawal card. Kaiser said that he would forward to Pangman the 18 December 1984 letter. Kaiser did so on 10 June, stating in an accompanying letter that Fischbach had filled out a withdrawal card application while employed by the Employer and that: "He was informed that he could not get a withdrawal card while being employed and would not be given a withdrawal card until he complied with the 12–18–84 disposition on his membership with the pending charges." Kaiser reaffirmed that he had not received any timely withdrawal request and further stated: "When Mr. Fischbach complies as requested and pays his dues up through the month in which he complies with clearing his membership status, and makes proper application for a withdrawal card, at that time he will be issued a withdrawal card from" Respondent.[5]

An Explanation of Certain Credibility Findings

When Fischbach applied for a withdrawal card on 28 January, his application was premature under the International's constitution, which mandated that the card could be granted only to a memeber who was no longer employed. Fischbach testified that on 28 January Kaiser told him only that the card was being denied because he did not apologize as he requested in the 18 December 1984 letter. In my findings above, I have discredited Fischbach's testimony, finding that Fischbach, although truthful and credible, recalled many incidents in generalities, whereas Kaiser had a thorough and believable recall of the details of his confrontations with Fischbach. Furthermore, I find that Fischbach sent the February letter to Respondent formally requesting a withdrawal card only as a result of Kaiser's advice on 28 January that Fischbach could obtain a withdrawal card only when he ceased his employment, and that Fischbach was advised further that he had to pay his dues to the date of that application (as required by Respondent's bylaws and the international's constitution). Otherwise, there appears to be no reason that would have prompted Fischbach to send the letter in February, after he had quit his employment, and to specifically mention in the letter that his dues had been fully paid.

It also appears that Respondent was put on notice that Fischbach planned to quit his employment on 15 February; and the question is whether Respondent should have delayed the granting of his application until 16 February, without any further written notice by Fischbach. Indeed, Respondent could have checked with the Employer to ensure that Fischbach had in fact left the Employer's employ, as he said he was going to, and, on validating Fischbach's claim, issued the desired card. If there had been no further communications in this proceeding, and if the unfair labor practice charge herein had been timely filed, there might be justification to hold that Fischbach's application of 28 January sufficed and put the Union on notice that he was quitting on 15 February and that the withdrawal card was to be issued when he quit.

In any event, I am persuaded that Fischbach sent a followup letter on 16 February renewing his request of 28 January. I reject Kaiser's testimony that Respondent did not receive that letter. I find that Kaiser's personal animosity to Fischbach affected his truthfulness. Contrary to his statements and letters, Kaiser testified that Fischbach would not have had to apologize to obtain his card, to wit: "I couldn't have withheld a withdrawal card from him if he had come [sic] in and followed the procedures. We wanted this [apology] in our files because he promised us he would do that" and "We wanted that but we couldn't have held him to that." I find this belated explanation false. Kaiser was irrationally impelled to deny Fischbach his rights and was willing to do anything in order to avoid giving out a withdrawal card to one who, he believed, had impugned his integrity and the integrity of his organization.

I, therefore, find that he tailored his testimony to deny receipt of Fischbach's February letter. I reject Respondent's claim that Fischbach did not prepare the letter and did not send it. As stated above, I found Fischbach sincere, candid, and believable. The letter is consistent with Kaiser's earlier advice to Fischbach that the 28 January application was untimely and that the application had to be made only after Fischbach had left his employment. In light of his numerous other requests to obtain the withdrawal card, there is no cogent reason Fischbach

---

[4] Under date of 22 May, the Union sent a form letter to Fischbach confirming that he had paid dues through March; stating that he was in arrears for April and May, and that, if he had terminated his employment, he should request a withdrawal card; and notifying him that "Dues must be paid through the month that you request a withdrawal card in."

[5] There is no question that Fischbach's dues were paid only through March.

should have attempted to prepare the February letter as a ruse to prove that he did apply for a withdrawal card. The lack of Respondent's address on the letter is of no consequence. Clearly, Fischbach knew the address, as shown on all the other correspondence introduced in this proceeding. Indeed, Fischbach visited Respondent's office on 28 January, as Kaiser conceded. Surely, Fischbach knew Respondent's address, and I credit his testimony that he addressed the envelope containing the February letter and sent it to Respondent.

Discussion of the Applicable Law

The General Counsel's argument in favor of finding a violation relies on a prior Board decision involving Respondent and is succinct:

> The proviso to Section 8(b)(1)(A) of the Act states that a labor organization shall have the right ". . . to prescribe its own rules with respect to the acquisition or retention of membership. . . ." Notwithstanding the 8(b)(1)(A) proviso, the Supreme Court in *Patternmakers League v. NLRB*, 119 LRRM 2928 (1985), held that a labor organization could not fine individuals, who tendered their resignations during a strike and returned to work, pursuant to a rule restricting the right to resign from membership. In *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), the Board held that *any* restrictions placed by a union on its members' right to resign are unlawful.
>
> [T]he Board has held that Respondent's by-laws and its International's constitution contain provisions which render a withdrawal tantamount to a resignation. *Teamsters Local No. 579 (Northern Conveyor Manufacturing Corporation)*, 274 NLRB 100 (1985), fn. 1. . . . Accordingly, since it has been found that, as written, Respondent's by-laws and the International's constitution equate withdrawal status with resignation, any restrictions Respondent placed on a member's right to withdraw must be considered in light of the rules governing a member's right to resign.
>
> In his letter to Pangman, dated June 10, 1985, Kaiser states Fischbach was told he would not obtain a withdrawal card until he complied with the demands of the December 18, 1984 letter, at which time the pending charges would be dropped. In *Sheet Metal Workers Local 73 (Safe Air, Inc.)*, 274 NLRB 374 (1985), the Board held that the mere maintenance of a constitutional provision that, inter alia, prohibited resignation during the pendency of internal charges was unlawful. Therefore, Respondent's reasons for refusing Fischbach's request for a withdrawal card, i.e., the pendency of internal union charges, and failure to comply with the December 18, 1984 letter, are unlawful. Additionally, Kaiser's insistence that Fischbach pay his dues through the month in which he requested a withdrawal card would also run afoul of the Board's ruling that Respondent can place *no* restrictions on the right to resign. *Machinists Local Lodge 1414*, supra. Thus, Respondent cannot insist on any dues payment as a condition to obtaining a withdrawal card.

In *Teamsters Local 579 (Northern Conveyor)*, 274 NLRB 100 (1985), Respondent fined a member who had previously withdrawn from Respondent for crossing Respondent's picket line. The member claimed that he should not have been subject to discipline because he was not a "card-carrying member" and did not feel that he "belonged to the union, because [he] was on a withdrawal status." The Board agreed, stating in footnote 1:

> In agreeing with the judge that the Union unlawfully disciplined Vierck, we rely solely on the language on the withdrawal card and the Union's bylaws which on its face equated withdrawal status with resignation. The withdrawal card obtained by Vierck stated that the holder "has withdrawn in good standing from membership" and refers to an individual on withdrawal status as an "ex-member." Similarly, the union bylaws state that a member who obtains a withdrawal card "shall be considered to have voluntarily withdrawn from membership in the Local Union."
>
> Nothing in either the bylaws or on the card informed an employee on withdrawal status of possible discipline for crossing a picket line and, in fact, the language in the bylaws and card could reasonably lead Vierck to believe that he could cross the picket line without being disciplined by the Union. Any ambiguity created in this situation is construed against the Union. Accordingly, we find that by disciplining Vierck, the Union violated Sec. 8(b)(1)(A) of the Act.

Accordingly, for the purposes of determining the right of a withdrawn member to cross a picket line, the Board held that a member had such a right and could not be fined or threatened with a fine, especially because "the language of the withdrawal card and the Union's bylaws . . . equated withdrawal status with resignation" and the member was "reasonably [led] to believe that he could cross the picket line without being disciplined by . . . the Union." But the instant proceeding is neither a union discipline case nor a proceeding involving a constitutional clause limiting the right of a union member to resign nor a proceeding involving a member's resignation from a union. It is a case involving Fischbach's request for a withdrawal card, not for the purpose of crossing a picket line, but to transfer at some future time to another affiliate of the International.

It should be clear by now how the Board regards a union member's right to resign. Section 7 of the Act grants an employee the right to refrain from union activity. Anything that interferes with or restricts that right is illegal, except for a lawful union-security provision. Thus, the cases cited by the General Counsel demonstrate that a labor organization may not discipline a resigned member or otherwise restrict the right to resign from membership in any way by limiting that right to certain periods of time, such as "if offered in anticipation of charges being preferred against [the member], during

the pendency of any such charges or during a strike or lockout." *Sheet Metal Workers Local 73 (Safe Air)*, 274 NLRB [illegible] (1985).

There is, however, no statutory provision which requires a labor organization to grant to a member the privilege of obtaining a withdrawal card. There is no statutory provision which requires a labor organization to charge no initiation fees to a former member who resigned from the union. The granting of a withdrawal card by Respondent permits a member to sever his or her relationship with the Respondent—to pay no dues and receive no benefits or rights as a fully paid member—and to rejoin as a full member without paying the $100 initiation fee required of other employees, but previously paid by the "withdrawn" member.

The Board held in *Northern Conveyor* only that the withdrawal card and Respondent's bylaws "equated withdrawal status with resignation." It did not hold that an application for a withdrawal card was the same as a resignation. Furthermore, the Board found a violation in *Northern Conveyor* only because the member was reasonably led to believe that his crossing of a picket line would not lead to discipline.[6] But Fischbach was subjected to no misunderstanding. He did not intend to resign. Cf. *Machinists Local 758 (Menasco, Inc.)*, 275 NLRB 755 fn. 15 (1985), and accompanying text. He desired to obtain a withdrawal card so that he could work in Illinois and join another local of the International without paying a new initiation fee. Nominally, of course, by obtaining a withdrawal card, Fischbach would lose essentially all of his rights as a member of Respondent, but he would maintain the right of not being required to pay an initiation fee a second time.

In granting him that right, Respondent may, pursuant to the proviso in Section 8(b)(1)(A), enact rules with regard to the retention of membership under a withdrawn status. Respondent contends that it is reasonable to enact a rule not to grant a withdrawal card to one who is still working. I agree. The fundamental basis for withdrawing from a local labor organization is that the employee is no longer working within the local's jurisdiction. Otherwise, the employee can continue to work while being listed as a withdrawn member and not being liable to pay dues to the union. There may be some justification for Respondent not to permit a member to take advantage of its benevolent practice of granting withdrawal cards when the member is subject to internal union discipline. But, whether reasonable or not is not for the Board to judge. Under the Act, Congress has left to Respondent the right to adopt rules regarding the retention of membership; and as long as there has been no contention by the General Counsel, no less showing, that Section 7 rights were restrained or coerced, that should end this matter.[7]

There is, however, one other point that ought to be considered, that is, Respondent's contention that the instant proceeding is barred by Section 10(b) of the Act. I have found above that Fischbach was denied a withdrawal card on 28 January. Further, his renewal of the application for the card on 16 February was not responded to, which may be understood as yet another denial. Both those dates were more than 6 months prior to the date, 26 September, when the unfair labor practice was filed. The General Counsel argues that the denial was a continuing violation and the denial was renewed by Pangman on 4 June and reaffirmed by Kaiser on 10 June.

I have reviewed all the authorities cited by the parties and find indistinguishable *Roofers Local 106 (Midwest Roofing)*, 202 NLRB 851 (1973), in which a union member was expelled from the union prior to the applicable 10(b) period, but applied for membership within the statutory period, and the application was denied based on the earlier and allegedly unlawful expulsion. The Board reversed the administrative law judge's finding that the charge was timely:

> We do not adopt the Administrative Law Judge's conclusion with respect to Respondent's refusal to readmit [the employee] to union membership. However illegal Respondent's initial expulsion of [the employee] from membership may have been, that occurred . . far beyond the 10(b) period. No timely charge was filed with respect thereto. The Charging Party may not nullify the effects of the 10(b) bar by thereafter reapplying for membership, and then filing a charge based on Respondent's more recent action, since this action was in essence merely a reaffirmation of Respondent's earlier, time-barred conduct. We therefore find no violation in Respondent's refusal to admit [the employee] to membership.

Fischbach has done almost the very same thing. Denied a withdrawal card in January and February, he should have filed a charge in July, or possibly August, because his dues were paid up in February. He did not and instead contacted Pangman who asked Kaiser in June why he had refused to grant Fischbach his withdrawal card in January and February. Kaiser answered with the same reasons he had previously given. Pangman's June request was merely a renewal of Fischbach's requests made earlier in the year. To paraphrase the Board's language quoted above, Kaiser merely reaffirmed Respondent's earlier, time-barred conduct, and Fischbach may not nullify the effects of the 10(b) bar by reapplying for the withdrawal card and questioning the earlier, time-barred refusals. Accordingly, even if I had found that the Union violated the Act by its conduct in January and February, Section 10(b) bars the finding of

[6] No finding was made by the Board that any provision of the Union's bylaws or International's constitution was unlawful on its face. In *Safe Air*, decided by the Board 11 days after it decided *Northern Conveyor*, the Board ordered expunged constitutional provisions which restricted the right to resign. The Board did not do so in *Northern Conveyor* and the complaint herein does not allege that any provision of Respondent's bylaws or the International's constitution is unlawful on its face.

[7] Of course, although it may be argued that Kaiser's actions were reprehensible, the Board is not the adjudicator of Fischbach's rights under Respondent's bylaws or under the free speech provisions of the Landrum-Griffin Act.

any violation. *Teamsters Local 595 (Certified Grocers)*, 218 NLRB 1286 (1975).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

JMC Transport, Inc. and Russell Broaddus III d/b/a R-B Rentals, a sole proprietorship *and* Lemuel Marina. Case 9–CA–17694

31 March 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 25 November 1986 Administrative Law Judge Thomas E. Bracken issued the attached supplemental decision. Only the Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, JMC Transport, Inc. and Russell Broaddus III d/b/a R-B Rentals, a sole proprietorship, Jeffersonville, Indiana, their officers, agents, successors, and assigns, shall jointly and severally take the action set forth in the Order.

[1] In finding that Russell Broaddus III d/b/a R-B Rentals is jointly and severally liable with JMC Transport, we rely on our holdings in *Southeastern Envelope Co.*, 246 NLRB 423 (1979), and *Commissary of the Great Race Pizza Shoppes*, 277 NLRB 1175 (1985).

Deborah R. Grayson, Esq., for the General Counsel.
Russell Broaddus III, of Louisville, Kentucky, for the Respondents.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

THOMAS E. BRACKEN, Administrative Law Judge. On 28 September 1984, the National Labor Relations Board issued its Decision and Order in this case, concluding, inter alia, that Respondent JMC Transport, Inc. (JMC) had violated Section 8(a)(1) of the Act, by discharging Lemuel Marina on 5 November 1981. (272 NLRB 545.) In its decision, the Board ordered JMC, inter alia, to offer employee Lemuel Marina immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equal position, and make him whole for any loss of earnigns he may have suffered by reason of the Respondent JMC's unfair labor practices against him. On 12 November 1985, the Court of Appeals for the Sixth circuit entered its judgment granting enforcement of the Board's decision, 776 F.2d 612 including the backpay provisions of the Board's Order. Respondent JMC's request for a hearing en banc was denied and, on 8 January 1986, the court of appeals issued a mandate to enforce its judgment.

On 6 JUne 1986, the Regional Director for Region 9 issued an amended backpay specification and order rescheduling hearing, alleging that Marina was due a certain sum as backpay and also alleging the premises which resulted in the calculation of such sum. Answers were duly filed by JMC and Russell Broaddus III d/b/a R-B Rentals, a Sole Proprietorship in (R-B Rentals) denying the specifications' accuracy in various respects. Although admitting that backpay began 5 November 1981, Respondent JMC denied that it owes any backpay beyond 1 February 1982, alleging that it converted to a system of independent contractors at this time. JMC also admitted that the computations of the specification concerning average weely earnings, interim earnings, expenses, and totals are mathematically correct. JMC denied that R-B Rentals is a single employer with, and/or alter ego, and/or successor employer to JMC.

The answer filed by R-B Rentals denied each and every allegation of the specification, inlcuidng a denial that R-B Rentals is a single employer with, and/or alter ego, and/or successor employer to JMC.

A hearing was held before me on 31 July 1986 in Louisville, Kentucky. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine the witness,[1] and to present evidence.

On the entire record[2] in this case, from my observation of the witness and his demeanor, and after due consideration of the brief filed by the General counsel and the brief filed by Respondent, I make the following findings

I. THE ISSUES

The main issue to be determined in this proceeding is whether R-B Rentals is a single employer with, and/or alter ego, and/or successor employer to JMC so as to impose liability jointly on JMC and R-B Rentals for the backpay obligation incurred by JMC as a result of JMC's unfiar labor practices. Respondents contend, as previously stated, that there is no relationship between JMC and R-B Rentals, whether it be termed single employer, alter ego, or successor.

The other primary issue is whether the gross backpay period extends to the date of closure of JMC on 30 November 1985. The amended backpay specification provides that Marina be compensated as if he had worked

[1] Russell Broaddus III was called by the General Counsel as her witness, and was the sole witness to testify. Broaddus, a layman, entered his appearance at the commencement of the case, for both JMC and R-B Rentals.

[2] Broaddus filed a brief on behalf of both Respondents. Subsequently, on 19 September 1986, the General Counsel filed a motion to disregard portions of Respondents' brief, with a memorandum in support of motion to disregard portions of Respondents' brief. No opposition has been submitted to the motion. On consideration of the matter and the lack of opposition, I find the General Counsel's motion to be meritorious, and it is granted. The motion is marked as G.C. Exh. 41, and the memorandum in support thereof is marked as G.C. Exh. 42, and are received into evidence.

continuously for JMC and/or R-B Rentals from the time of his illegal discharge on 8 November 1981 throughout 1981, 1982, 1983, 1984, and until 30 November 1985, when JMC went out of business. According to the backpay specification, the General Counsel asserts that the total amount of backpay due Marina from the Respondents after deduction of interim earnings is $47,516.98.

Respondent JMC further contends that in any event its liability for backpay terminated on 1 February 1982, when it converted its operation to a system of using independent contractors to haul its freight.[3] Pursuant to JMC's contention it would owe Marina $4,055.92.[4]

II. BACKGROUND[5]

In December 1978 or 1979 Broaddus first purchased a tractor and, within several months thereafter, purchased a trailer, which he leased to other parties to carry their freight. His first customers were the House of Nelson and Kentucky Liquor and Wine. Thereafter, sometime prior to June 1980 Broaddus secured another customer, Willett Distilling Company. The House of Nelson used up to two tractors and two trailers for 6 months or a year. Broaddus testified that sometime in 1980 the name R-B Rentals first came into use, to designate the business entity that Broaddus used in the renting of tractors and/or trailers. R-B Rentals was a sole proprietorship, and was owned and operated by Broaddus who was its only officer. Its only other office employee for its 5-year life was a part-time bookkeeper.

In about 1981, Broaddus hired a mechanic to perform maintenance work on his tractors and trailers. In 1984, he had from two to four mechanics who performed repairs on R-B Rentals equipment as well as on the equipment of other truck owners.

On 1 July 1980[6] JMC was incorporated to engage in the business of transporting freight and commodities under a certificate from the Interstate Commerce Commission, within the 48 States of the continental United States. Broaddus was the incorporator of JMC, its president, and a member of the board of directors. He initially contributed $5000 to $10,000 to its operating capital. Stewart Koch contributed $20,000 and John David Willett contributed a smaller amount. The stock was initially divided as follows: Broaddus 80 percent, Koch 10 percent, and Willet 10 percent. In 1982 Broaddus owned 90 percent of JMC stock and Koch owned 10 percent. For the fiscal years endings 30 June 1983 and 1984, ownership was as follows: Broaddus 66.67 percent, Koch 19.05 percent, George Hughes 9.52 percent, and DeAnna Owens 4.76 percent.

The other officers of the corporation at its inception were Kenneth Schweitzer, vice president, and Koch, secretary-treasurer. Schweitzer also served as general manager until the summer of 1981 when he was replaced by DeAnna Owens.

According to Broaddus, JMC had major customers, including General Electric, Reynolds Metals, Kroger, and many distilleries. It also had several customers that it serviced throughout its entire existence, including the distilleries.

III. FINDINGS AND CONCLUSIONS

A. *Single Employer*

The legal principles to be applied in determining whether two separate employers constitute a single employer are well settled. The controlling criteria are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *Bacchus Wine Cooperative*, 251 NLRB 1552 (1980); *B & P Trucking*, 279 NLRB 693 (1986). The Board has stressed the first three of these factors, in particular the presence of control of labor relations, because these factors tend to show operational integration. However, no one of these factors is controlling, nor need all of the "controlling criteria" be present. Single-employer status, for purpose of the Act, depends on all the circumstances of the case and is characterized as an absence of an "arm's length relationship found among unintegrated companies." *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980).

1. Interrelation of operations

Throughout the 5-year existence of JMC it operated out of of a leased flat, concrete building at 1719 Potter's Lane, Jeffersonville, Indiana. This building consisted of offices on the westside and a 1-1/2 bay garage on the eastside. JMC had six offices with one of these occupied by President Broaddus. The general manager occupied one office,[7] and the bookkeeper[8] occupied a third office. The dispatcher and permit clerks each occupied an office, and apparently several clericals occupied the sixth office. Its mail was received at P.O. Box 2163, listed on some of the exhibits as being in Jeffersonville, and in other exhibits as being in Clarksville, Indiana.[9]

The only office of R-B Rentals consisted of one rented room in the same building that housed JMC's offices at 1719 Potter's Lane. Broaddus testified that "the room wasn't very large" and described it as the bookkeeper's office.[10] When Broaddus was asked if there were only

[3] During the course of the hearing, the term independent contractors was seldom used to describe a class of drivers who drove for JMC. In its place, the witness and the General Counsel constantly used the term owner-operators. As the evidence will show, these drivers did not own, and were not buying, a tractor, but were in fact lessees who paid a rent to Broaddus for the tractor at so much per mile.

[4] The net backpay for the last quarter of 1981 is $2,693.13, and the net backpay for January 1982 would be one-third of the $4,088.34 shown on the specification, resulting in the amount of $4,055.92.

[5] Broaddus' testimony as to facts was often preceded by the statement "I believe." Sometimes he relied on "I don't believe." He frequently gave events took place some 6 or 7 years prior to his testimony in this case. In the main I have credited his testimony concerning events, but not his conclusionary statements.

[6] Broaddus asserted in his opening statement that the date of incorporation was about 1 June 1980. However, JMC's Small Business Corporation Tax Returns for 1982, 1983, and 1984 reports the date as 1 July 1980.

[7] Kenneth Schweitzer was the original general manager but left in April 1981. He was succeeded by DeAnna Owens, who left in 1984, at which point Broaddus assumed the duties of general manager.

[8] Ann Douglas was the original bookkeeper, followed by Wanda Hayelup, and then Mildred Kindeman at unknown intervals.

[9] Jeffersonville and Clarksville are two small towns located directly across the river from Louisville, Kentucky, and are contiguous to each other, *Rand McNally Road Atlas* 1985.

[10] There was one other tenant of the building, a trailer sales firm.

signs that indicated that this bookkeeper's office was an office for R-B Rentals, the owner replied that he did not think so. Broaddus originally kept its books and later they were kept by an outside bookkeeping firm. Subsequently, Norma Veron became its bookkeeper in a part-time capacity and was R-B Rentals' only office employees.

R-B Rentals' mail was also received at P.O. Box 2163, the same one used by JMC. R-B Rentals and JMC letterheads each used this box as its address. JMC also used it as its address in its 1982, 1983, and 1984 Indiana tax returns. (G.C. Exhs. 5, 6, 7.) After a mechanic was hired in 1981, and R-B Rentals commenced to repair and maintain tractors and trailers, it used as its garage the one and one-half bay in the same building that contained JMC's six offices.

a. *The tractor-trailers used to haul JMC's freight*

After its incorporation in July 1980, as soon as it started to operate, JMC immediately leased equipment[11] from Broaddus. The record does not show how much equipment was leased in 1980 by Broaddus to JMC or anyone else. Broaddus did provide, under subpoena, a lease dated 24 June 1981, from Russell Broaddus III to JMC that covered five tractors. However, the date of the leases did not begin on 24 June, but began on the "Commencement Date" shown on schedule A of General Counsel's Exhibit 12. The terms for the first tractor listed on this schedule, a Kenworth (7), and the second listed tractor, a Mack, began on 20 January 1981. The third tractor on the list had a term beginning 2 May 1981, with the final two tractors having a commencement date of 22 July 1981. All were for a period of 3 years.

On 3 January 1984 Broaddus apparently entered into a long-term lease with JMC for nine tractors.[12] Threee of the tractors leased under this 1984 agreement, the 1979 model Peterbilts, 9, 11, and 12, had also been leased in the 1981 lease agreement. The remaining six tractors, unit numbers 13–18 were all 1981 Peterbilts. General Counsel's Exhibit 11, a list of JMC's equipment, shows as of January 1985 that Broaddus tractors 7, 9, 13, 14, 15, 16, 17, and 18 were still leased to JMC. Also leases to JMC at this time were six tractors owned by owner-operators. The record does not indicate if the periods of lease for these tractors of the owner-operators were for a trip, a month, or any other period.

In response to the General Counsel's same subpoena for copies of all lease agreements between JMC and R-B Rentals for trailers, Broaddus produced none for 1980, 1981, 1982, and for the first 10 months of 1983. He did produce a one-page "Lease Agreement" dated 1 November 1983, effective until cancellation, that was signed by Owens as JMC' representative, and by Broaddus as lessor. (G.C. Exh. 10.) This agreement covered the leasing of five 1982 Utility refrigerated trailers, and five 1983 Fruehauf dry trailers. JMC's equipment list of January 1985 shows that JMC continued to lease the same five Fruehauf trailers, and one of the refrigerated trailers. The other four reefers had been sold by Broaddus in the intervening years. The 1985 list of equipment also showed that JMC had leased 10 trailers from Evans Leasing, 5 from Koch, and 6 from Rentco. There is nothing in this record to show whether these trailers leases with Evans Leasing, Koch, and Rentco were for a trip, a month, or any other period of time.

Outside of JMC, the only customer that Broaddus rented trailers to, over a substantial period of time, was Willett Distillery. This was for the storage of goods, not the transportation of goods, as is shown by the following questions and answers:

> Q. What was—following June of 1980, in what form did you do business with Willett and House of Nelson?
>
> A. Willett used quite a few of my trailers for storage.
>
> Q. How long after 1980 did they do so?
>
> A. I guess several years because we had a continuing relationship with them. We hauled whiskey, full barrels of whiskey for them, empty barrels, finished product, case goods, whatever you want to call it. And they used the equipment for storage.[13]

Thus in 1984 and early 1985, JMC was the primary, if not the sole, lessee of Broaddus' tractors and trailers. Broaddus admitted that from August 1985 until JMC's closing, R-B Rentals leased equipment only to JMC.

b. *The truckdrivers used by JMC to deliver its freight*

In the 5 years that JMC hauled freight for customers, the drivers of the tractor-trailers were placed in the seat of those tractors through five different processes. After JMC's incorpotation in 1980, it hired drivers who then became standard, regular employees on the payroll of JMC. In response to the General Counsel's subpoena JMC was unable to produce payroll records to show the names and dates of employment of any of these initial drivers.[14] However, in 1982, JMC decided to use owner-operators to deliver its freight, although the record does not disclose who made this decision or why. Broaddus testified that he met one-on-one with JMC's drivers and explained to them how they cold become "owner-operators." He explained that they were leasing equipment from him as the owner, and that they would in turn pay him under the terms of a lease agreement, so such per mile for rental of the truck.[15]

---

[11] When Broaddus used the term "equipment" he was referring to tractors and trailers jointly or tractors only.

[12] G.C. Exhs. 13A thru I are one-page documents, on letterheads of JMC, and are captioned, "Appendix A, Long Term Equipment Lease." However, no such lease was offered into evidence. These nine documents are signed under the caption "JMC Transport Inc. Carrier," by DeAnna Owens, and under the caption "contractor" by Broaddus.

[13] Broaddus' answers in the above colloquy point up the interrelationship of the two entities. His statement that Willett used "quite a few of my trailers" obviously refers to his sole proprietorship, R-B Rentals. In his very next answer, when he stated "We haul whiskey," he is obviously referring to the corporation he controls, JMC.

[14] Broaddus testified that there was about 10 or 12 drivers at the time of Marina's discharge in November 1981.

[15] Two lease agreements between Broaddus and Terry Cathay were received into evidence. G.C. Exh. 21 was for a 45-day lease, with Cathay payng a rental of 10 cents per mile. The other lease agreement was for 1 year, with Cathay paying as rental 13 cents per mile.

Broaddus denied that he told these drivers how they would be paid by JMC stating that they had to deal with JMC about that. The record does not indicate who explained to these drivers how they would be paid by JMC after they became owner-operators, or if such an explanation took place. The drivers did sign lease agreements with JMC, for which they were to be compensated by receiving either 68 percent of the base gross revenue, plus 14 cents per mile, or 75 percent, depending on the type commodities they were hauling.[16] Broaddus testified that a majority of the drivers who leased his tractors and drove for JMC were former employee drivers for JMC. This system by which JMC used owner-operators to deliver JMC's freight lasted from 1 February 1982 to 8 September 1983.

Broaddus testified that JMC's experience with owner-operators was not financially successful for JMC because of the tremendous turnover among drivers.[17] General Counsel's Exhibit 18 readily illustrates this turnover. Thirty-five individual drivers' names are set forth therein as having driven nine different tractors for JMC as owner-operators during this 19-month period. Not one single tractor was driven by only one owner-operator during this period as Broaddus testified is the usual practice. Tractor 11 had eight different drivers, 16 had six, and tractors 10, 12, and 17 had five different drivers each. One driver, Terry Cathay, drove three different tractors during this period.

At this point in time, JMC adopted its third arrangement for securing drivers to deliver its freight, through the medium of leased truckdrivers from Transport Contractors Inc. (Transport). Broaddus denies that when JMC became dissatisfied with its use of owner-operators, that JMC talked to Transport about the furnishing of drivers, but testified that R-B Rentals had done so. I do not credit Broaddus' testimony regarding this issue, based on the following correspondence between Transport and JMC. By letter dated 29 August 1983, Transport wrote to Broaddus, as follows:

> Mr. Russell Broaddus III
>
> (President)
>
> J.M.C. Transport Incorporated
> 1719 Potters Lane
> Jeffersonville, IN 47130

The first sentence read as follows:

> To follow up on our conversation last Thursday and after consultation with Mr. Bill Tatter, we have agreed the drivers can be provided by our firm at 29.6 cents/mile.

The final sentence concluded:

> Thank you for your consideration and we hope to be doing business with your firm within the near future. G.C. Exh. 30A.

Attached to the letter was a typed four-page proposed agreement, the first paragraph of which read as follows:

> THIS AGREEMENT made and entered into by and between TRANSPORT CONTRACTORS, INCORPORATED, hereinafter referred to as "Lessor," and JMC TRANSPORT, INCORPORATED, hereinafter referred to as "Lessee" on this 6th day of September, 1983.

The signatory parties to the agreement were typed on page 4 as follows:

> Transport Contractors, Incorporated
>
> By _____
>
> Position President
>
> JMC Transport, Incorporated
> By _____

Significantly, the firm name JMC Transport was marked out on both page 1 and page 4 of the proposed agreement, and in both places was inserted in its stead "R-B Rentals." The final signature on this executed agreement was that of Russell Broaddus, stating as his position, "Owner." No contract was produced by Respondents to show that R-B Rentals was going to provide JMC with these drivers that Transport was leasing to R-B Rentals, and I draw the reasonable inference that there was none. I also do not credit Broaddus' testimony that JMC did not talk to Transport about the furnishing of drivers, based on the agreement as prepared and understood by Transport, which plainly shows that Transport understood it was dealing with JMC, when it talked to Broaddus.

From 21 September 1983 until 12 March 1984, R-B Rentals supplied drivers to JMC that had been supplied to it by Transport. I have prepared below a list of the leased that Transport provided R-B Rentals who were in turn provided to JMC.[18] I have also inserted thereon the periods for which five of these referred drivers formerly drove as owner-operators for JMC.[19] Two of these drivers, Arnold and McCoy, made the transfer of their employment status on the very day they ceased to be owner-operators. Williams had an interval of 2 days and Carter 7 days. Three of the Transport drivers, Ashly, Lloyd, and Williams drove less than 2 months, when they were placed on the extra board. Thus during this 5-month period, basically eight drivers, five of whom had previously been owner-operator drivers, delivered the freight of JMC to the same customers as they had formerly delivered to, and used the same tractors they previously drove.

[16] G.C. Exh. 23 has attached thereto apps. A and B which are equipment lease forms between terry Cathay as "contractor" and JMC as "carrier." They were signed, on behalf of JMC, by DeAnna H. Owens, vice president, on 12 March and 13 April 1982 respectively.

[17] Broaddus made no comment as to whether it was successful for R-B Rentals.

[18] This data was taken from G.C. Exh. 33.

[19] This data was taken from G.C. Exh. 18.

Names of Drivers Transport Furnished to R-B Rentals	Previously Drove for JMC as Owner-Operator	Drove for JMC thru Transport Referral to R-B Rentals
Joe B. Arnold	8/30/83–10/11/83	10/11/83–3/12/84
A. L. Ashby		9/23/83–11/2/83
Willie L. Carter	3/10/83–11/7/83	11/10/83–3/12/84
Terry Cathay	2/10/82–12/2/82	
	5/14/82–5/21/82	11/17/83–3/12/84
	12/2/82–8/23/83	
Thomas L. Lloyd		9/28/83–11/9/83
Joe McCoy	2/1/82–7/11/83	
	9/8/83–10/17/83	10/17/83–3/12/84
James M. McDowell		12/12/83–3/12/84
Walter Nelson		9/21/83–3/12/84
Michael A. Schlise		9/26/83–3/12/84
Alford R. Williams		11/1/83–1/19/84
Clayton Williams	5/12/83–10/3/83	10/5/83–1/15/84

In March 1984 Broaddus decided that the expense to R-B Rentals for securing drivers from Transport was too great, so he terminated that agreement. He then decided "to hire drivers and lease them on as owner-operators," and place them on the R-B Rentals payroll. Broaddus did not have to launch an extensive search for drivers. Five of the seven persons who had driven R-B Rentals tractors pulling trailers loaded with JMC freight in February 1984, drove from Broaddus in the following month of March.[20] Broaddus also identified three other drivers from the same file, and all eight of these named drivers are set forth in column 1 below.

Broaddus did supply R-B Rentals payroll journal for the months of August through December 1984, so that the names of the R-B Rentals persons who drove JMC trucks for this period are known. They are set forth in column 2 below. This column shows that five of the men supplied by Transport were now driving JMC tractors as leased drivers from R-B Rentals. The column also shows the names of five other drivers who Broaddus testified also drove tractors during this period. Column 3 sets forth the drivers on R-B Rentals' payroll who drove for JMC in the period of 15 March 1985 through 9 August 1985.[21] It shows that three drivers employed by R-B Rentals in 1984, Carter, McCoy, and Nelson, also drove for it during this time period. Five additional drivers were hired by R-B Rentals during this period.

In August 1985, the employer of the drivers changed again, this time to once more become employees of JMC as they had been in 1980. Broaddus testified that R-B Rentals had a change of operation at this time. When asked what circumstances led to this change of operations, he replied, "I laid off a bookkeeper and since I had no bookkeeper, I decided to let JMC take over the drivers." Column 4 below shows that all seven of the drivers employed by R-B Rentals in the previous 5 months were now on the JMC payroll driving the same equipment as they previously drove. It is also to be noted that Kenneth McMichael was placed on JMC's payroll at this time. McMichael had an extensive employment record with R-B Rentals as its mechanic.

	Drivers on R-B Rentals Rentals Payroll		Drivers on JMC Payroll
	8/84–12/84	3/15–8/9/85	8/16–12/12/85
Mar. 1984 Broadus put Former Transport Drivers on R-B Rentals Payroll:			
Arnold	Arnold		
Carter	Carter	Carter	Carter
Cathay	Cathay (disch 5/84)		
	McCoy	McCoy	McCoy
McDowell			
Nelson	Nelson	Nelson (off 6/85)	
Broadus also hired for R-B Rentals Payroll:			
T. Bogard	W. Tichener	F. Drury	F. Drury
D. Dorsey	J. Buress	J. Gambrill	J. Gambrill
W. Tichener	J. Drury	C. Griffin	C. Griffin
	M. Murphy	R. Smith	R. Smith
	J. Schliescher	J. White	J. White

Thus the record is clear that there was a substantial continuity of the men who drove tractor-trailers for

[20] These names were located in a cash disbursement journal for March, as payroll records were not provided in response to the General Counsel's subpoena.

[21] This data was secured from checkstubs from R-B Rentals checkbooks G.C. Exhs. 36(a)–(u).

JMC and delivered its freight throughout JMC's 5-1/2-year existence. Nine of the 10 to 12 JMC employee drivers of 1980, leased R-B Rentals trucks as alleged owner-operators in 1982–1983. Five of the six JMC owner-operators became employees of Transport in 1983–1984, who referred them to R-B Rentals, who in turn provided them to JMC as drivers. From March 1984 to August 1985, six of the eight former Transport drivers continued to drive from R-B Rentals after it severed its agreement with Transport, and in the last 4 months of its existence JMC retained and employed all the drivers who had just previously been on the payroll of R-B Rentals. That the men who drove its trucks were of the utmost importance, indispensable to JMC, need not be argued, for without these drivers, JMC could not carry out its basic mission, to deliver freight for its customers.

The record is crystal clear that there was an interrelation of operations between JMC and R-B Rentals. Both entities used the same office building and the same business address. Although JMC's business was the transportation of miscellaneous freight over long distances, it started in business, and ended in business, without ever owning a single tractor or trailer. Nor did it need to own any equipment. R-B Rentals garage and parking lot were immediately adjacent to JMC's office and dispatcher, and its tractors and trailers were at the instant call of JMC. R-B Rentals furnished almost exclusively the tractors and trailers that JMC used to haul its freight, and supplied the leased drivers except for the first and last year when JMC employed its own employee drivers. JMC and R-B Rentals operated in tandem, with each dependent on the other for its survival.

2. Common management

Broaddus started JMC as its president, chief financier, chairman of the board of directors, and its driving force in its short-range and long-range management. Although JMC had a position titled general manager, this general manager reported to Broaddus at least once a day, on any subject that was pertinent to the running of the business. Such subjects included personnel, safety, and equipment.

Broaddus and the general manager had the power to hire and fire. However, before the general manager could hire an employee, he would discuss with the president whether a new employee was needed. If the discharge of an employee involved a difficult decision, Broaddus also would be consulted prior to the final decision.[22]

The general manager supervised the office staff, which consisted of the permit clerk, bookkeeper, and secretary, but did not supervise the larger part of its staff, the truckdrivers. Schweitzer was the general manager from 1 July 1980 to about September 1981, when he was replaced by DeAnne Owens, the bookkeeper. Owens served as general manager until February 1984, when she also left the employ of the Company. Broaddus testified he then took over the duties of the general manager, and served as such until JMC ceased doing business.

[22] Broaddus' discharge of Marina in 1981 is an example of this procedure.

Outside of Broaddus' dominating management of JMC and R-B Rentals, the major link of common management was the dispatcher. The dispatcher was an employee of JMC, but he supervised all truckdrivers, whether they were employees of JMC, Transport, R-B Rentals, owner-operators. As Broaddus testified the dispatcher was considered as part of management and had the authority to take a driver of a truck when out on the road, and replace him with a relief driver. His duties consisted of dispatching the drivers to deliver their loads, directing them to pick up freight, securing loads for drivers when they were back hauling, and sending advances to drivers when they were out on the road. Every driver when out on the road had to call in to the dispatcher every day between 8 and 10 a.m., as well as when he was unloaded, or had an equipment failure.

Dispatchers came and went at varying intervals of time. Kenneth Schweitzer first handled the duties of a dispatcher, and was replaced by DeAnna Owens. After Owens came Thomas Denman, Tom Hayes, "Betty," and George Epperson. Epperson served as the dispatcher until the termination of JMC's business.

As the sole management official, and sole full-time office employee of R-B Rentals, Broaddus clearly directed and managed the entire operation of this sole proprietorship. As president of JMC, Broaddus made the bid decisions as to where to secure its equipment, the type tractors and trailers to use, as well as from what source it would secure drivers for its equipment.

It was Broaddus who decided that JMC, in its initial operations, would hire its own employees to drive the tractor-trailers that delivered its freight. It was Broaddus who decided in February 1982 that JMC would use owner-operators to haul its freight. When JMC decided to secure drivers from Transport, it was Broaddus who discussed the details of the agreement with the general operations manager of Transport. It was also Broaddus who decided to sever his contract with Transport and to put drivers on the payroll of R-B Rentals. Finally, it was Broaddus who made the decision, in August 1985, to take the drivers off the R-B Rentals payroll and let them once again be employees of JMC, and be carried on its payroll.

Broaddus' activities, as well as those of the dispatchers and general managers, ensured that there was an effective common management of two companies, and I so find.

3. Centralized control of labor relations

The record is also clear and consistent that Broaddus controlled the labor relations at JMC by his overseeing of its operations and personnel, and by his direct involvement in personnel decisions. As previously stated, Broaddus was consulted by the general manager before a new employee would be hired, and he made the decision to discharge Marina.

The day-to-day supervision of the drivers remained the same whether they were carried on JMC's payroll, R-B Rentals' payroll, or Transport's payroll, or were called owner-operators. The JMC dispatcher had identical authority to send the drivers out to deliver freight to what-

ever consignee or destination the dispatcher chose. Likewise he had the authority to order them to pick up freight when returning to the terminal instead of deadheading back. The same company policy pamphlet that had been issued in 1981 as work rules to company employees, was issued to each succeeding driver, no matter what payroll he was on,[23] and he was bound by these rules. Also, each driver who hauled JMC's freight, no matter on whose payroll, received a copy of the Interstate Truck Drivers handbooks with its many work regulations, and was told its contents were a part of company policy.

As the sole owner and manager of R-B Rentals, with only one part-time office employee, it is evident that Broaddus controlled the labor relations of R-B Rentals. However, R-B Rentals had very few employees to be covered by its labor relations policies. The truckdrivers it supplied to JMC, whether as owner-operators or leased employees, were under the direct supervision of JMC's dispatcher and bound by the rules and regulations contained in JMC's manual and its interstate handbook. Outside of its part-time bookkeeper, the only other employees it had, were mechanics. For most of its existence, R-B REntals only had one mechanic, with the exception being in 1984 when it had four mechanics.

I find that the evidence is overwhelming that there was centralized control in the labor relations of JMC and R-B Rentals.

4. Common ownership

The evidence is clear that there was substantial common ownership of JMC and R-B Rentals by Broaddus. Broaddus was the incorporator of JMC and its dominant stockholder during the 5 years of its existence. As an indicia of his control no check could be issued without his signature. Although over the life of the corporation he drew only $3000 in salary, his individual tax return for 1983 shows that he received $34,186.40 in interest income from JMC. This interest was earned on money loaned by Broaddus to JMC.[24]

However, JMC was obviously not in sound financial condition as early as 1983, when Broaddus came personally to its aid. Broaddus pledged his house as security for a loan, and in return the Liberty National Bank granted JMC a loan in the amount of $121,000 payable on demand. Broaddus also personally pledged $20,000 to the Westfield Company, a bonding company, so that it would be guaranteed payment of up to $20,000 for advances made to drivers while they were out on the road. There is nothing in the record to indicate that any of the minority stockholders made any personal contributions to JMC's survival, and I infer there were none.

The ownership of R-B Rentals is uncontradicted, as Broaddus was its sole owner. As to the signing of checks, the same policy was followed as that at JMC, with Broaddus being the only person authorized to sign checks on behalf of R-B Rentals. The record does not indicate what compensation Broaddus was to receive, whether on a weekly or yearly basis, from his leasing of tractors and trailers to JMC or anyone else. His 1983 individual tax return reports that he received $152,056 in rent income for that calendar year. The same tax returns for 1984 and 1985 do not show any rental income but do show that Broaddus used depreciation of the assets of R-B Rentals to lower his individual tax liability. (G.C. Exhs. 16 and 17).

From the above it is evident that substantial common ownership resided in Broaddus as the majority owner of JMC and the sole owner of R-B Rentals.

It is readily evident that there was an absence of an arm's-length relationship between JMC and R-B Rentals. The two companies had adjacent offices with no distinguishing sign to let the public know that there were two different companies. They used the same post office box and address. They transferred drivers backs and forth from JMC's payroll to R-B Rentals' payroll at the command of Broaddus. Broaddus leased his tractors and trailers to JMC, signing the leases as owner of R-B Rentals, while the person he dealt with for JMC, Owens, was an employee hired by Broaddus, and subsequently discharged by him. When Broaddus dealt with the general managers or dispatchers of JMC it is obvious that they, as employees, were not able to deal with him as equal bargainers.

Under all the facts and circumstances of this case, I find therefore that because there was a closely knit interrelation of operations between JMC and R-B Rentals, that there was common management, a centralized control of labor relations, and common ownership, that JMC and R-B Rentals constitute a single employer within the meaning of the Act. *Carson Cable TV*, 275 NLRB No. 201 (Aug. 20, 1985) (unpublished), enfd. 795 F.2d 879 (9th Cir. 1986); *Soule Glass & Glazing Co.*, 246 NLRB 792 (1979), enfd. in relevant part 652 F.2d 1055 (1st Cir. 1981); *Midlands Express*, 236 NLRB 619 (1978). I further find that R-B Rentals is jointly and severally liable with JMC for the unfair labor practice of JMC. Since R-B Rentals constitutes a single employer with JMC, R-B Rentals was properly named in the backpay specification even though it was not named in the underlying procedure. *NLRB v. Deena Artware*, 361 U.S. 398, 402 (1960).

B. *Alter Ego*

In determining whether R-B Rentals is the alter ego of JMC as contended by the General Counsel, a number of factors must be considered, although no one of which, taken alone, is determinative. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Alpine Construction Corp.*, 276 NLRB 415 (1985). These factors include: common management and ownership, common business purpose, nature of operation, supervision, common premises and equipment, and common customers.

[23] On 3 September 1981 JMC issued to each of its employee drivers a 3-page single-spaced document on JMC stationery that was captioned "Company Policy, Instructions to Drivers." This document contained 33 rules that the drivers had to abide by in order to drive for JMC. G.C. Exh. 14.

[24] The record does not disclose the basis for Broaddus' receipt of the $34,186.40. He did testify that he contributed $400,000 to $500,000 to JMC over the life of the Company. The record does not indicate if he received interest on this contribution or if he was ever repaid in part or in full.

As set forth in sections III,A,2 and III,A,4 above, the first two factors of common management and ownership clearly exist, and need not be reviewed here.

However, I do not find the third factor, common business purpose, to be present in this case. JMC's business purpose was to pick up goods and commodities of customers with its trucks and deliver that freight to consignees throughout the 48 States as a common carrier. R-B Rentals' purpose was to lease its tractors and/or trailers to customers, and to maintain and repair this equipment so as to be in good operating condition for leasing.

The next factor, nature of operation, is a troublesome one. It is true that the operation of the two companies was coordinated, but I do not find that this sufficiently bridges the different natures of their respective businesses. JMC was an interstate common carrier of miscellaneous freight operating under the authority of the ICC. R-B Rentals was an owner of tractors and trailers any one of which could be leased by any carrier, company, or individual who wanted to lease such equipment. I therefore do not find that the nature of operations of the two companies was the same.

However, I do find that there was common supervision at the two companies as set forth in detail in sections III,A,2, and III,A,3 above. The overriding domination of Broaddus for both R-B Rentals and JMC was present on a daily basis. In addition, the dispatcher of JMC supervised the drivers furnished by R-B Rentals with the same degree of power and authority as he exercised over clearly JMC employees.

I also find that common premises and equipment were used by the two companies. JMC and R-B Rentals used the same building for their adjacent offices. R-B Rentals used the garage bays situated in the same building as JMC's offices to perform repairs and maintenance on its tractors and trailers. The equipment used by JMC for the great majority of the 5-1/2 years of its existence came almost solely from R-B Rentals.

Concerning the last factor, common customers, I do not find that the General Counsel has produced sufficient evidence to meet her burden of proof. Broaddus testified that JMC had 16 major customers.[25] However, the record only discloses two customers who were served by both JMC and R-B Rentals, and they were Willett Distributing Company and the House of Nelson. I therefore do not find that JMC and R-B Rentals shared common customers.

Inasmuch as there was no common business purpose between JMC and R-B Rentals, the nature of operations was different, and the customers were vastly different, I do not find that there were sufficient common factors between JMC and R-B Rentals that would require that R-B Rentals be considered an alter ego of JMC. I conclude therefore that R-B Rentals was not an alter ego of JMC.

C. *Successorship*

The General Counsel also contends in her brief that R-B Rentals should be held jointly liable with JMC on the basis that it is a successor to JMC. The General Counsel's opening explanatory words concerning this theory are as follows:

> The Board has held that one who acquires and operates the business of any employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

The brief then goes on to cite the case of *Perma Vinyl Corp.*, 164 NLRB 968 (1967), enfd. sub nom. *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 554 (5th Cir. 1986). I agree with the General Counsel's legal theory but find it inapposite to this case. In the case cited above, U.S. Pipe did purchase Perma Vinyl's facilities and business. The General Counsel does not allege that R-B Rentals purchased JMC, nor could she, but vaguely contends that R-B Rentals "acquired"[26] JMC. I do not find that R-B Rentals acquired JMC in any manner, at anytime. The General Counsel apparently contends that R-B Rentals acquired a portion of JMC's business in October 1983, when R-B Rentals provided JMC with six drivers who had formerly driven for JMC as owner-operators, and also provided the tractor-trailers for them to drive. The General Counsel goes on to elucidate this theory as follows:

> Thus, R-B Rentals was a successor to that portion of the JMC business which had employed company drivers and had utilized the equipment of Russell Broaddus until August 1985 when the drivers were again placed on the JMC payroll.

In support of this proposition the General Counsel cites two cases, the first being *Fab Steel Co.*, 231 NLRB 372, 378 (1977), enfd. 587 F.2d 689, 695 (5th Cir. 1979). However, in that case Fab Steel, the successor, was a clearcut purchaser of one of the seven plants of the seller, Mosher Steel Company, including the purchase of the plant's machinery, equipment, and inventory. The second case cited, *Saks Fifth Avenue*, 247 NLRB 1047 (1980), enfd. in relevant part 634 F.2d 681 (2d Cir. 1980), is also inapposite. That case involved a unit of employees employed by Gimbels to perform alterations on women's clothing owned by Saks. At this worksite they were represented by a union. The work was done for Saks in Gimbels' building pursuant to a subcontract with Gimbels. Saks subsequently secured its own building and terminated its alteration contract with Gimbels. Gimbels then discharged all 18 employees, and Saks hired 16 of the 18 employees and set up its own alteration department in its own building. When the former bargaining agent requested Saks to bargain, Saks refused to do so. The Board found that Saks was a successor employer

[25] I draw the inference that JMC also had a number of minor customers.

[26] According to *Black's Law Dictionary*, 5th Edition, the meaning of acquire is: "To gain by any means, usually by one's own exertions; to get as one's own; to obtain by search, endeavor, investment, practice, or purchase; receive or gain in whatever manner; come to have. In law of contracts and descents, to become owner of property; to make property one's own."

and therefore must recognize and bargain with the Union.

It is obvious in the instant case that R-B Rentals in no way compares with Saks, or JMC with Gimbels. When Saks commenced performing alterations in its new building with its own employees, Gimbels was completely divorced from any relationship with Saks. But when R-B Rentals provided six drivers in October 1983, JMC in no way disappeared from the scene, or altered its operation in any manner, but continued to pick up and deliver freight for its customers exactly as it had from its inception in 1980.

In *Saks* the Board stated: "the Board has held that in determining successorship, the keystone is whether there is substantial continuity of the employing industry."

Clearly, there was no continuity of the work formerly done by JMC, by R-B Rentals after R-B Rentals supplied the six drivers in 1983. JMC's general manager and its six office employees continued to perform their office duties in behalf of JMC's role as a common carrier in the trucking industry, without any control by R-B Rentals. The dispatcher continued to dispatch the drivers to pick up and deliver freight all in the name of JMC not R-B Rentals. Broaddus continued to solicit business for JMC and remained in overall control of its operation.

I find and conclude that R-B Rentals had never taken over the control of JMC's business, that it was not a successor of JMC and that it is not under the successor theory, responsible for remedying JMC's unlawful discharge of Marina. *Premium Foods*, 260 NLRB 708 (1982); *Contract Carrier*, 258 NLRB 353 (1981).

D. *Gross Backpay Period*

An administrative law judge considering conflicting backpay formula arguments must determine the most accurate method of determining backpay amounts. *East Wind Enterprises*, 268 NLRB 655 (1984); *J. S. Alberici Construction Co.*, 249 NLRB 751 (1980). Coupled with this obligation, however, is the longstanding and fundamental principle that uncertainties will be assessed against the wrongdoer. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966). The General Counsel contends that the backpay period terminated on 30 November 1985, the date JMC ceased doing business.

Respondent JMC in its answer agrees that the backpay period began 5 November 1981, the date of Marina's discharge, but insists that it ended 1 February 1982, the date JMC converted to a system of independent contractor drivers. It is true that in February 1982, JMC did change its method of providing drivers for the tractors it leased, by switching from employee drivers to a modified type of owner-operators, a procedure JMC used for the next 19 months. But this was only the second of five procedures used by JMC to provide drivers for its tractors. It in turn was followed by two different methods of using leased drivers, with the fifth and final procedure being a return to the original 1980 procedure of JMC, having its own employees drive the tractor-trailers.

Assuming arguendo that the so-called owner-operators were independent contractors excluded from protection under the act, Respondents are still liable for backpay, under the holding of the Supreme Court in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). In *Golden State* the respondent contended that the discriminatee, a discharged driver salesman, was not entitled to any backpay from the time it converted its delivery system from driver-salesman to distributors, who were independent contractors. The Supreme Court noted with approval that the court of appeals[27] had rejected this contention as follows:

> However, it is undisputed that when Baker was discriminatorily discharged he was an ordinary employee. The Act's remedies are not thwarted by the fact that an employee who is within the Act's protection when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against. *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953).

Marina's status with JMC is clearly analogous with that of the driver-salesman in *Golden State*. In February 1982, when JMC commenced using owner-operators, all but one of these had been JMC employee drivers. JMC presented no objective evidence that would show that Marina would not have been offered the same opportunity to lease a tractor as these former JMC employee drivers.

Admittedly, it is ambiguous whether Marina, absent his unlawful discharge, would have continued to drive for JMC and R-B Rentals. But other drivers, similarly situated, did continue to drive for JMC until its closing.[28] Driver Joe McCoy, originally a driver employee of JMC, continued to drive JMC's tractors for the next 5 years until JMC ceased doing business. Willie Carter, first employed as an owner driver in March 1983, also continued to drive the tractors used by JMC until the date JMC closed its doors.

Respondent has failed to establish its affirmative defense that it would not have employed Marina but for his unlaful discharge. That Marina was a competent over-the-road driver is reflected in the two previous trips JMC had assigned to him, just prior to his discharge. Both trips were obviously very long hauls, from Kentucky to California and back, and were made successfully by Marina.

I find that because other similarly situated drivers were retained to operate the tractors used by JMC to pull its trailers throughout the backpay period, the ambiguity of whether Marina would have also been retained must be construed in his favor. *Boilermakers Local 27 (Daniel Construction)*, 271 NLRB 1038 1984); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980).

In light of the foregoing findings and conclusions, and on the entire record considered as a whole, I make the following recommended[29]

---

[27] 467 F.2d 164, 166 (9th Cir. 1972).

[28] Cathay, his driving partner, was signed to two leases by R-B Rentals, the last one being for a period of 1 year.

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, JMC Transport, Inc., its successors or assigns, and Russell Broaddus III, d/b/a R-B Rentals, a sole proprietorship, shall jointly and severally, pay to Lemuel Marina $47,516.98, plus interest to be computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Olympic Medical Corp.*, 250 NLRB 146 (1980),[30] with appropriate deductions for taxes required to be withheld under Federal and state laws.

[30] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Bentley-Jost Electric Corporation *and* International Brotherhood of Electrical Workers, Local Union No. 494, AFL–CIO. Case 30–CA–9266

6 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 12 January 1987 Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions, supporting brief, and answering brief, and the General Counsel filed cross-exceptions, supporting brief, and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bentley-Jost Electric Corporation, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We deny as unnecessary the General Counsel's request for a visitatorial provision in our Order.

Paul Bosanac, Esq., for the General Counsel.
Russ R. Mueller, Esq., of Milwaukee, Wisconsin, for the Respondent.
Neal F. Rosenberg, Business Manager, of Milwaukee, Wisconsin, for the Union.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard in Milwaukee, Wisconsin, on 13 November 1986, on the General Counsel's 15 August 1986 complaint,[1] alleging in substance that following the Union's request for information regarding the relationship of Respondent Bentley-Jost Electric Corporation to another employer, Respondent, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), failed and refused to fully respond to the Union's request. In response to the General Counsel's complaint, Respondent filed a timely answer, dated 20 August 1986, in which it admitted certain allegations, denied others, and denied the commission of any unfair labor practices.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, submit oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to file posthearing briefs which have been carefully considered.

On the entire record, including the briefs, and taking into account the uncontradicted and credited testimony of the witnesses, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

As a result of stipulations and concessions at the opening of the hearing, there is no dispute that Bentley-Jost Electric Corporation, a Wisconsin corporation with an office and place of business in Milwaukee, Wisconsin, is an electrical contractor in the building and construction industry. It is a member of the National Electrical Contractors Association-Milwaukee Chapter, N.E.C.A., Inc. (NECA or Association), an association of employers in the building and construction industry existing for the purpose, inter alia, of representing employer-members in negotiating and administering collective-bargaining agreements with the Union. It is admitted that in the past calendar year, a representative period of its business operations, Respondent received goods, products, and materials valued in excess of $50,000 from other enterprises in Wisconsin which enterprises received the goods, products, and materials directly from points outside the State of Wisconsin. Respondent admits and I find that, at all material times, on the basis of the above "indirect inflow" of goods and materials, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

Respondent admits and I find that at all times International Brotherhood of Electrical Workers, Local Union No. 494, AFL–CIO (the Union), had been, and is, a labor organization within the meaning of Section 2(5) of the Act.[2]

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent for 20 years has been and is an industrial and commercial electrical contractor, performing either as prime or subcontractor, in four counties in and around the Milwaukee, Wisconsin area. As noted, Respondent is a member of NECA whose Milwaukee Chapter has 87 employers, and normally employs between 10 and 15 full-time employees including supervisors. The Union, in bargaining NECA, represents about 1000 electrical em-

[1] The Union's underlying unfair labor practice charge was filed and served on Respondent on 1 July 1986.

[2] Respondent also admits that Louis J. Jost Jr., at all material times, has been, and is, Respondent's president and a supervisor within the meaning of Sec. 2(11) of the Act and an agent of Respondent within the meaning of Sec. 2(13) of the Act. Jost is Respondent's chief operating and executive officer.

ployees in the four-county area in and around Milwaukee, Wisconsin.

At the hearing, Respondent conceded that, at all material times, it had been a signatory to and bound by successive collective-bargaining agreements between NECA and the Union, the latest of which is for the period 1 June 1985 to 31 May 1988 (G.C. Exh. 2). Respondent also admitted that the Union is the statutory collective-bargaining representative for employees covered in the contract unit, admittedly an appropriate unit,[3] and asserted that the only issue in the case was the substantive issue, presented hereafter, relating to the lawfulness of its failure and refusal to give certain information to the Union.

The General Counsel presented three witnesses (including Louis J. Jost Jr., Respondent's president). Respondent chose to rest on the evidentiary record as presented by the General Counsel and to rely on the legal defenses propounded by Respondent in its pleadings, again at the hearing, and further specified in its timely brief. I find that the evidence raises no material issues of fact, that the witnesses testified credibly, and that the case presents only a legal issue.

Donald L. Statza, a Local 494 business representative, whose duties include the enforcement of the Union's collective-bargaining agreements, first heard of the existence of Specialty Trades, Inc. in 1985 and learned that it was in the electrical contracting business in the Milwaukee area. Specialty Trades, Inc. is not a signatory to any collective-bargaining agreement with the Union and, in particular, is not a signatory to the Association agreement which binds Respondent.

Respondent's president, Jost, admitted that he had heard of Specialty Trades, Inc., but declared that there was no corporate connection between Respondent and Specialty Trades, Inc. He testified that he knew that Specialty Trades, Inc. was located in and worked out of a house owned by one Charles Schmitt on 53d Street in Milwaukee; that it was a nonunion operation engaged in the business of plumbing, heating, and electrical contracting, with the electrical work being of the same type as performed by Respondent. Jost also admitted that another location for Specialty Trades, Inc. is an answering service called Jost Management Services, Inc., which is located in Respondent's office (Tr. 43); and that although Specialty Trades, Inc. had been in operation for about 2 years and performs the same type of electrical work as Respondent (Tr. 44), it is not in competition with Respondent according to his "memory" (Tr. 52).

Jost further testified that he has a son Brian Jost and a brother Robert Jost; that Respondent's office clerical, Phyllis Sommers, had been Respondent's clerical for 6 to 8 years until a 1985 merger of six employing companies (all controlled by or involving members of the Jost family) which merger resulted in the creation of Jost Management Services Inc. Sommers is the office clerical for the merged company.

[3] Sec. 2.05 of the current collective agreement, inter alia, provides: "The . . . transfer by an individual employer of any work . . . to any person . . . not recognizing the IBEW or one of its Local Unions . . . will be deemed a material breach of Agreement." (G.C. Exh. 2.)

In addition, Jost testified that David Nowicki, a former electrical inspector for the city of Greenfield, Wisconsin, is a supervisory electrican who acquires construction permits for Specialty Trades, Inc.; and that Specialty Trades does not pay Nowicki a salary but remunerates him in the form of occasional gratuities, otherwise unspecified in the record.

Sometime in November 1985, Union Representative Statza, reading a local newspaper ("Daily Reporter") that carries reports of the granting of electrical permits in municipalities in and around Milwaukee, discovered that Specialty Trades, Inc. had been issued a construction permit in the nearby community of Wauwatosa, Wisconsin. He obtained a copy of the permit (G.C. Exh. 14), found that David Nowicki was the supervisory electrician who obtained the permit for Specialty Trades, and that the permit showed a telephone number, presumptively the telephone number of Specialty Trades. When union agent Statza dialed the number, he discovered that it was a telephone answering service. The telephone answering service notified him that Specialty Trades had both canceled the answering service and directed the answering service to refer any problem to Bentley-Jost.

Thereafter, in April 1986, when Union Agent Statza continued his investigation and discovered a Specialty Trades permit application in Milwaukee, Wisconsin, there was a different telephone number thereon (G.C. Exh. 15). He called that phone number, and a woman answered the phone on behalf of "S.T.I." When Statza asked for Schmitt, the woman said that she would get him, but Statza did not continue the conversation. Statza thereafter sought to discover from a Bentley-Jost employee the situs of that telephone number (645–6988) and was told that the phone bearing that number was in Respondent's office.

In further search for the identity of Specialty Trades, Inc., Statza found that a Wauwatosa application for an electric contractor license (G.C. Exh. 7) was filed in behalf of Specialty Trades, Inc. and signed by Louis J. Jost Jr., as "Treas." [sic] of Specialty Trades, Inc. Jost admitted that the signature was his. Jost, as above noted, is president of Respondent.

Statza's continuing investigation disclosed an electrical permit for a job submitted by Louis Jost, on behalf of Bentley-Jost, to perform contracting work at a bank (Mitchell Savings and Loan) in Greenfield, Wisconsin (G.C. Exh. 8). Statza sought and obtained the permit after he visited the bank jobsite in order to discover who was actually doing the electrical work. He discovered on the job a box containing light fixtures with the name "Specialty Trades" marked on the box. When Statza visited the job again, he found Charles Schmitt on the job. Schmitt said that he was "Specialty Trades" and that Specialty Trades had the job. The permit, as above noted, was issued to Bentley-Jost. He said that his brother and another worker were the only workers on the job.

Statza also found that Specialty Trades, Inc. had filed an application for an electrical license in Milwaukee sometime after August 1985 with Brian Jost being the secretary of the applicant (G.C. Exh. 12). He also dis-

best copy available

covered that Phyllis Sommers, Respondent's office clerical, was notarizing permit applications for electrical contract work for both Specialty Trades, Inc. and Respondent (G.C. Exhs. 7, 12, and 13).

In light of this information, Statza sent for the State of Wisconsin articles of incorporation of both Specialty Trades, Inc. and Bentley-Jost (G.C. Exhs. 9, 10, and 11). The documents disclose no apparent relation between the two corporations.

On the morning of 28 April 1986, Statza and another union agent traveled by car to Schmitt's Speciality Trades' 53d Street address in Milwaukee. They observed a man leave the house, drive to Wauwatosa, and stop at a jobsite where a pizza parlor was being remodeled. At the jobsite, they took pictures of persons on the jobsite (G.C. Exhs. 17, 18, and 19). Present on the jobsite that morning were Respondent's president, Louis Jost, and his brother, Jim Jost.

On 19 May 1986, Union Business Manager Neal F. Rosenberg wrote to Respondent the following letter (G.C. Exh. 3), attached to which was a questionnaire of 44 questions concerning Respondent's and Specialty Trades' business, suppliers, officers, directors, and employees:

> It has come to our attention that your company is, or may be, in violation of its collective bargaining agreement with this union, by reason of the operations by your company or its principals, of another company called Specialty Trades Inc. hereafter referred to as Company B, or by the performance of work which would otherwise be performed by your company. Specifically, we believe that there is or may be violation of Article II, Sections 2.01 and 2.05; Article IV, Section 4.02; Article VI, Wages; Article VIII, Sections 8.01 and 8.02; Article IX; Article X; Article XI, Sections 11.01 and 11.06 of the Milwaukee Division Inside Wireman Agreement and possible other articles.
>
> Company B is presently performing the same services that were previously performed by your company with your employees. In addition, we believe that there is a connection between your company and Company B either financially or through management personnel, or both, and we believe that the object of creating Company B was to circumvent the provisions of our collective bargaining agreement.
>
> Please consider this letter a grievance. We wish to meet at your earliest convenience to attempt to settle this grievance. In order to determine whether in fact there is a violation, we request that you provide answers to the questions on the attached questionnaire.
>
> Please submit your response within ten days of the date of this letter, so that we can proceed with the handling of this grievance under the terms of our collective bargaining agreement.
>
> Sincerely
> Neal F. Rosenberg
> Business Manager

By letter of 29 July 1986 (G.C. Exh. 4), and an accompanying answer sheet, Respondent's attorney Mueller answered the Union.[4] In particular, in the answer sheet, Respondent denied that Bentley-Jost performed any work on Specialty Trades, Inc.'s products or jobs or that Specialty Trades, Inc. performed any work on Bentley-Jost's jobs. It provided three other pieces of information with regard to Specialty Trades: it named Specialty Trades' supervisor as Charles Schmidt [sic]; it denied that any of its supervisors performed work for Specialty Trades or that any of Specialty Trades supervisors performed work for it; and finally, it denied that any of its managerial personnel were ever employed by Specialty Trades or that any of Specialty Trades' managerial personnel were ever employed by Respondent. With regard to the three dozen other questions put by the Union to Respondent, Respondent noted, for example, that it performed estimating work for Specialty Trades, Inc. (question 22); but on other questions such as (question 33) the identity by job titles or craft positions of the number of employees employed by Specialty Trades, the persons who bid for Specialty Trades (question 28), Specialty Trades Sources of credit (question 11), bank (question 4), accountant (question 6), and where it kept its books and records (question 5), Respondent failed to answer.

On 6 August 1986, the Union replied:

> Your letter of 29 July 1986 is clearly an inadequate response to the questions which we had previously sent to you requesting information necessary to carry out our duty as the collective-bargaining representative. It is clear you are merely continuing your violation of the National Labor Relations Act.
>
> Very truly yours,
> Neal F. Rosenberg
> Business Manager

In response to this union accusation, Attorney Mueller, on 11 August 1986 wrote:

---

[4] The covering letter to Attorney Muller's response is:

Dear Mr. Rosenberg:

Enclosed herewith is a separate document on which information is given on behalf of Bentley-Jost Electric Corp. to the Questionnaire, which you submitted with your May 19, 1986 letter to the Company, in connection with the grievance stated in that letter.

Your Questionnaire asks questions regarding "Company B" and your letter of May 19, 1986, identifies this as "Specialty Trades, Inc.". The information given on the enclosed regarding Specialty Trades, Inc. is based on information and belief and is indicated by "[Company B]". Any information not given for Specialty Trades, Inc., is because such is considered of a confidential nature to that separate corporation and the information is independent from that which relates to the operations of Bentley-Jost Electric Corp. In other words, the information that is given concerning Specialty Trades, Inc. is based on direct business dealings.

You may wish to contact Mr. Richard Jacklin, 5401 Chateau Drive, #1 Rolling Meadows, Illinois, President, Specialty Trades, Inc., relative to the requested information that is not provided by the enclosed.

Unless I hear from you soon to the contrary, this reply will be considered as having fulfilled your request for information with regard to the stated grievance.

Very truly yours,
Russ R. Mueller

This is in reply to your 6 August 1986 letter relative to the Company's attempt to satisfy the Union's request form information in connection with the grievance identified in your letter of 19 May 1986.

Your reply to the information submitted to you by my letter of 29 July 1986, "is clearly an inadequate response" cannot be further considered unless you explain why you consider that to be so.

Very truly yours,

R. Mueller

By 1 July 1986, the Union had filed the instant unfair labor practice charge.

A. *Positions of the Parties*

In short, the General Counsel and the Union take the position that the record here discloses that the Union had gathered sufficient evidence to provide it with an objective basis for believing that Respondent, in violation of contract prohibitions, was diverting unit work and that such evidence provided the necessary legal "trigger," linking its request for information to Respondent's relationship to work performed by nonunit employees. *Pence Construction Corp.*, 281 NLRB 322 (1986); *Davis Acoustical Co.*, 280 NLRB 1432 (1986); *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531 (4th Cir. 1985).

Respondent, apparently not abandoning its 29 July written defense of the "confidential nature" of the information it possessed regarding Specialty Trades, also defends on the proposition that the obligation to furnish information in these cases is a product of the collective-bargaining process. As such, Respondent argues that whatever the knowledge acquired by the Union with regard to the operations of Specialty Trades, Inc., such knowledge remains irrelevant because the Union, in support of its grievance, never notified Respondent of the facts supporting the Union's conclusion that Respondent was violating the collective-bargaining agreement. On this basis, Respondent concludes that the General Counsel has failed to prove the "triggering" mechanism: to make relevant the requested information to some necessity that such information be given to the Union. Respondent further contends that its letter of 29 July 1986 to the Union, answering some of the Union's questions, was both a product of the collective-bargaining process and a demonstration of Respondent's good faith in answering the Union's questions. The secondary defense is that, in any event, Respondent satisfactorily answered the Union's request form information based on any obligation created by the preliminary information supplied by the Union; and that any statutory obligation for Respondent to further reply must be based on further union information to trigger Respondent's further duty to supply other information.

Nothing in the record, including Respondent's correspondence and argument, indicated that Respondent did not possess the requested information or construed the Union's 44-question questionnaire as a demand for irrelevant material. Indeed Respondent not only answered some of the questions put to it by the Union but initially defended its failure to further answer questions principally on the ground that the information was "confidential."

With regard to an employer's obligation to furnish information to the employees' collective-bargaining agent, concerning the alleged diversion of unit work in violation of a collective-bargaining agreement in cases when, as here, it is alleged that the nonunion (employer) recipient of the transferred work is in some way related to the transferring employer, the Board's rules may be found in cases such as *Pence Construction Corp.*, supra; *Davis Acoustical Co.*, supra; *Washington Materials v. NLRB*, 803 F.2d 1333 (4th Cir. 1986); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); and *Associated General Contractors of California*, 242 NLRB 891 (1979), enfd. 633 F.2d 766 (9th Cir. 1980). These rules establish an employer's obligation to furnish the Union the requested information if there is a probability that such information is relevant and will be of use to the union in fulfilling its statutory duties and responsibility as the employees' exclusive bargaining representative. The Union's informed administration of the contract, including protection and preservation of unit work (a mandatory subject of bargaining), as here, is such a statutory duty in addition to any contract prohibitions against transfer of unit work. Cf. *Southern Nevada Builders Assn.*, 274 NLRB 350 (1985).

The Board, in determining relevancy of the requested information, uses a liberal discovery-type standard. Information regarding terms and conditions of employment of *unit* employees represented by the Union is *presumptively* relevant. Where the information, as here, concerns employees or operations other than those represented by the union, i.e., Specialty Trades, Inc., there is no such presumption. *Ohio Power Co.*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). In this latter situation, the burden is on the union to establish relevance of the requested information.

Here, as in *Pence Construction*, the General Counsel and the Union assert that the information gathered by Union Representative Donald L. Statza (and reported to Union Business Manager Neal Rosenberg) provided an objective, factual, and reasonable basis for believing that unit work was being diverted from Respondent, thus fulfilling the Union's burden of establishing the relevancy of the information requested.

B. *Discussion and Conclusions*

I am indebted to the analysis of Judge Cullen in *Pence Construction Corp.*, supra. As noted therein, the union had the burden of showing the relevancy of nonunit information, but the burden is not an exceptionally heavy one. The information requested need not necessarily be dispositive of the issues between the parties. It must only have some bearing on it. *Pfizer, Inc.*, 268 NLRB 916, 918 (1984). The employer's obligation, in short, is to furnish information that has *a probable or potential relevance* to the union's "performance of its duties and obligations" because a broad discovery rule is crucial to full development of the role of collective bargaining contemplated by the Act. *Pence Construction Corp.*, supra, citing cases. There must be "informed administration" of the collec-

tive agreement by the union. Ibid., citing *Safeway Stores*, 252 NLRB 1323 (1980).

In cases involving the unlawful diversion of work, whether in involving an alter ego, subcontracting, or merely tranferring or diverting unit work, the burden on the union is to establish the relevancy of the requested information as an aid to contract administration including contract violation. The right of the union to "informed" contract administration is a statutory, not a mere contract, right. *Southern Nevada Builders Assn.*, 274 NLRB 350 (1985).

The proof necessary to "trigger" the employer's obligation to furnish information relating to work transfer in alleged violation of the contract is not such as to establish that, in fact, there was unlawful diversion of the work, but merely that the Union "had a reasonable belief that enough facts existed to give rise to a reasonable belief that" there was an unlawful diversion of work away from unit employees. *Pence Construction Corp.*, citing *Walter N. Yoder & Sons*, 754 F.2d 531, 536 (4th Cir. 1985), enfg. 270 NLRB 652 (1984). Further, it is clear from *Pence Construction*, that there need not be a pending grievance pertaining to the alleged contract violation in order to trigger the employer's obligation to surrender the requested information. In the instant case, however, the Union, citing Respondent's alleged violation of specific contract provisions protecting unit work, formally made a grievance out of its demand. The obligation to supply information extends not only to information to support the Union's decision whether or not to file or process a grievance, but, as above noted, to that which is necessary for the "informed administration" of a collective-bargaining agreement.

Although the present facts do not necessarily show either the existence of a single-integrated unit of employees employed by Respondent and Specialty Trades, Inc. or that Specialty Trades, Inc. was established or exists to unlawfully divert work out of Respondent's unionized unit, the Union did submit preponderant credible evidence, through the testimony of Donald Statza, and the record shows (based in part on the admissions of Louis Jost Jr.) that Respondent is a constituent part of Jost Management Service, Inc.; that Specialty Trades, Inc. is physically located in Jost Management Services, Inc.; that Specialty Trades, Inc. maintains a telephone answering service wherein Jost Management answers for Specialty Trades, Inc. using a Jost Management clerical; that Specialty Trades, Inc. makes applications for licenses and permits through Respondent's president, Louis Jost Jr. as Specialty Trades' treasurer and Brian Jost (son of Louis Jost Jr.); that Specialty Trades (Schmitt) and its employees were found at the Mitchell Saving and Loan jobsite, in Greenfield, Wisconsin, where the electrical job permit was issued not to Specialty Trades but to Respondent; and yet materials on the job were in the name of Specialty Trades, Inc. In addition, the union agents followed a person apparently in the employ of Specialty Trades Inc. to a Specialty Trades, Inc. jobsite and there found Respondent's president Louis Jost Jr. and Jim Jost, Respondent having allegedly no corporate or business relationship to Specialty Trades, Inc. As a prima facie matter, the evidence clearly shows, at least, an intermixing or confusion of bidding, corporate officials, production materials, and employees between Respondent and Specialty Trades, Inc.

Because Specialty Trades, Inc. admittedly performs electrical contracting work of the same nature as Respondent, I conclude that the Union, on the above evidence, had a reasonable basis for its belief that Respondent, in violation of the collective-bargaining agreement, might well be diverting work from unit employees employed by Respondent to employees of Specialty Trades, Inc. who are not covered by any collective-bargaining agreement with the Union. Thus, the record shows sufficient evidence linking possible Respondent contract violation work diversion to the Union's 19 May questions concerning the relationship of the two employers.

C. *Respondent's Defenses*

Although filing of the grievance is not a condition precedent to obligating the employer to supply relevant information, *Pence Construction Corp.*, supra, and although Respondent does not deny the potential relevance of the propounded questions (many of the same questions propounded and found relevant in *Davis Acoustical Co.*, supra), it does defend on the ground that the Union failed to adequately notify Respondent of the facts on which the Union sustained its "reasonable basis for believing" that Respondent was in violation of the collective-bargaining agreement.

Neither logic nor case precedent demonstrates that the Union, in triggering Respondent's obligation to supply information, is required to divulge to the Employer the information on which it bases its "reasonable basis for believing." Although it is true that some cases, e.g., *Davis Acoustical Co.*, show that the Union communicated with the employer the facts of apparent work diversion which its investigation divulged, there is no such indication in *Pence Construction Corp.* In that case, as here, the factors do not necessarily establish that the employer was unlawfully diverting work to another entity. The only necessary condition is that the evidence provided the Union with a reasonable basis for *its belief*, expressed here in a letter to the Respondent, that Respondent was diverting erstwhile unit work, thereby violating the collective-bargaining agreement. I conclude that the Board, not Respondent, is the arbiter of whether the Union's evidence supports the "reasonable belief."

The Board appears to hold, in *Pence Construction*, that there must only be a reasonable basis for the union's conclusion, conveyed to respondent, that respondent was violating the collective-bargaining agreement. The union's correspondence with the employer, as in the instant case, showed no disclosure of evidence on which the union based its reasonable belief; rather, as in the instant case, the communication of the union to the employer alleged only specific contract violations and merely alleged, as in the instant case, the employer's purpose of evading the obligations of collective-bargaining agreement. To rule otherwise, that the union must supply evidence, I find, would make respondent, rather than the Board, the arbiter of whether the union's belief of the existence of a contract violation had a "reasonable basis,"

which is the Board's standard in *Pence Construction*. Were there an obligation, as Respondent insists, for the Union to supply Respondent with initial information, and thereafter, further information after Respondent's intermediate reply, before the Union could establish a "reasonable basis" for its belief of a contract violation, not only would Respondent, rather than the Board, become the arbiter of the Union's reasonable belief, but Respondent would become exclusive goal-keeper in a cat-and-mouse game: each time the Union would submit evidence to Respondent, Respondent would decide whether it was sufficient to initially trigger and, thereafter, to further trigger Respondent's obligation to further supply information. Neither the Act, nor logic, nor the case law permit such a dilatory procedure. Moreover, such a procedure would support continued delay (a) in having the Union decide whether to file, or, as in the instant case, proceed to further process, a contract grievance; and (b) in permitting continued intermediate diversion of unit work which might ultimately be in violation of the contract and the Act. *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). Such a procedure would undermine the express contrary policy of *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438–439 (1967): to require the employer to convey to the union the information necessary to promptly evaluate the merits of the union's grievance in order to sift our unmeritorious claims.

In addition, Respondent's formal response of 29 July 1986 to the Union's 19 May 1986 questionnaire interposes not a denial of the relevancy of the questions, but only an assertion that the answers are of a "confidential nature" to the operations of that "separate corporation." In fact, Respondent's response answers some of the Union's questions. Respondent's partial answer on the merits implicitly denotes, in my judgment, an admission of both the Union's need to know and the prima facie relevance of the questions in the questionnaire.

Furthermore, Respondent's naked plea of "confidentiality" itself, absent a denial of relevance, serves to excite the Union's interest with regard to possible unlawful diversion rather than to quiet it. In the absence of an explicit denial of relevance, I separately conclude that Respondent's partial answer, joined to a defense of "confidentiality," per se is independent supporting evidence of relevance of the Union's questions even in the absence of other proof.

I conclude, therefore, that the Union has supplied evidence beyond mere suspicion and surmise, *Southern Nevada Builders Assn.*, 274 NLRB 350 (1985), and under *Pence Construction* has demonstrated sufficient evidence to support its burden of proof regarding the relevance of its request for information concerning nonunit employees and operations, *Ohio Power Co.*, 216 NLRB 987 (1975). It has proved a reasonable basis for its *belief* (whether or not ultimately true) that Respondent was diverting unit work in violation of the collective-bargaining agreement. Such proof is further strengthened by (a) Respondent's partial answer; and (b) Respondent's plea of confidentially. That evidence, together with its 19 May 1986 letter to Respondent alleging a violation of the collective-bargaining agreement and an unlawful evasion thereof, was sufficient to support the Union's burden of proof demonstrating that the requested information was relevant and essential to the performance of the Union's obligations as the collective-bargaining representative to process its grievance and to administer the collective agreement. I am therefore constrained to conclude that Respondent, by failing to produce the requested information, violated Section 8(a)(5) and (1) of the Act as alleged.[5] In reaching this conclusion, I necessarily find no merit in Respondent's argument that the material is "confidential" and therefore need not be produced. I have found no case threatening an employer's claim of the relationship between itself and an alleged recipient of unlawful work diversion as being "confidential." Indeed, as above noted, I have found the plea of confidentiality to be further evidence supporting the Union's reasonable belief of work diversion. Although the Board, in case of trade secrets, has established a protective mechanism, in the face of a Union's otherwise lawful demand for information which might cause harmful disclosure, *Kelly-Springfield Tire Co.*, 266 NLRB 587 (1983), there is no reason to believe that a procedural device protecting an employer's trade secrets can relate to an employer allegedly engaged in unlawfully diverting work. In any event, the facts of record fail to show prima facie secret material to be protected.[6] Cf. *NLRB v. Jaggars-Chiles-Stovall*, 639 F.2d 1344 (5th Cir. 1981).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By failing or refusing to provide the Union, in writing, with the information requested in the Union's letter and questionnaire of 19 May 1986, Respondent has unlawfully refused to bargain with the Union and has engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(5) and (1) of the Act, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. This affirmative action will include the grant of the requested information and the posting of the usual notice.

---

[5] *Pence Construction*, supra; see also *Washington Materials v. NLRB*, 803 F.2d 1333 (4th Cir. 1986).

[6] To the extent Respondent argues (Br. 12) that the Union should seek the information from Specialty Trades, Inc., the issue is whether Respondent is obliged to surrender the information, not Specialty Trades. In addition, cases such as *American Cyanamid Co.*, 129 NLRB 683 (1960), cited by Respondent, are distinguishable. Here, the Union is not seeking Respondent's records—merely answers. In the instant case, Respondent refused to fully answer the Union's questions.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Bentley-Jost Electric Corporation, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Brotherhood of Electrical Workers, Local Union No. 494, AFL–CIO by refusing to furnish the Union with the information, in writing, requested in the Union's letter and questionnaire of 19 May 1986.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Forthwith furnish the Union with the information requested in its letter and questionnaire of 19 May 1986.

(b) On request, bargain collectively in good faith with the Union with regard to wages, hours, and other terms and conditions of employment of employees in the appropriate unit specified in the collective-bargaining agreement between Respondent and the Union which agreement runs for the period of 1985 through 1988.

(c) Post at its office and other facilities in Milwaukee, Wisconsin, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Electrical Workers, Local Union No. 494, AFL–CIO by refusing to furnish the Union with the information requested in the Union's letter and questionnaire of 19 May 1985.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union with the information requested in its letter and questionnaire to us of 19 May 1986.

BENTLEY-JOST ELECTRIC CORPORATION

Tocco Division of Park-Ohio Industries, Inc. ***and*** **International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 91, UAW**

Park-Ohio Industries, Inc. ***and*** **International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local No. 91.** Cases 8–CA–12702, 8–CA–17148, and 8–CA–17394

7 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 30 July 1981 the Board issued a Decision and Order in Case 8–CA–12702, in which it found that Respondent Tocco Division (Tocco) of Park-Ohio Industries, Inc. (Park-Ohio) had violated Section 8(a)(1) and (5) of the Act by transferring certain work formerly performed by employees represented by the Union from its plant in Cleveland, Ohio, to its plant in Boaz, Alabama, without affording the Union an opportunity to bargain over the decision to transfer. *Park-Ohio Industries*, 257 NLRB 413 (1981). The Board ordered Tocco to cease and desist from unilaterally transferring unit work, to reinstitute the transferred work at its Cleveland plant, to bargain over the decision to transfer, and to reinstate with backpay the unit employees who had lost their jobs because of the unlawful transfer. The Sixth Circuit enforced the Board's Decision and Order. *Park-Ohio Industries v. NLRB*, 702 F.2d 624 (1983). A controversy having arisen over the amount of backpay due, the Regional Director for Region 8 issued a backpay specification and notice of hearing on 19 August 1985. The backpay proceeding is still pending.

On 4 November 1983 the Union filed a charge in Case 8–CA–17148. As amended on 15 March 1984, the charge alleges that Respondents Tocco and Ohio Crankshaft and Camshaft Division of Park-Ohio Industries, Inc. (Ohio Crankshaft)[1] violated Section 8(a)(5) by refusing to provide relevant information and refusing to bargain over Park-Ohio's decision to relocate the Tocco Division.

On 27 February 1984 the Union filed a charge in Case 8–CA–17394 against Ohio Crankshaft. As amended on 15 March and 25 April 1984, the charge alleges that Ohio Crankshaft discriminatorily discharged nine named employees in violation of Section 8(a)(3),[2] and violated Section 8(a)(5) by refusing to provide relevant information to the Union concerning the discharges in question. On 30 April 1984 the Acting Regional Director issued an order consolidating cases and a consolidated complaint in Cases 8–CA–17148 and 8–CA–17394, alleging violations of Section 8(a)(1), (3), and (5) of the Act. The complaint was amended on 9 May 1984. No hearing has been held on the consolidated complaint in those two cases, and the matter is still pending before the Region.

On 4 November 1983 the Union filed a charge in Case 8–CA–17148–2, alleging that Ohio Crankshaft had acted in concert with the Village of Newburgh Heights, Ohio, to enforce a local ordinance against union members in such a way as to interfere with their Section 7 rights.[3] The Union and other plaintiffs also filed an action in Federal district court seeking, among other things, to have the ordinance declared unconstitutional. The Regional Director deferred processing of the charge pending the court's decision. On 27 February 1986 the district court issued a written opinion declaring the ordinance unconstitutional. *Davis v. Village of Newburgh Heights*, 642 F.Supp. 413 (N.D. Ohio 1986).

Following the entry of the court's decision, Ohio Crankshaft entered into an informal settlement agreement, executed by the Union and the Regional Director as well as Ohio Crankshaft, in which Ohio Crankshaft agreed to post and comply with a notice promising not to engage in the acts that were the subject of the charge in Case 8–CA–17148–2. The settlement agreement was on a standard Board form. The only additions, apart from the name of Ohio Crankshaft and the case number, were a nonadmission clause and the statement that "It is understood and agreed by and between the parties to this Agreement that the General Counsel reserves the right to introduce any and all evidence concerning the instant charge in other matters hereafter litigated." The Regional Director approved the settlement on 17 April 1986.

On 21 October 1986 Park-Ohio moved for summary judgment in Cases 8–CA–12702, 8–CA–17148, and 8–CA–17394, alleging that under the Board's settlement bar rule, those cases may not be litigated because they were pending when the Regional Director approved the settlement agreement in Case 8–CA–17148–2. On 30 October 1986 the Board issued an order transferring proceeding to the Board and Notice to Show Cause in the three

[1] Although Tocco and Ohio Crankshaft are separate facilities, the Union represents a combined unit of production employees at both facilities.

[2] The General Counsel asserts that the employees were discharged for alleged picket line misconduct during a strike allegedly caused by other unfair labor practices.

[3] The ordinance contained several provisions regulating picketing in labor disputes.

pending cases, directing the General Counsel and the Union to show cause why the motion should not be granted. Both the General Counsel and the Union filed memoranda opposing the motion. Park-Ohio filed a reply, and the General Counsel filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

Under the "settlement bar rule" enunciated in *Hollywood Roosevelt Hotel Co.*,[4] and followed consistently thereafter,[5] a settlement agreement disposes of all issues involving presettlement conduct unless earlier violations of the Act were unknown to the General Counsel and not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties.[6] Park-Ohio contends that neither of the exceptions set forth above is applicable in this proceeding, and therefore that Cases 8–CA–12702, 8–CA–17148, and 8–CA–17394 should be dismissed because they were pending before Region 8 when the Regional Director approved the settlement agreement in Case 8–CA–17148–2.

The General Counsel and the Union oppose the Motion for Summary Judgment in Case 8–CA–12702 (the backpay proceeding), contending that Park-Ohio's proposed extension of the settlement bar rule to compliance cases is unprecedented.[7] They argue that the rule never was intended to cover situations in which unfair labor practices have been found, and where the only questions remaining concern compliance with a Board order.

The General Counsel and the Union also oppose granting summary judgment in the two pending unfair labor practice cases. They contend that the clause in the settlement agreement reserving the right to introduce evidence concerning the charge in Case 8–CA–17148–2 in future litigation is a clear reservation of the right to litigate the pending cases. They also argue that it is plain from the circumstances of the settlement that the agreement was intended to encompass only Case 8–CA–17148–2, and not the other pending cases. In support of their position they point out that only Case 8–CA–17148–2, and only Ohio Crankshaft, are mentioned anywhere in the agreement, and that the notice posted pursuant to the settlement agreement refers only to matters contained in the charge in Case 8–CA–17148–2. They also urge that it is simply unbelievable that the Regional Director or the Union would have agreed to dismiss pending cases involving potential restoration of transferred work and significant amounts of backpay, in which the Regional Director had found merit and issued a consolidated complaint, in return for Ohio Crankshaft's posting a notice in settlement of a completely unrelated charge. Accordingly, the General Counsel and the Union contend that the foregoing circumstances, combined with the clause in the settlement agreement reserving litigation rights, establish that the parties mutually understood that they were specifically reserving the other pending cases from the settlement.

We shall deny the Motion for Summary Judgment.

Concerning the backpay proceeding in Case 8–CA–12702, we agree with the General Counsel and the Union that the settlement bar rule was not intended to encompass such actions. Indeed, as set forth in *Hollywood Roosevelt Hotel*, the rule "bars subsequent litigation of presettlement conduct *alleged* to constitute unfair labor practices."[8] It was not meant to preclude compliance litigation where unfair labor practices already have been found by the Board, and we so hold. Accordingly, the portion of the motion addressed to the backpay proceeding is dismissed with prejudice.

We also deny, but without prejudice, the portion of the motion addressed to the pending unfair labor practice cases. We reach this result because, on the limited record before us, we are unable to determine whether the parties to the settlement agreement in Case 8–CA–17148–2 mutually intended to reserve from that agreement the issues in the other pending cases. If such was their intent, the litigation of those cases would not be precluded.[9] At this point, however, the intent of the parties is unclear. For example, we disagree with the contention of the General Counsel and the Union that the language in the settlement agreement reserving litigation rights is unambiguous evidence that the parties intended to reserve the right to litigate *those* cases. The language refers instead to "other matters hereafter litigated." We find the quoted language—which could be interpreted either as referring only to the litigation of charges that may be filed in the future, or also to the litigation of pending charges—inherently ambiguous.

Additional ambiguity as to the parties' intentions arises from the fact that the charges in the various cases involve two separate divisions and facilities

[4] 235 NLRB 1397 (1978).

[5] See, e.g., *Universal Blanchers*, 275 NLRB 1544 (1985); *E.S.I. Meats*, 270 NLRB 1430 (1984); *Ventura Coastal Corp.*, 264 NLRB 291, 298–301 (1982); *Cambridge Taxi Co.*, 260 NLRB 931 (1982).

[6] *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397, supra.

[7] Park-Ohio does not contest this point.

[8] 235 NLRB 1397 (emphasis added).

[9] Id.

of Park-Ohio. Thus, whereas Cases 8–CA–17148–2 and 8–CA–17394 involve only Ohio Crankshaft, Case 8–CA–17148 apparently is concerned chiefly with events at the Tocco Division. Moreover, as the General Counsel and the Union point out, only Ohio Crankshaft (and not Tocco) is named as a charged party in the settlement agreement. It is unclear, then, whether the settlement agreement was intended to cover only Ohio Crankshaft, or to include Tocco as well.

Ambiguities such as those discussed above raise substantial and material questions of fact concerning the intended scope of the settlement agreement that should be determined at a hearing. We therefore deny the portion of the motion addressed to Cases 8–CA–17148 and 8–CA–17394, without prejudice to the introduction at the hearing of evidence tending to establish the intent of the parties in arriving at the settlement agreement.

ORDER

The Motion for Summary Judgment is denied as set forth above.

Leeward Auto Wreckers, Inc. *and* United Steelworkers of America, AFL–CIO, CLC. Case 37–CA–1969(E)

7 April 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 9 April 1985 Administrative Law Judge Jay R. Pollack issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Applicant filed cross-exceptions, a supporting brief, and a brief in answer to the General Counsel's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Supplemental Decision and Order.

In his initial decision in this case, the judge recommended the dismissal of the complaint allegations which alleged that the Respondent-Applicant had violated Section 8(a)(5) and (1) of the Act by failing to notify the Union of its decision to lay off all unit employees in May 1982, and by thereafter assigning nonunit employees to perform the bargaining unit work and subcontracting out such work without giving notice to, or bargaining with, the Union.[3] On the question of the lack of layoff notification, the judge found that the Respondent-Applicant had provided the Union with proper notice as required under the contract. The judge also found that the Respondent-Applicant's unilateral decision to subcontract out the bargaining unit work and to assign such work to nonunit employees was not unlawful under the Board's holding in *Westinghouse Electric Corp.*, 150 NLRB 1576 (1965).[4] No exceptions were filed to the judge's decision and it was subsequently adopted by the Board in an unpublished order dated 13 December 1983.

The Applicant then filed the instant application for an award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA) and, following an evidentiary hearing, the judge issued the attached supplemental decision. In that decision, the judge found, and we agree, that the General Counsel was substantially justified in issuing the complaint and proceeding to hearing in this case.[5] The record in this regard reveals that following the filing of the charge by the Union, the General Counsel obtained information from union officials and employees, in the form of affidavits and written statements, which supported its assertion that the Applicant unilaterally laid off all bargaining unit employees, subcontracted out the bargaining unit work, assigned unit work to nonunit employees, and negotiated directly with an employee, instead of with the Union, concerning his terms and conditions of employment, in an attempt to undermine the Union's representative status and to establish a nonunion shop.

Following receipt of the Union's evidence, the General Counsel sought to obtain a statement of position from the Applicant concerning the above allegations and, with this in mind, met with its president and owner, Sakae Fujimoto, and its labor consultant, Michael McGuire. Although it was afforded a full and fair opportunity to fully state its position and to provide the General Counsel with any and all evidence it had in support thereof or which might otherwise have a bearing on the issues raised by the charge, the Applicant provided the General Counsel only with an affidavit from Fujimoto responding solely to the "direct dealing" allegation, and did not provide a written statement of its position concerning the other allegations despite promising to do so. Instead, the Applicant, through

[1] The Applicant also filed a "Seventh Motion to Amend EAJA Application for Fees and Expenses," and a motion, with accompanying memorandum, to augment the record to include an exhibit attached to its answer to the General Counsel's exceptions, and to correct its answering brief. In view of our decision, we find it unnecessary to rule on the Applicant's motions.

[2] The General Counsel asserts, in essence, that the judge's findings of fact and conclusions of law, particularly in regard to the Applicant's net worth statement, are the result of bias. After a careful examination of the entire record, we are satisfied that the General Counsel's assertion is without merit.

In view of the finding herein that the General Counsel was substantially justified in issuing the complaint and continuing to litigate the underlying unfair labor practice proceeding through the filing of a posttrial brief to the judge, we find it unnecessary to pass on the General Counsel's contention that the Applicant failed to comply with the Board's Rules and Regulations in its application for fees and expenses.

[3] The judge, however, found merit to the complaint allegation that the Respondent-Applicant violated Sec. 8(a)(5) and (1) of the Act when it bargained directly with an employee, rather than with his Union, over the employee's terms and conditions of employment, and issued an order directing it to cease and desist from engaging in such conduct.

[4] The Board in the *Westinghouse* case held that an employer's failure to notify and bargain with a union over such a decision will not violate the Act if the employer can show that its decision (1) was motivated solely by economic considerations, (2) comported with its customary business operations, (3) did not vary significantly in kind or degree from an established past practice, (4) had no demonstrable adverse impact on unit employees, and (5) the union had an opportunity to bargain over the decision in prior bargaining sessions. The judge found that the Applicant's decision in this case satisfied all the above criteria.

[5] We believe that Congress, in reviewing the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), as amended by Pub. L. No. 99-80, 99 Stat. 183 (Aug. 5, 1985), did not alter, but merely clarified the definition of "substantially justified." "Substantially justified" means more than "mere reasonableness." H.R. Regs. 99-120, p. 9.

McGuire, orally expressed its belief that its unilateral decision to subcontract out the unit work and to assign nonunit employees to perform that work was not unlawful because its contract with the Union did not prohibit it from doing so and because, in its view, the Union waived its right to object to its actions by failing to obtain, during recent contract negotiations, a restriction on that conduct in the contract. However, at no time during the precomplaint investigation did the Applicant assert, or present evidence to show, that the Union was properly notified of the layoff before it went into effect, and that its unilateral decision to subcontract out the bargaining unit work and to have unit work performed by nonunit employees during the layoff was motivated by economic considerations, accorded with its usual method of operations, and was consistent with an established past practice. As the judge correctly notes, that evidence, which the Applicant had in its possession prior to the hearing, was withheld from the General Counsel during the investigation and not produced until the Applicant presented its rebuttal evidence on the fourth day of hearing. In view of the Applicant's apparent failure to cooperate fully with the General Counsel's investigation of the case, the General Counsel had no alternative but to rely on the limited information obtained during that investigation in determining whether or not to issue a complaint. On the basis of that information, it was not unreasonable for the General Counsel to infer that the Applicant's conduct, as described in the charge, was unlawful. For this reason and as previously stated, we conclude, in agreement with the judge, that the General Counsel was substantially justified in issuing the complaint and in proceeding to a hearing in this case.

However, we do not agree with the judge that the General Counsel was required to stop prosecuting the case after the Applicant produced evidence on the fourth day which demonstrated that it had a past practice of subcontracting and of assigning nonunit employees to perform unit work during layoffs, that the Union had acquiesced in that practice, and that its actions in this regard were motivated solely by economic considerations. Although the introduction of that evidence clearly had the effect of weakening the Government's case against the Applicant, the General Counsel was nevertheless under no obligation to withdraw its case at that point since the General Counsel could not have known, prior to the issuance of the judge's decision, what, if any, weight he would give to the Applicant's documentary evidence and the testimony of its witnesses vis-a-vis that produced by the General Counsel.[6] More importantly, the judge's finding that the Applicant had a valid defense under the Board's *Westinghouse* decision was not based solely on the documentary evidence produced by the Applicant on the fourth day but rather rested also on his decision to resolve certain conflicts in testimony in the Applicant's favor.[7] For example, in concluding that the Applicant's assignment of unit work to nonunit employees, after laying off all unit employees, was consistent with an established past practice, the judge found it necessary to reject Fujimoto's testimony that such assignments of work occurred only when unit employees were unavailable to perform such work due to absenteeism. In rejecting Fujimoto's testimony in this regard, the judge was also implicitly rejecting the testimony of Union Representative Sid Lampley and employee Kevin Kekahuna that was corroborative of Fujimoto's testimony on this issue. Clearly, had such testimony been credited, it would have been supportive of the General Counsel's position on this crucial question. Likewise, the judge's finding, that the Union had been afforded an opportunity to bargain over the Applicant's decision to subcontract out bargaining unit work and to assign such work to nonunit employees, was based in part on his crediting Fujimoto's and McGuire's testimony over Lampley's testimony on this issue. The judge's comment, that no reasonable attorney could have expected to prevail on this issue on the basis of Lampley's testimony, has no relevance here since it is the trier of fact, and not the General Counsel, which must determine whether a particular witness' testimony is worthy of belief or should be discounted.

In view of the above facts, we conclude that the General Counsel was substantially justified in continuing to litigate the case to the close of hearing and in filing a posttrial brief with the judge. Accordingly, we shall dismiss the Applicant's application for an EAJA award.

ORDER

It is ordered that the application of the Applicant, Leeward Auto Wreckers, Inc., Honolulu, Hawaii, for an award under the Equal Access to Justice Act is dismissed.

---

[6] In this regard we note that following the close of the General Counsel's case-in-chief, the Applicant moved for dismissal of the complaint. The judge, however, denied the motion and, in doing so, expressed his reservation only concerning the merits of the "direct dealing" allegation which, as noted, he found to be meritorious.

[7] The Board has denied EAJA awards in cases when credibility resolutions were necessary for a determination of the issues raised by a complaint. *Barrett's Interiors*, 272 NLRB 527 (1984); *SME Cement, Inc.*, 267 NLRB 763 (1983).

Alan D. Longman, Esq. and *Marcie B. Axelrad, Esq.*, for the General Counsel.

Jared H. Jossem, Esq. and *Perry W. Confalone, Esq. (Torkildson, Katz, Jossem, Fonseca & Moore)*, of Honolulu, Hawaii, for the Applicant.

SUPPLEMENTAL DECISION

(Equal Access to Justice Act)

JAY R. POLLACK, Administrative Law Judge. I heard this case under the Equal Access to Justice Act, Pub. L. 96–481, 94 Stat. 2325 (EAJA) and Section 102.43 of the Board's Rules and Regulations in trial at Honolulu, Hawaii, on November 27 and 28, 1984. The case arose as follows:

On November 10, 1983, I issued a decision in which I concluded that Leeward Auto Wreckers, Inc. (the Respondent and the Applicant) had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by bargaining directly with an employee concerning wages, benefits, and other conditions of employment, and bypassing United Steelworkers of America, AFL–CIO, CLC (the Union) as the exclusive bargaining representative. More importantly, I dismissed the central allegations of the complaint that the Applicant had: (a) unilaterally laid off bargaining unit employees without prior notice to or bargaining with the Union; (b) unilaterally transferred work to supervisors and other nonbargaining unit employees without prior notice to or bargaining with the Union; and (c) unilaterally subcontracted out bargaining unit work without prior notice to or bargaining with the Union. No exceptions were filed to my decision and, on December 13, 1983, the Board issued an unpublished order adopting my findings and conclusions.

Thereafter, on January 12, 1984, the Applicant filed with the Board an Application for fees and expenses pursuant to the Equal Access to Justice Act, Pub. L. 96–481, 94 Stat. 2325, and Section 102.43 of the Board's Rules and Regulations, and a motion to withhold confidential financial information from public disclosure. On January 15 the Board referred this matter to me for appropriate action. The Applicant seeks legal fees and expenses in the amount of $47,040.28, as of March 27, 1985. The General Counsel contends, in substance, that the Applicant is not an eligible party under EAJA; that the Applicant is not a prevailing party; that the position of the General Counsel was substantially justified; that special circumstances make the granting of an award unjust; and that the fees and expenses claimed are in excess of what could reasonably be awarded in this case.

On consideration of the entire record in this supplemental proceeding, including the record in the underlying unfair labor practice case, and the briefs of the parties, I make the following findings and conclusions.

I. THE APPLICANT'S ELIGIBILITY

Section 504 of EAJA limits eligibility to, inter alia, a corporation, partnership, association, or organization whose net worth did not exceed $5 million and who had no more than 500 employees at the time the adversary adjudication was initiated.[1] Section 102.43(g) of the Board's Rules and Regulations provides:

> (g) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

The Applicant's records indicate that at the time of the issuance of the instant complaint, January 31, 1983, it employed less than 15 employees and had a net worth of less than $1 million.[2] The record reveals that during the normal course of its business the Applicant delivered, without charge, certain auto parts to Ace Towing Service, a business owned and operated by Hisako Fujimoto, wife of Sakae Fujimoto, the Applicant's president and sole stockholder. However, neither the Applicant nor Sakae Fujimoto owns voting shares or any other interest in Ace Towing Service, and neither Ace Towing Service nor H. Fujimoto owns voting shares or any other interest in the Applicant.[3] The amount of moneys involved with the auto parts given by the Applicant to Ace Towing Service would not affect the Applicant's eligibility under EAJA. In any event, the combined net worth of the Fujimotos, and all their businesses, Ace Towing Service, Leeward Auto Wreckers, and Fujimoto Trucking, falls far below the EAJA eligibility standards. Accordingly, I find that the Applicant is an eligible party under EAJA.

The Applicant contends that it is "engaged in a highly competitive business in which it must bid for contracts from the County of Honolulu but that public disclosure of [its] confidential financial position could undermine [its] capacity to compete for work." The General Counsel asserts that the Applicant "has failed to show that public disclosure is not required in the public interest." Based on the evidence of the Applicant's financial position already in the underlying unfair labor practice case, the competitive nature of the Applicant's business, and the fact that the Applicant falls so deeply below the eli-

[1] See Sec. 102.43(c)(5) of the Board's Rules and Regulations.

[2] The Applicant's net worth was arrived at by using the cost of acquisition rather than the depreciated value of assets listed in the net worth exhibit. See *W. C. McQuaide, Inc.*, 270 NLRB 1197 (1984); *Stucco Stone Products*, 270 NLRB 1195 (1984).

[3] Although an evidentiary hearing was conducted pursuant to a request by the General Counsel, the General Counsel did not seek to litigate its allegations that Ace Towing Service was an affiliate of the Applicant or to litigate any other aspect of the Applicant's EAJA eligibility.

gibility requirements, I find that further disclosure is not required in the public interest. I, therefore, grant the Applicant's motion to withhold from public disclosure the net worth exhibit filed with the application. However, I note that the granting of this motion is not determinative of the availability of the documents under the Freedom of Information Act. See Section 102.147(g)(2) of the Board's Rules.

II. PREVAILING PARTY

Under Section 102.143(b) of the Board's Rules, a prevailing party is a respondent in an unfair labor practice case "who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding, and who otherwise meets the eligibility requirements" for an award under EAJA.

The complaint, as amended, alleged in substance that the Applicant violated Section 8(a)(5) of the Act and, derivatively, Section 8(a)(1) by engaging in the following conduct: (1) about May 1, 1982, laying off bargaining unit employees without prior notice to or bargaining with the Union; (2) about July 1, 1982, transferring bargaining unit work to supervisors and nonbargaining unit employees, without prior notice to or bargaining with the Union; (3) about June 1, 1982, subcontracting out bargaining unit work without prior notice to or bargaining with the Union; and (4) about October 4, 1982, directly dealing with an employee concerning rates of pay and other conditions of employment and, in that manner, bypassing the Union as the exclusive bargaining representative.

As stated earlier, I dismissed the first three allegations and found a violation with respect to the fourth. The first three allegations, if found meritorious, would have required a remedy of reinstatement and backpay for at least some bargaining unit employees. During the unfair labor practice hearing, the parties engaged in good-faith negotiations in an attempt to settle the case. However, negotiations broke down over cost items. The General Counsel succeeded in proving only one separate and distinct allegation. That allegation, direct dealing, did not involve an economic remedy but solely the posting of a notice. It was clearly not the central issue in the case and ranked last in significance of the issues presented.

The central issues in the case involved the alleged unilateral use of subcontractors and supervisors to perform bargaining unit work. The Applicant prevailed on these issues as well as the issue of the alleged unilateral layoff. Comparing the allegations of the complaint with the result obtained by the Applicant, I find the General Counsel's argument that the Applicant was not a prevailing party to be without merit.

The General Counsel's contention that because I found a violation of Section 8(a)(5) the Applicant did not prevail in a significant and discrete substantive portion of the proceeding is at odds with the express language of the Board's Rules. The Board's Rules are designed to prevent the Government from including in a valid complaint additional allegations that are not substantially justified. The position urged by the General Counsel would permit the Government to throw into a complaint any and all allegations involving the same section of the Act without justification and still escape the provisions of EAJA. The Board's Rules are designed, in accordance with EAJA, to require substantial justification for each significant and discrete substantive portion of the complaint. Of course, there are times when allegations are so entwined that they cannot be subjected to separate analysis under EAJA. However, that clearly is not the case here.

The General Counsel relies on the unreported case of *Okeh Caterers*, JD–(SF)–34–83, to support his argument that the Applicant was not a prevailing party. First, the case has no precedential value because no exceptions were filed and thus the Board adopted pro forma the judge's decision. Second, the facts are so clearly distinguishable that the case is of no value in the instant proceeding. In *Okeh Caterers*, Administrative Law Judge Jerrold Shapiro, in dismissing an EAJA claim involving an allegation that an employer illegally solicited employees' grievances, noted that the solicitation allegation was "part and parcel" of a further meritorious allegation that the employer had illegally interrogated employees. Thus, Judge Shapiro reasoned, "it was necessary for Respondent to . . . defend against this allegation of illegal interrogation" and he found that "it would be inequitable to award Respondent expenses for litigating the solicitation of grievances allegation even if the General Counsel had no reasonable basis in law for including it in the complaint."

In the instant case, the layoff, transfer of bargaining work, and subcontracting were not part and parcel of the direct dealing allegation. If the General Counsel only alleged the meritorious direct dealing allegation, the Applicant would not have had to defend the other allegations. Moreover, I have no doubt that the case would have settled if only the direct dealing allegation had been alleged. To defend the direct dealing case, the Applicant would have had to cross-examine one General Counsel witness and offer testimony of one of its own witnesses. Such a trial would have lasted less than 1 day. To litigate the three central allegations of the complaint required 6 days of trial (4 full and 2 partial days of trial). In addition to an increase in the number of witnesses, there was a necessity for documentary evidence not required for litigation of the direct dealing violation. Further, there would have been no monetary risk to the Applicant if only the direct dealing violation had been alleged. The direct dealing allegation might have been part and parcel of the central allegations (layoff, subcontracting, and supervisory performance of work) but the reverse is not true. The central allegations were not part and parcel of the direct dealing allegation and the General Counsel needed separate and distinct justification for their inclusion in the complaint.

III. SUBSTANTIAL JUSTIFICATION

EAJA provides that an administrative agency award to a prevailing party certain expenses incurred in connection with an adversary adjudication, unless the agency finds the position of the Government is "substantially justified." Although EAJA is silent on the meaning of the "substantially justified" standard, the Board has held

the test is one of reasonableness. When the Government can show that its case had a reasonable basis both in law and fact, no award will be made. *Enerhaul, Inc.*, 263 NLRB 890 (1982), revd. 710 F.2d 748 (11th Cir. 1983); *Shellmaker, Inc.*, 267 NLRB 20 (1983). The Government is not required to establish that its decision to litigate was based on a substantial probability of prevailing. *Wolf Street Supermarket*, 266 NLRB 665 fn. 1 (1983); *Hamel Forest Products*, 270 NLRB 1078 (1984). EAJA was not intended to stifle the reasonable regulatory effects of Federal agencies. *Wyandotte Savings Bank v. NLRB*, 682 F.2d 119, 120 (6th Cir. 1982). Similarly, EAJA was not intended to deter the Government from advancing in good faith a close question of law or fact. *Shellmaker*, supra; *Derickson Co.*, 270 NLRB 516 (1984). Further, EAJA was not intended to foreclose the Government from exploring novel or close questions of law. Thus, EAJA provides that the Government should not be held liable where "special circumstances make the award unjust." The legislative history of EAJA explains the purpose of the "safety valve" of special circumstances.

> This "safety valve" helps to ensure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often gives the courts discretion to deny awards where equitable considerations dictate an award should not be made. [S. Rep. 96–253, 96 Cong., 1st Sess. at 6; H. Rep. 96–1418, 96 Cong., 2d Sess. 11, reprinted in 1980 U.S. Code Cong. & Ad. News 4984, 4990.]

The Board has utilized a case-by-case approach in analyzing EAJA cases. It has interpreted the reasonableness standards in such a manner as to not interfere with the General Counsel's vigorous enforcement of the labor laws. *Shellmaker*, supra, and *Derickson Co.*, supra (close questions of law and fact); *Iowa Parcel Service*, 266 NLRB 392 (1983) (a novel but credible extension and interpretation of the law); *Charles H. McCauley Associates*, 269 NLRB 791 (1984) (a credibility question which was ultimately decided against the General Counsel); and *International Maintenance Systems*, 267 NLRB 1136 (1983) (failure of the applicant to cooperate in the precomplaint investigation). Since October 1, 1981, the Board has granted an award in only one EAJA case, *Debolt Transfer*, 271 NLRB 299 (1984). In that case, the General Counsel's position was characterized as "betting on a long shot."

In the instant case, the General Counsel argues that his "decision to issue complaint and proceed to trial fall well within permissible standards for government action." The General Counsel argues that the Applicant's successful defense regarding its past practice of subcontracting and using supervisors to perform bargaining unit work "was not 'developed' nor even apparent until well into trial. [The Applicant] failed to raise the defense at any stage of the investigation, pre-trial period or in the pleadings." Thus, the General Counsel argues that "the Regional Director was justified in issuing complaint and going to trial *based on the facts available to him prior to the hearing*."

The Applicant argues that the General Counsel was on notice that the issues of subcontracting and management performance of unit work were fully negotiated during contract negotiations and that the Union failed to exact a concession on those matters. Further, the Applicant argues that the General Counsel was on notice that a prior history of subcontracting and management performance of unit work existed on the ground that the bargaining that took place revealed the past practices and that such bargaining would not have occurred in the absence of such past practices. The Applicant argues that "General Counsel cannot argue substantial justification 'based on the facts available to him prior to the hearing' . . . where [the Applicant] put the General Counsel on notice that the Union adamantly sought to prohibit, by contracted amendment, subcontracting and management performance of unit work, and where the General Counsel's own agents were aware of those matters and discharged the General Counsel's case."

The Applicant presented evidence that prior to the issuance of the underlying complaint, it cooperated with the Regional Director's investigation of the underlying unfair labor practice charge. According to Michael McGuire, a labor consultant who represented the Applicant during the times material to the complaint allegation, he informed the Board investigator "that there could be no refusal to bargain violation regarding transfer of bargaining unit work because the Union conceded those issues during our negotiations." The General Counsel presented evidence from the investigator that McGuire had urged the following defenses: (1) that there was no prohibition against subcontracting in the contract executed by the parties; (2) that there was no clause in the contract that prohibited managerial employees from performing unit work; (3) that the issue of the subcontracting and management personnel performing unit work was presented to the Union and that the Union waived any right to claim a violation of the Act because the contract did not prohibit such practices; and (4) that the Board should defer to the grievance and arbitration processes of the bargaining agreement under its *Collyer* doctrine.[4]

Apparently, McGuire did not inform the investigator that the Applicant had a past practice of subcontracting and using management personnel to perform unit work nor did McGuire present any evidence of such past practices. That evidence was not offered in the record until the fourth day of trial.[5]

The legal principles which controlled the outcome of the instant case came from the Board's decision in *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965). In *Westinghouse*, the Board, in holding that an employer did not violate Section 8(a)(5) and (1) by failing to notify and consult with the union before subcontracting work, stated at 1576:

---

[4] *Collyer Insulated Wire*, 192 NLRB 837 (1971).

[5] Jared Jossem, the Applicant's trial attorney, testified that he did not see the canceled checks showing such past practices until the second day of trial.

> Thus, it is wrong to assume that, in the absence of an existing contractual issue, it is a *per se* unfair labor practice in all situations for an employer to let out unit work without consulting the unit bargaining representative. As the Supreme Court has indicated in broader context, even where a subject of mandatory bargaining is involved, there may be "circumstances which the Board could or should accept to excuse or justify unilateral action."

In *Westinghouse*, the Board based its dismissal on these factors: Consistency with past practices and normal method of operation, absence of a demonstrated adverse effect on the unit employees, and ability of the union to have negotiated about this type of practice during past negotiations. See *New Orleans Board of Trade*, 125 NLRB 1258, 1259 (1965).

The facts and reasoning that caused me to dismiss the General Counsel's allegations were as follows: The Respondent, motivated solely by economic concerns, laid off its entire work force. Respondent had insufficient current assets to meet its current liabilities. Moreover, its customer, Hawaiian Western Steel, also laid off its employees and ceased purchasing from Respondent. Although nonunit personnel performed work for Respondent, none of these persons were paid and there is insufficient evidence that there existed a sufficient amount of work to permit the recall of any employees. During the four periods of layoff in 1981, Respondent's managerial and nonunit employees performed bargaining unit work. Although none of the 1981 layoffs involved a complete shutdown, managerial employees did perform work usually performed by unit employees. Also during the 1981 layoffs, subcontractors, independent contractors, nonunit employees, and employees hauled cars for Respondent on a piece rate basis. Thus, Respondent's transfer of the work to nonunit personnel and independent contractors was consistent with its past practice and normal method of operation. Further, the evidence reveals that the Union had knowledge of such past practices as it specifically demanded that such practices cease. The Union proposed contract language to end these practices, but faced a staunch refusal by Respondent. Finally, the Union reluctantly conceded to Respondent's position and withdrew its contract proposals. Thus, the evidence establishes that the Union had an opportunity to bargain about the performance of bargaining unit work by nonunit personnel and acceded to Respondent's demand to continue its past practices. Respondent's unilateral actions initially had no adverse impact on the unit employees. It was the economic layoff and not the transfer of work that caused the employees to lose work opportunities. However, at some later stage there apparently would have been sufficient work to allow the recall of some employees but for the transfer of work. However, this effect of Respondent's action differs only in degree from what took place during the layoffs in 1981. The Union had its opportunity to bargain in January 1982 to prevent such a recurrence but acceded to Respondent's position. It appeared to me that the General Counsel was seeking by way of this complaint that which the Union was unable to obtain in negotiations. Under all of these circumstances, I found that the Applicant had not violated Section 8(a)(5) and (1) of the Act as alleged in the complaint. See *Rochester Telephone Corp.*, 190 NLRB 161, 164 (1974); see also *General Electric Co.*, 240 NLRB 703, 708 (1979).

I found the case relied on by the General Counsel to be inapposite: *Talbert Mfg. Co.*, 264 NLRB 1051 (1982); *Garland Distributing Co.*, 234 NLRB 1275 (1978); and *Whitehead Bros. Co.*, 263 NLRB 895 (1982). In the *Talbert* case, the foremen performed production work during a layoff, which work was of a type and extent they had not previously done. Further, the employer and union had bargained about the question of foremen doing bargaining unit work and had reached tentative agreement on a proposal that would have prohibited foremen from doing the work they did during the layoff. In the *Garland* case, the transfer of work to a nonunit employee violated an express provision of the existing collective-bargaining agreement. In *Whitehead Bros.*, the subcontracting of work was inconsistent with past practice and the union had no opportunity to bargain about the subject in prior negotiations. As discussed above, the facts of the instant case required a determination that no violation of the Act had been established.

I found that the General Counsel had not sustained his burden of proof regarding the layoff allegation for the following reasons:

> Uncontradicted evidence reveals that Respondent gave notice of the layoff to the Union steward. Such notice comported with the contract requirement that notice of large scale layoffs be given to the Union Unit Committee.[6] Although the contract required 30-day notice, the General Counsel failed to establish that the notice was less than 30 days or otherwise was insufficient to give the Union a reasonable opportunity to bargain over Respondent's decision. Moreover, the undisputed evidence offered by Respondent reveals that in May, shortly after the layoffs, Respondent discussed these matters with Union Representative John Rusen. Rusen agreed to contact Respondent over possible accommodations to allow Respondent to recall the employees. However, Rusen did not further pursue the matter. In any event, the General Counsel has failed to establish that Respondent did not give the Union an adequate opportunity to bargain over the layoff or the effects of the layoff, as alleged in the complaint. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

[6] The General Counsel argues that Respondent did not prove that the Union steward was part of the Union Unit Committee. Obviously, the General Counsel has the burdens of proof reversed.

Based on the record before me, it was clear that the Applicant had a valid defense. Thus, the General Counsel argues that his complaint was substantially justified "based on the information in possession at the time" the complaint issued. Based on the lenient standard used by the Board, the instant complaint would be found by the Board to be substantially justified when issued. However,

during the litigation it become apparent that the Applicant had a valid defense and the complaint was groundless about the allegations at issue. Notwithstanding the existence of a controlling defense, the General Counsel continued to pursue this litigation.

In *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983), the United States Court of Appeals for the District of Columbia Circuit in discussing the Government's obligation to accede to the other party as soon as it becomes apparent that its litigation stance is not substantially justified, stated:

> It seems clear that, if the government does not immediately accede to the plantiff's demand, but instead initially opposes his claims and then at some later stage (*e.g.*, in a pre-trial settlement) surrenders, the United States will be liable for attorneys' fees regardless of which theory is applied. Under such circumstances, not only will the government have acted unreasonably, but it will have adopted (at least briefly) a litigation position lacking substantial justification. For strong indications of Congress' intent that fees be awarded under these circumstances, see H.R.Rep. No. 1418, *supra note* 20, at 11; S.Rep. No. 253, *supra note* 20, at 7. But see *Alspach v. District Director Of Internal Revenue*, 527 F.Supp. at 229 (finding the litigation position of the IRS to have been "substantially justified" when it initially resisted a clearly meritorious suit to enjoin it from collecting a tax, but surrendered 1 month after it had located and reviewed the taxpayer's file). The only question open to serious dispute is whether the government should be obligated to pay fees when it surrenders at the very outset of litigation. [Id., at 555–556 fn. 58].

The Court of Appeals for the Second Circuit in *Environment Defense Fund v. Watt*, 722 F.2d 1081, 1086 (2d Cir. 1983), agreed with the District of Columbia Circuit's view in *Spencer v. NLRB*:

> We find it incumbent upon the government to abandon its opposition to the other party as soon as it becomes apparent that its litigation stance is not substantially justified. See *Ellis v. United States*, 711 F.2d 1571, 1576–1577 (Fed. Cir. 1983).[6]

[6] We would thus agree with the analysis of the government's litigation position in *Operating Eng'rs Local Union No. 3 v. Bohn*, 541 F.Supp. 486 (D. Utah 1982). In that case, plaintiffs sued to enjoin performance of work under a road construction contract which stated incorrect wage rates. Nine days later, defendants agreed to modify the contract, and a formal modification was approved the following month. On grounds that "[o]nce the action was filed, the government acted almost immediately to concede all the substantive relief plaintiff sought," *id.* at 496, the court found the government's litigation position to be substantially justified. We do not, as discussed *supra*, express any view on that court's interpretations of the word "position."

In *Tyler Business Services v. NLRB*, 695 F.2d 73, 75–76 (4th Cir. 1982), the United States Court of Appeals for the Fourth Circuit in applying EAJA to proceedings both on the agency level and on judicial review stated:

> The House report on the Act states that in regard to review of agency adjudications, the government must "make a positive showing that its position and actions *during the course of the proceedings* were substantially justified."[9] The report states this standard should also apply in reviewing the government's position in judicial proceedings.[10] For example, the government's preliminary decision to institute an administrative proceeding may not justify an award of attorney's fees. This circumstance, however, would not preclude an award, if at subsequent stages of the administrative process or upon judicial review it appears that the government's position at these levels of litigation was not substantially justified.

[9] H.R. Rep. No. 1418, 96th Cong., 2d Sess. 13 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4992 (Emphasis added).

[10] See *id.* at 18, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4997.

The *Tyler* case was cited with approval by the United States Court of Appeals for the Fifth Circuit in *Natchez Coca-Cola Bottling Co. v. NLRB*, 750 F.2d 1350 at 1352 (5th Cir. 1985).

The General Counsel contends that the Board has rejected the view of the circuit courts and that I am bound by the Board's decision unless and until reversed by the United States Supreme Court. The General Counsel cites *International Maintenance* supra, for this proposition. However, the *International Maintenance* case simply did not address the issue presented here. In *International Maintenance*, the administrative law judge held that the General Counsel was substantially justified in issuing the unfair labor practice complaint because there existed a close question of law and fact concerning the supervisory status of an employee and because the General Counsel had proffered prima facie evidence regarding the alleged discriminatory discharge of two employees. The judge further recommended a rule that failure to cooperate fully in the investigatory stages of an unfair labor practice case would be per se sufficient to deny an application under the "special circumstances" safety valve. The Board, however, expressly declined to enact such a rule:

> Nor do we find it appropriate to enact a rule, as suggested by the administrative law judge, that would automatically bar an applicant from receiving benefits under the Equal Access to Justice Act for failing to cooperate in the investigatory stages of an unfair labor practice proceeding. [Id. at 1136 fn. 2]

The issue presented here, whether the Government must abandon its position when it becomes apparent that its position is not substantially justified, was never discussed by either the administrative law judge or the Board in the *International Maintenance* case.

As a last resort, the General Counsel argues in his posthearing brief that had I resolved credibility disputes in his favor he would have prevailed and thus, he was substantially justified under Board law. It is true under

Board cases the General Counsel has avoided EAJA awards when credibility resolutions were ultimately decided against the General Counsel. See, e.g., *SME Cement*, 267 NLRB 763 (1983); *Barrett's Interiors*, 272 NLRB 527 (1984). However, that portion of the instant case that involved a credibility resolution, the testimony of Sid Lampley, union representative, on which the General Counsel attempts to rely, was a dispute which no reasonable attorney could expect to be resolved in the General Counsel's favor.[6] Sid Lampley, the General Counsel's witness, had no bargaining notes, and no explanation for the resolution of the bargaining impasse. All Lampley did was deny the testimony of the Applicant's witnesses, but was unable to offer any affirmative evidence of what occurred. Under these circumstances, the testimony of Respondent's witnesses, buttressed by bargaining notes, had to prevail over Lampley's testimony. More importantly, based on the record evidence, the General Counsel would not have prevailed even if Lampley's vague testimony had been credited. The Applicant did not need to prove that the Union waived its right to bargain over these changes but only that the Union had an opportunity to do so. The General Counsel's witnesses admitted that the Union attempted to obtain language prohibiting such practices and did not obtain the desired contract language.

IV. SPECIAL CIRCUMSTANCES

The General Counsel contends that because Respondent failed to bring pivotal facts to his attention during the precomplaint investigation under the "special circumstances" safety valve no award should be granted.

During the EAJA proceedings, the Applicant established that following the close of the unfair labor practice hearing, the Applicant's trial attorney wrote the Acting Regional Director attempting to settle the case. In this letter, dated July 21, 1983, the attorney set forth the weakness of the General Counsel's case and prepared a settlement that reflected those matters. On August 25 the Regional Attorney wrote a reply in which he stated that the Applicant should have made its evidence available prior to the issuance of complaint. He further indicated that the proposed settlement was acceptable to the Regional Office but would not be approved without the Union's concurrence.

Notwithstanding the evidence disclosed at trial, and the review of this matter by the Regional Attorney, the General Counsel continued to prosecute the case.

As previously noted, the Board in *International Maintenance* declined to enact a rule that an applicant failed to cooperate in the investigative stages of an unfair labor practice proceeding be automatically barred from an award under EAJA. However, the failure of the employer in *International Maintenance* to offer certain evidence in the investigation of that case affected the denial of an EAJA award. In that case the General Counsel was substantially justified in proceeding to complaint and trial based on the evidence of the charging party. In *Danzansky-Goldberg Chapels*, 272 NLRB 903, 906 (1984), the judge emphasized the importance of the Respondent's cooperation, commenting that:

> It is that cooperation that has made some of the issues raised by the EAJA application so close. The issues in this proceeding would have been much easier to resolve—in the General Counsel's favor—if during the General Counsel's investigation of the charges, the Company had withheld information from him regarding the basis for its behavior.

It is not inconsistent with the policies of EAJA to disallow costs for expenses incurred because the respondent-applicant did not cooperate in the precomplaint investigation. It is reasonable to assume that the government would not have prosecuted the case if it had known litigation would be unsuccessful. Thus, it follows that a respondent-applicant should not be rewarded for costs that it incurred solely as a result of its own litigation strategy, i.e., choosing to go to litigation rather than cooperating in the investigation. However, a respondent-applicant's failure to cooperate or failure to fully cooperate in the investigation does not absolve the Government of all responsibility. The Government must still be substantially justified at all stages of the proceeding, i.e., the Government must withdraw its opposition to the respondent-applicant when the Government's position clearly becomes frivolous, unreasonable, or groundless. Thus, the Board cases of *International Maintenance* and *Danzansky-Goldberg* are reconcilable with the court cases of *Spencer v. NLRB*, *E.D.F. v. Watt*, and *Tyler Business Services*.

The issue becomes whether the Government should be assessed costs *ab initio* because it did not withdraw immediately or whether costs should accrue as of the day it became clear that the Government's position was frivolous, unreasonable, or groundless. In my view, the best policy would be to commence costs as of the day it became clear that Government's position was groundless, if the Government did not withdraw within a reasonable period of time. If the Government withdrew within a reasonable period of time, no costs should be assessed. It is reasonable to allow the Government some time to carefully consider the evidence and make a reasoned determination about whether to withdraw or proceed. If the Government withdraws within a reasonable period of time, the costs seem attributable to the respondent-applicant's failure to cooperate in the investigation rather than the Government's litigation position. However, if the Government continues to proceed it is no longer justified and should be billed for costs. Assessing costs *ab initio* would not in my view encourage proper governmental action any better than assessing costs as of the day it became clear that the Government's position was no longer substantially justified. To award costs *ab initio*

[6] My credibility resolution reads as follows:

> The above recitation of facts is based on the credited testimony of McGuire and Fujimoto. Although Lampley denies such an exchange took place, he could give no other explanation for the breakoff in negotiations or the subsequent change resulting in a contract. Further, Lampley had only a vague recollection of the negotiations and no notes from which to refresh his memory. McGuire was a much more reliable witness regarding negotiations and had bargaining notes which he used to refresh his memory. Finally, admissions in the testimony of Alensonorin [Union president] corroborate McGuire's version of these events.

would, however, encourage respondent-applicants not to cooperate in the investigation. In the instant case, I am not willing to infer that the Government would have prosecuted the case even if it was aware of the respondent-applicant's defense prior to trial. Finally, the rule proposed herein, in my view, would encourage a respondent to attempt good-faith settlement negotiations, in which its defenses may be revealed, rather than waiting to present them at trial.

I believe the special circumstances doctrine aids the General Counsel to the extent that costs should not be assessed until it became clear, during the trial, that the Government's position was no longer justified. Special circumstances, however, do not absolve the General Counsel from costs for continuing to prosecute the case and filing a posttrial brief, after it became clear that the Government's position was frivolous, unreasonable, or groundless.

To the extent that my decision appears in conflict with that of the courts in *Spencer v. NLRB* and *E.D.F. v. Watt*, I note that both those decisions dealt with the question of an applicant that had to sue the Government in order to obtain certain relief. Here the Government sued the applicant in part because the applicant did not make the Government aware of its defense until sometime during the litigation. Thus neither *Spencer* nor *Watt* presented the issue of what effect the applicant's failure to cooperate in the precomplaint investigation should have on an award under EAJA. For the reasons expressed above, I find that granting an award from the date that it became clear the Government's position was no longer justified is consistent with the rationale of the *Spencer* and *Watt* cases, i.e., to award prevailing private parties the fees they incurred in combatting unreasonable arguments advanced by the Government, while denying fees incurred in defeating substantial arguments. Cf. *Goldhaber v. Foley*, 698 F.2d 193, 197 (3d Cir. 1983) (holding that EAJA must be interpreted so as to charge the Government with that portion of the expenses attributable to its unjustifiable positions). See also *Ellis v. U.S.*, supra at 1576.

V. THE ISSUES TO WHICH THE APPLICANT DID NOT PREVAIL

The General Counsel alleges that the award should be reduced because the Applicant did not prevail concerning the direct dealing allegation. Further, the General Counsel seeks to reduce any award because the Applicant was unsuccessful in urging certain defenses that were applicable to both the successful and unsuccessful portions of the case.

An applicant may not be compensated under EAJA for fees and expenses incurred in litigating matters in which the Government's position was substantially justified, as it would contravene the purposes of EAJA to require the Government to bear the expense of defending its reasonable positions. *Matthews v. U.S.*, 713 F.2d 677, 684 (11th Cir. 1983); *Goldhaber v. Foley*, supra.

In *Hensley v. Eckerhart*, 461 U.S. 424, 435–436 (1983), the United States Supreme Court addressed the question of whether a partially prevailing plaintiff may recover fees for time spent on unsuccessful claims. The Court held that the Congressional intent to limit awards, under the Civil Rights Attorney's Fees Awards Act of 1979, 42 U.S.C. § 1988,[7] to prevailing parties, requires that unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claims. In situations where a lawsuit cannot be viewed as a series of discrete claims, however, the court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." A plaintiff's attorney who obtains "excellent results" is entitled to a "fully compensatory fee." This normally will include all hours expended in the litigation and should not be reduced "simply because the plaintiff failed to prevail on every contention raised in the lawsuit."

Further the Court stated:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the amount to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified. [Id. at 436–437.]

Applying the *Hensley* principles to this case, the Applicant is clearly not entitled to fees for time spent on the direct dealing allegation on which it was unsuccessful. The Applicant has reduced its claim for an award by a factor of 10 percent to account for this portion of the case. The trial time expended on this issue occurred prior to the time for which I am granting the award, i.e., prior to the date at trial on which the Applicant's exculpatory evidence was offered. In view of this fact and the relatively small amount of time devoted at trial (and, therefore, in the transcript) and the brief to this allegation, the 10-percent reduction appears reasonable.

The Applicant denied jurisdiction in its answer to the complaint. The Applicant's defense as to jurisdiction extended the time necessary for trial. However, that occurred prior to the period for which an award is being granted. Therefore, no further reduction in the award is necessary.

The Applicant unsuccessfully urged that the case be deferred pursuant to the Board's policy enunciated in *Collyer Insulated Wire*, supra. The Applicant's *Collyer* defense was unsuccessful. That defense was applicable to both the prevailing and unprevailing allegations of the complaint. It would have been a valid defense to the allegations on which the Applicant prevailed. It was not valid regard the allegation on which the Applicant did not prevail. However, if only the direct dealing charge was alleged against the Applicant, it is highly probable the *Collyer* defense would not have been raised. It was not unreasonable for the Applicant to raise the *Collyer* defense with regard to the allegations on which it pre-

[7] Although the case involved the Civil Rights Attorney's Fees Awards Act, the Court said that the standards established are "generally applicable" in any case where Congress has authorized an award of fees to a prevailing party. See fn. 7.

vailed. If the direct dealing allegations had not been included in this case, or if the direct dealing allegation had not been sustained, deferral to arbitration would have been a meritorious defense. Further, considering the Applicant's high degree of success, the award of fees should not be diminished because of a defense reasonably asserted, but not responsible for the ultimate successful outcome of the case. Thus, I will not reduce the award based on the Applicant's failure to prevail on its *Collyer* defense.

VI. REASONABLE FEES AND EXPENSES

Pursuant to Section 102.145(c) of the Board's Rules, the judge shall consider the following factors in determining the reasonableness of fees:

(1) If the attorney, agent, or expert witness is in practice, his or her customary fees for similar services or, if an employee of the applicant, the fully allocated cost of the services.

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services.

(3) The time actually spent in the representation of the applicant.

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudication proceeding.

The customary fees of Jared Jossem, the Applicant's lead attorney and trial attorney was $125 per hour. Jossem's time was computed at $75 per hour for purposes of the EAJA application pursuant to the Board's Rules. The customary fee for Perry Confalone, a law clerk and now an attorney, was computed at $65 an hour and later $75 an hour. The rates billed for the attorneys appear to conform to the prevailing rates in Honolulu, Hawaii, where they practice. The Applicant has submitted records establishing the actual time spent in the underlying proceeding and in the EAJA prosecution. The General Counsel takes issue with the reasonableness of the time and expenses.

The Applicant seeks total fees and expenses of $47,040.28.[8] That amount is a result of the deduction of certain fees attributable to the unsuccessful defense of the direct dealing allegation (on which the General Counsel prevailed) and certain charges attributable to a law clerk. Further, the application was amended at various times to include additional time spent in prosecuting the application.

a. The General Counsel contends that the Applicant's claim of 10-1/4 hours for trial preparation should be reduced to 8 hours, apparently on the ground that the Applicant called only three witnesses to testify. This approach does not take into account the quality and nature of trial preparation. Further, in view of the importance of the case to the Applicant—a monetary remedial order most likely would have forced the Applicant out of business—the amount of time spent on trial preparation does not appear unreasonable.

b. The General Counsel contends that the time allotted for a trial day should be limited to 1 hour in excess of actual court time. I do not find any basis for so reducing the award. It appears reasonable that in excess of actual trial the Applicant's attorney would spend time reviewing the day's proceedings with his client and preparing for the next day. Sessions with clients and witnesses before and after the actual court time for that day appear to be reasonable and necessary.

c. The General Counsel contends that the time claimed for brief writing is excessive. The brief was researched and written by a law clerk and the General Counsel contends that extra time was taken because of the clerk's inexperience. I find some merit in this contention. Further, the trial attorney apparently did not give the law clerk the benefit of his pretrial research.

The General Counsel further argues that the Applicant's manner of preparing the posttrial brief increased costs. The Applicant did not purchase a copy of the trial transcript (saving in excess of $1000) and utilized the General Counsel's copy of the transcript. This approach required more extensive notes, and therefore more time, than if the Applicant had purchased its own copy of the transcript. However overall, the Applicant decreased rather than increased the cost of the brief by not purchasing a copy of the transcript. The General Counsel cannot be heard to complain about this departure from the standard procedure which inured to his benefit.

In sum, because the trial attorney did not give the law clerk the benefit of his prior research and because the law clerk was inexperienced, I have reduced the claim for preparing the brief by 20 percent. See *Kutska v. California State College*, 564 F.2d 108 (3d Cir. 1977); *Action on Smoking v. CAB*, 724 F.2d 211 (D.C. Cir. 1984). The Government need not pay for the law clerk's learning experience. Further, the attorney for Applicant admitted that on occasion time spent by a new attorney or clerk is written off the client's bill as "education." My reduction of the claim is similar to such action by the law firm.

d. The General Counsel contends that the Applicant should be awarded only 4 hours at $50 per hour for prosecuting the instant application. I find that argument to be totally without merit. The Application is entitled to a reasonable award for costs in presenting its EAJA claim. Further, the prolonged nature of this litigation was caused by the General Counsel.[9] The hearing was at the request of the General Counsel, who resisted all attempts to narrow the scope of the hearing or to resolve matters without a hearing. The Applicant could not abandon its application but rather had to respond to the General Counsel's motion. It would be unjust to deny an award for such action.

I note that the General Counsel has no deterrent in EAJA for prolonging the litigation and delaying the award. There is no provision in EAJA for interest or any other sanction if the Government delays. Interest

[8] As of March 27, 1985.

[9] For example, after the General Counsel's motion to dismiss the application was denied, the General Counsel filed two motions for reconsideration. Second, the General Counsel refused the Applicant's offer to correct an alleged error in service. Third, the General Counsel requested a hearing but refused to follow the rules for such a request even after being so ordered by the judge. Fourth, the General Counsel has requested time extentions for the filing of papers and briefs amounting to 9 weeks.

does not run until there is a judgment against the Government. Thus, it appears to be in the General Counsel's interest to delay these proceedings. At least the General Counsel's conduct in this case strongly suggests such an approach. It is the Applicant, not the General Counsel, who has been prejudiced by the delay. It would further unjustly penalize the Applicant to impose the arbitrary and unreasonable limits on the EAJA award proposed by the General Counsel.

As the United States Court of Appeals for the Third Circuit in *Bagby v. Beal*, 606 F.2d 411 (3d Cir. 1979) stated:

> If an attorney is required to spend time litigating his fee claim, yet not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. [Quoting *Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978).]

e. The General Counsel contends that since no exceptions were filed by any party, the Applicant should not be entitled to fees for work performed after my decision. However, it appears to me that time spent reviewing the decision with the client and efforts made to convince the General Counsel not to appeal the decision, are reasonable expenses related to the litigation. Contrary to the General Counsel, I do not find such to be "make work" claims.

f. The General Counsel objects to the referral of the EAJA case to the same administrative law judge that dismissed the underlying complaint allegations. Section 102.148(b) of the Board's Rules mandates that an application be referred by the Board to the judge who heard the adversary adjudication on which the application is based. That rule is in accord with EAJA, which requires the application be submitted to the "adjudicative officer of that agency." 5 U.S.C. § 504(a)(1) and (2). The purpose of referral to the same judge who heard the case is that he or she is more alert to the merits of the application with respect to such issues as partially prevailing parties, substantial justification and reasonableness of time and expenses to various aspects of the litigation. The General Counsel expressly denied that he wanted to disqualify the judge. In any event, to the extent that the General Counsel's objection is viewed as an attempt to disqualify the judge, the General Counsel did not comply with the Board's Rules for requesting disqualification of a judge. Section 102.37 of the Board's Rules; see also *Top Form Mills*, 273 NLRB 1246 fn. 1 (1984).

g. The General Counsel further objects to my limiting of the EAJA hearing to specific issues. Section 102.153 of the Board's Rules attempts to avoid prolonged EAJA proceedings by providing that "An evidentiary hearing shall be held only where necessary for resolution of material lissues of fact." Further the Board's Rule provides that:

> A request that the administrative law judge order further proceedings shall specifically identify the disputed issues and the evidence sought to be adduced, and shall explain why the additional proceedings are necessary to resolve the issues.

In the light of the Board's Rules the General Counsel cannot complain that the evidentiary hearing was limited by his own failure to make a specific request to litigate further matters.

h. The General Counsel's other arguments are specious and not worthy of further consideration.

VII. THE APPLICANT'S REQUEST FOR AN ADDITIONAL AWARD

The Applicant seeks an additional award to compensate for the delay in this proceeding caused by the General Counsel. See *National Ass. of Concerned Vets v. Secretary of Defense*, 675 F.2d 1319 at 1335 (D.C. Cir. 1982). The additional award requested represents 11-percent simple interest of the original fee award. However, as mentioned earlier, EAJA does not provide for prejudgment interest. Further, as an exception to sovereign immunity, EAJA has been strictly construed. See *Monark Boat Co.*, 262 NLRB 994 (1982), affd. 708 F.2d 1322 (8th Cir. 1983). Accordingly, no interest payment will be awarded. However, the General Counsel's conduct in prolonging these EAJA proceedings as well as in the underlying litigation[10] has been considered and has in effect, resulted in an award greater than would be normally granted in a case of this nature.

Based on the above findings and conclusions, I shall recommend that the Applicant be awarded fees and expenses, including time spent pursuing recovery of its application under EAJA.[11]

[Recommended Order for dismissal omitted from publication.]

---

[10] The General Counsel prolonged the underlying litigation by inadvertently failing to comply with Sec. 102.118 of the Board's Rules in not submitting to the Applicant's trial attorney all the statements of one of his witnesses and by attempting to litigate matters dismissed from the case by the Regional Director. Further, during settlement discussions of the underlying case, the General Counsel urged the Applicant to bypass its own attorney and negotiate a settlement with the Union.

[11] All outstanding motions inconsistent with this recommended Order are denied.

Custodis-Cottrell, Inc. *and* Charles Windell Bryant. Case 10–CA–21199

8 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 10 June 1986 Administrative Law Judge Hutton S. Brandon issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's decision, we note that there is no basis to warrant a remand in this proceeding to allow the introduction of the joint labor/management safety agreement between Georgia Power Company and the North Georgia Construction Trades Council. (The Respondent was not a party to that agreement.) Initially, the judge sustained the Respondent's objection to the introduction of that agreement based on relevancy, but he subsequently relied on the General Counsel's offer of proof to conclude that the agreement did not create an exception to the no-strike provisions in the three existing collective-bargaining agreements applicable to the Respondent's work at the Plant Scherer site. Thus, even though the judge did not accept the agreement into evidence, he considered its materiality on the basis of this offer of proof. Moreover, based on the joint labor/management safety agreement's expressed intention not to affect existing collective-bargaining agreements, it is clear that the agreement does not create an exception to the no-strike provisions of the parties' existing collective-bargaining agreements, which set forth clear and unequivocal waivers of the right to strike at the Plant Scherer worksite.

[2] In adopting the judge's conclusion that no exception to the no-strike clauses of the parties' collective-bargaining agreement has been established, Member Johansen disavows the judge's statement that exceptions to no-strike clauses are not to be lightly inferred. Indeed, the Supreme Court has held that *waiver of the right to strike* will not be lightly inferred. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). He finds, however, that the contractual no-strike provisions evidence a clear and unmistakable waiver of the right to engage in work stoppages such as the one at issue and concludes, in agreement with the judge, that the stoppage was unprotected.

Sharon Howard, Esq., for the General Counsel.

Mark Johnson and *Robert Terry, Esqs. (Spencer, Fane, Britt & Browne)*, of Kansas City, Missouri, for Respondent.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was tried at Forsyth, Georgia, on 25 and 26 March 1986. The charge was filed by Charles Windell Bryant, on 9 September 1985,[1] and the complaint and notice of hearing issued on 15 January 1986 alleging that Custodis-Cottrell, Inc. (Respondent or the Company), violated Section 8(a)(1) of the National Labor Relations Act, in the discharge of Bryant and 11 other employees[2] on 26 August for concertedly engaging in a work stoppage. The primary issue presented is whether the concerted work stoppage was caused by abnormally dangerous conditions for work within the meaning of Section 502 of the Act.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New Jersey corporation with an office and place of business located at Juliette, Georgia, where it is engaged in heavy construction. During the past calendar year, Respondent purchased and received at its Juliette, Georgia location materials and supplies valued in excess of $50,000 directly from suppliers located outside the State of Georgia. The complaint alleges, Respondent by its answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Work of Respondent and Applicable Bargaining Agreements*

This case requires a determination of whether abnormally dangerous working conditions existed at Respondent's Juliette, Georgia place of business on 26 August. Determination of that issue requires an understanding of Respondent's construction work and methods. The parties stipulated to most of the facts involving Respondent's operation. Thus, Respondent is involved as a contractor in the building of natural draft cooling towers for Georgia Power Company's Plant Scherer, a coal-fired power generating station in Juliette, Georgia. Respond-

[1] All dates are in 1985 unless otherwise indicated.

[2] The complaint was amended at the hearing to include discharged employees David Sharp, Roy Walters, Don Livingston, Jay Royal, Buddy Barrett, D. Ramsey, Lump Phillips, Harold Morgan, Aubrey Johnson, D. Walker, and Marty Smith.

[3] Sec. 502 in pertinent part provides, "nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

ent completed construction of three cooling towers at Plant Scherer in the past and on 26 August was in the process of constructing a fourth tower, the one involved in this proceeding. A completed cooling tower is approximately 450 to 550 feet in height and is constructed principally of steel reinforced concrete. The principal parts of the cooling tower are the veil (the reinforced concrete walls of the structure that form the bulk of the tower), the columns (large concrete pillars that support the veil), and the internals (elements that cool the water passing through the tower).

The veil is constructed by pouring successive concentric rings of concrete one on top of the other until the top of the veil is reached. In performing the construction work, Respondent employs various crafts including ironworkers, carpenters, and laborers who are members of, or are represented by, the Iron Workers' union, the Carpenters' union, and Laborers' union, respectively. Three collective-bargaining agreements are applicable to Respondent's job. The first is the International agreement between the Carpenters, Iron Workers, and Laborers International Unions and Respondent (Natural Draft Cooling Tower Agreement). This agreement in section 11 provides:

> In the event of any dispute, the employer agrees that there will be no lock out and the unions agree that there will be no stoppage or slow down of work, nor any strike of its members, either collectively or individually, and all disputes will be settled as provided in the following paragraph.

A second agreement exists between the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 387 (Local 387), and the Association of Steel Erectors and Heavy Equipment operators and is applicable to Respondent's Plant Scherer job. This agreement (Local Master Agreement) includes the following clause at article 3:

> It is hereby agreed by the Union and the Employer that the Union will not resort to strikes (which includes stoppages or slow downs of work) during the life of this agreement. Accordingly, neither the Union nor the employees will instigate, promote, sponsor, engage in, honor, support, or condone any strike.

Finally, a third agreement (Plant Scherer Project Agreement) is binding on Georgia Power Company, its contractors, including Respondent, and subcontractors and the International and local unions affiliated with the Building Construction Trades Council Department, AFL–CIO. This agreement contains the following provision at article 15:

> The Union agrees that so long as the local or area agreement applicable to the central Georgia site is in effect, there shall be no strikes, refusals to work, wobbles, walk offs, slow downs, or picketing for any purpose whatever at the central Georgia site.

All local craft unions are signatory to the Plant Scherer Agreement including Local 387. All the above-noted agreements contain grievance machinery concluding in final and binding arbitration.

Under the Natural Draft Cooling Tower Agreement, Respondent employs a composite work force made up of three crafts: carpenters, laborers, and ironworkers. The agreement allows members of each union to perform tasks which under normal practice would be considered within the exclusive work jurisdiction of members of the other unions. Article 9 of the same agreement provides "high pay," a wage premium for work performed by employees on high construction. The parties stipulated that the construction work involved in this case is inherently hazardous, that employees work at high elevations, and that, as is the case in most construction industry jobs, they are constantly exposed to the elements. They work on a four-tier rope mesh enclosed (except at the top level) scaffold surrounding the inter and outer rim of the veil. There is a waist-high outside handrail on each level of the scaffold. The scaffold is anchored in concrete and supported by I-beams.

The morning shift begins at 7 a.m. when the composite crew ascends to the scaffold by way of a wire-mesh enclosed stairway anchored to the veil wall. The composite crew breaks away the plywood forms from the previous day's pour. The carpenters then shape the plywood panels for the formation of the next set of forms utilizing electric saws and drills, the electricity for which is supplied by power cables and extension cords running up the veil walls and around the scaffold.

In preparation for the next pour the scaffold is raised approximately 5 feet by a hydraulic pump through a process which takes approximately 30 to 60 minutes. Work continues during the raising of the scaffold with the ironworkers finishing the installation of horizontal reinforcing steel (rebar) and beginning to place and tie the vertical rebar, which will be covered in the next day's pour. In effect, the vertical rebar is placed a day ahead of the pour which covers it.

Also during the jacking process, the laborers spray lubricating oil on the plywood forms and, after the jacking is completed, the carpenters complete buckling the oiled forms into place. The ironworkers continue to install the reinforcing steel and the laborers connect the pipes which carry the concrete for the pour around the veil rim.

Before the pour begins, the forms are inspected by the field superintendent who also inspects the scaffold to make sure that it is properly placed and securely supported. Following this, orders for concrete are submitted and after testing of the concrete as it is delivered, the concrete is pumped from the base of the veil to the level of the pour. The laborers are responsible for performing the pouring of the concrete and use an electrical tool referred to as a vibrator, which is inserted in the concrete to eliminate air pockets. During the pour the ironworkers complete the tying of horizontal steel rods and, when installation of all steel is completed, the ironworkers and the carpenters distribute reinforcing steel around the scaffold for placement during the next day's shift. In ad-

dition, the crew normally cleans up the scaffold. Completion of these operations normally coincides with the end of the shift. After the shift is completed, the employees descend from the veil. The foregoing is essentially repeated each day until the veil is completed. It was stipulated that it is the practice in the industry not to interrupt the concrete pour except in extraordinary circumstances.

B. *The 26 August Walkoff*

It is undisputed that on 26 August, Respondent employed approximately 145 employees on its project. This figure included 15 ironworkers, 15 carpenters, and 17 laborers working on the scaffold on tower 4. At the time work began at 7 a.m., the sky was overcast and chances of rain appeared to be increasing. That rain with thundershowers was moving into the central Georgia area beginning in the early morning as evidenced by the testimony of David Livingston, the official in charge of the National Weather Service Station in Macon, Georgia, and official U.S. weather radar observation records made from the U.S. Weather Services Radar Station at Athens, Georgia. According to Livingston's testimony and the radar records, the intensity of the rain and thundershowers increased as the morning wore on. However, Livingston was unable to testify that showers occurred at Juliette, Georgia, during the morning of 26 August or that thunder or lightning occurred at that location. Livingston testified that rain had been observed at his location, the Macon airport south of Macon, and more than 30 miles from Juliette but no thunder or lightning.

That it did rain at the Plant Scherer site during the morning of 26 August is not disputed. What is disputed is the time of the rain, the intensity of the rain, and whether any thunder or lightning was associated with the rain. On that morning Respondent's operation was at pour 21 on tower 4 which meant that at that point the men working on the veil were working approximately 140 feet high. Charging Party Bryant testified that it rained all morning on 26 August, at times harder than at other times. He related that around 10 o'clock he heard thunder at a distance. However, he saw no lightning.[4] According to Bryant, who like most of the ironworkers worked on the top level of the scaffold, the employees began to talk about the bad conditions and "going home." The concrete pour began around 10:30 a.m. The ironworkers' foreman, Bobby Brock, came by and, based on Bryant's uncontradicted and credible testimony, was "cussing" about the wisdom of starting the pour. Around 11:30 a.m. when it was still raining "hard," Bryant saw some ironworkers leaving to descend the stairway from the veil. Bryant testified that he and his coworker, ironworker Howard Morgan, therefore decided they would leave also, but as they began to do so, they were told by Brock that if they were going down, they should go back and remove the vertical rebar that had been set in place but not tied. They did so and then proceeded to go down the stairs, but not before Brock told them that if they went down they were fired.

It is undisputed that 11 ironworkers in addition to Bryant left the veil at approximately 11:30 a.m. and went home. Three ironworkers, including Foreman Brock, remained on the veil and completed the work that day. The carpenters and laborers also remained on the job and completed the work. The concrete pour continued and Respondent finished the job by drawing workers from other points on the project.

The 12 ironworkers who walked off the job were discharged. Of those that testified in this proceeding, all contended that the work on the veil on 26 August under the conditions prevailing was unsafe. Specifically, Bryant testified that it was difficult to work with wet gloves and with water running out of his shoes. Others complained that there was a possibility of lightning striking the scaffold, and that the scaffolding was oily and wet making it slick and difficult for employees to move around.

Norman "Buddy" Barrett, one of the ironworkers who walked off, testified that the rain had begun gradually but kept getting harder and finally before the pour started, it was a "flood." He found it necessary to drop down to the next level of the scaffold as some of the other ironworkers did so that at least the floor of the scaffold above him gave some protection from the rain. Barrett testified that he walked out with the other ironworkers because he felt like it was raining too hard, that it was making everything slick, and that it made it difficult to see what one was doing.

Three ironworkers in addition to Bryant, Donald Livingston, "Lump" Phillips, and Martin Smith all testified that they had heard thunder during the morning. Thus, Livingston related that he had heard thunder in the distance and it was "coming" about the time the concrete trucks arrived for the pour.[5] Further, Livingston testified that around the same time he saw lightning in the distant north and described it as intercloud lightning rather than cloud to ground lightning. He further testified that 20 to 30 minutes after the heavier rain started he descended to the next lower level of the scaffold for protection from the rain. Although he and other ironworkers who did the same thing did not perform any work on the second level, none were rebuked for their presence on the lower level.

Phillips testified that he heard thunder 30 to 40 minutes before "the bottom fell out." However, he added that Bryant heard it too and, as already related, Bryant testified it occurred around 10 a.m. According to Phillips when "the bottom fell out," Foreman Brock came by and, referring to Field Superintendent Jack Richey, remarked he had gone "crazy" and ordered the concrete. Phillips further testified without contradiction that some of the ironworkers replied that they were not going to work and that Brock responded saying he could not tell them what to do but "you'd be a damn fool to stay up here and work." Nevertheless, as the ironworkers were

[4] Respondent, in the testimony of its Field Superintendent Jack Richey, conceded that when there is thunder and lightning, the men are removed from the tower because then "it's just not a good place to be." If a pour has begun, however, a few men may be left on the tower to bulkhead the pour after which they go to the ground.

[5] Records of Respondent show that the first concrete truck arrived about 10:30 a.m.

in the process of leaving, Brock met them at the stairs and told them to remove the vertical rebar before leaving. Some of them did so and then approached the stairs to descend. At that point Brock stated that anybody that "hit the ground" was fired. Brock did not testify. Phillips is credited regarding the statements attributed to Brock.

Smith testified that he had heard thunder at a distance that morning. Because Smith testified it was at a time when he was pulling concrete forms, I conclude that it was prior to the time the jacking of the scaffold occurred so that it must have been some 30 to 40 minutes prior to the time the pour began around 10:30 a.m.

Neil Rosser, called as a witness by the General Counsel, was one of the ironworkers who did not leave the job on 26 August. And while Rosser did not testify concerning any lightning or thunder, he testified that it began raining that morning some 20 to 30 minutes after he started work and got gradually harder during the morning. He related that it was raining hard prior to the time the pour began. At that time he went down to the second level of the scaffold. According to Rosser, because he wore prescription glasses and because the rain was so heavy, he could not see what he was doing. He related that if he had been told that he had to work or go home, he would have had to leave. However, because he said he understood that there was a provision in the collective-bargaining agreement that once a pour had started he could not leave due to weather without being fired, he decided to stay.

The consensus of the testimony of the General Counsel's witnesses was that the heavier rain when mixed with the oil flowing from the oiled concrete forms made the scaffold slippery. They complained that the heavy rain affected their ability to see what they were doing. Although there were drainage channels or slots in the pick boards (the scaffold floor), at least one of the witnesses said that some of the slots were filled with concrete and water stood in certain areas. All the General Counsel's witnesses testified that they felt that the weather conditions on the job at the time of the walkoff made the job unsafe. However, only Smith referred to the danger from lightning involved in setting up 17-foot lengths of vertical reinforcing concrete at the top of the veil rim as the ironworkers were required to do.

Respondent's witnesses including Field Superintendent Richey, Laborers' Foreman Tallent, and Carpenters' Foreman Rodney McCant, all denied hearing any thunder or seeing any lightning on the morning of the walkoff. All agree, however, that there had been rain that morning. Richey stated there had been a moderate shower before the jacking was completed at 8:59 a.m. There was no more rain until about 10:30 a.m. The pour started about 10:30 a.m. and about 10 to 20 minutes later, there was a "pretty good rain which did not affect visibility." Tallent described the shower occurring after the pour started as a "small shower" while McCant described it as a "moderate rain that did not obscure visibility." On the other hand, Respondent's witness, Craig P. Parkins, a carpenter, described the rain as a "pretty heavy rain," but he could still see across the interior of the veil some 250 to 300 feet. Carpenter employee Allan McCant likewise described the rain at the time the ironworkers left as "a pretty good" rain. Similarly, laborers' employee Robert Gray described the rain as a steady rain, while carpenters' employee Thomas Seymour testified it was raining "pretty good" when the carpenters left. None of Respondent's witnesses attributed any increase in risks on the job as a result of the rain or existing weather conditions at the time of the walkoff. They encountered no visibility problems which interfered with their work, denied the existence of any standing water on the pick boards, and generally denied the existence of any increased slipperiness due to rain and excess oil on the scaffold. In short, according to Respondent's evidence, the weather conditions did not create any greater danger of injury on the job than otherwise existed on a normal workday on the tower.

C. *Argument of the Parties*

The General Counsel argues, as the complaint alleges, that Bryant and the other ironworkers walked off the job because of their good-faith belief that the existing working conditions on the job at the time of the walkoff made the job abnormally dangerous within the meaning of Section 502 of the Act. While conceding that the job was inherently dangerous because of the height at which the employees were required to work, the weather conditions presented new factors which changed the character of the normal working conditions and made them abnormally dangerous within the meaning of Section 502. Therefore, the General Counsel asserts, because the walkoff did not constitute a strike by virtue of the application of Section 502, the walkoff was protected and Respondent's discharge of Bryant and the 11 other ironworkers interfered with their Section 7 rights and violated Section 8(a)(1) of the Act.

Briefly stated Respondent's argument and defense is that the working conditions of the ironworkers were not abnormally dangerous at the time they left work and their walkoff, therefore, was not protected under Section 502. Accordingly, Respondent by virtue of the no-strike clauses in the collective-bargaining agreements was within its right in discharging those who walked off the job.

D. *Conclusions*

Normally, a concerted work stoppage of employees to protect their working conditions, such as a requirement that they work in the rain, is consistent with their Section 7 rights and is protected under the Act. See *Quality C.A.T.V.*, 278 NLRB 1282 (1986); *McEver Engineering*, 275 NLRB 921 (1985), enfd. 784 F.2d 634 (5th Cir. 1986). But an employer does not interfere with employee Section 7 rights under the Act by discharging them for engaging in a strike in breach of a no-strike provision in a collective-bargaining agreement. This is because, generally speaking, no-strike clauses are viewed as a quid pro quo for provisions on binding arbitration of disputes between parties. Thus, if the dispute is arbitrable, it is presumed that the no-strike agreement prohibits employees from engaging in work stoppages in furtherance of that dispute. Section 502 of the Act, however, precludes a work stoppage in the face of "abnormally dangerous"

working conditions from being treated as a strike or work stoppage which would otherwise breach a no-strike provision. See *Clark Engineering v. Carpenters*, 510 F.2d 1075, 1079–1080 (6th Cir. 1975). The Board has long held that the test for determining the existence of abnormally dangerous conditions under Section 502 is an objective one. Thus, in *Redwing Carriers*, 130 NLRB 1208 (1961), enfd. as modified 325 F.2d 1011 (D.C. Cir. 1963), cert. denied 377 U.S. 905 (1964), the Board stated (at 1209):

> We are of the opinion that the term contemplates, and is intended to insure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered "abnormally dangerous."

Likewise, in *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974), the Supreme Court rejected a subjective test as the measure for determining the existence of an "abnormally dangerous conditions" under Section 502 stating at 386–387:

> [A] union seeking to justify a contractually prohibited stoppage under Section 502 must present ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.

This objective standard or measure has consistently been followed in Section 502 cases. See, e.g. *Gibraltar Steel Corp.*, 273 NLRB 1012 (1984); *L. E. Myers Co.*, 270 NLRB 1010 (1984); *Goodyear Tire & Rubber Co.*, 269 NLRB 881 (1984); *Richmond Tank Car Co.*, 264 NLRB 174 (1982); *Baker Marine Corp.*, 258 NLRB 680 (1981); *True Drilling Co.*, 257 NLRB 426 (1981).

Moreover, when the work involved is inherently dangerous, a finding of the existence of an "abnormally dangerous" work situation may not be based on previously existing conditions of longstanding endured by the employees for a considerable period prior to a work stoppage. As stated by the administrative law judge with Board approval in *Anaconda Aluminum Co.*, 197 NLRB 336 at 344 (1972):

> Absent the emergence of new factors or circumstances which change the character of the danger, work which is recognized and accepted by employees as inherently dangerous does not become "abnormally dangerous" merely because employee patience with prevailing conditions wears thin or their forbearance ceases. [Citations omitted.]

And, the hazard presented by the "abnormally dangerous" working conditions must not be speculative. Rather, the abnormally dangerous working conditions must put the employees in imminent peril. *Mine Workers District 6 (Consolidation Coal Co.)*, 217 NLRB 541, 551 (1975).

Considering the instant case in light of the foregoing principles, I am compelled to the conclusion that the General Counsel has not established the existence of an abnormally dangerous condition of work at the time of the walkoff of the 12 ironworkers here.

The record herein fully depicts the general working conditions of employees working on the veil. That it was inherently dangerous was conceded by all parties. The critical factual issue is whether the weather viewed by objective standards changed those working conditions from normally inherently dangerous to abnormally dangerous. The elements of weather cited by the General Counsel's witnesses as creating the extra hazardous conditions were the lightning (as indicated by the thunder) and the rain. Temperature and wind were not claimed to be factors.

No doubt the presence of lightning in the vicinity of the tower would create a new and dangerous working condition not normally encountered in the day-to-day routine. And as Field Superintendent Richey conceded, if lightning was observed in the vicinity, all employees would have been removed from the tower with the exception of only a few necessary to stop a concrete pour if one had started. Although the General Counsel called an electrical engineer as a witness, Dr. Paul Steffes, to testify regarding risks entailed in working in high places under lightning conditions, it takes no expert in light of human experience to recognize the dangers involved. However, while Steffes testified that lightning was not entirely predictable, he pointed out that distant thunder would not indicate imminent risk.

On the basis of the record considered as a whole and that testimony which I deem credible, objective evidence does not establish an imminent peril from lightning at the time of the work stoppage. Accepting the testimony of the General Counsel's witnesses regarding hearing thunder, such thunder was remote in both distance from the site and time from the walkoff. The last thunder Bryant claims to have heard was around 10 o'clock, an hour and a half before the work stoppage, and even then he admitted it was not "real close." This was the same thunder heard by Smith who had placed it much earlier in time. Phillips also heard the thunder heard by Bryant. Livingston's testimony was somewhat contradictory on the time he heard the thunder. At one point he put the thunder as occurring an hour after the shift began long before the work stoppage. However, at another point in his testimony in explaining why he left the job, he put the thunder and lightning around the time of the pour and related:

> I could see across the horizon farther from me, like north, I could see there even more. I could see lightning there and I could hear thunder, and there was more coming and the wind was blowing that way.

Based on the U.S. Weather Service maps in evidence, the path of the bad weather system was from the southwest to the northeast. Thus, to the extent Livingston saw lightning on the north horizon it was not headed in his direction. In view of this and because no other witness heard thunder at any time within an hour of the time the ironworkers left, I find Livingston's testimony on the point to be an incredible exaggeration. I find there were

no abnormally dangerous conditions existent at the time of the walkoff due to lightning.[6]

From a consensus of the testimony of witnesses of both the General Counsel and Respondent, one must conclude that a more intense rain began around the time the concrete pour started. Although the witnesses differ in their description of the intensity of the rain, I conclude that the rain was at least "drenching." Notwithstanding the fact that a number of ironworkers sought shelter on the second level of the scaffold, they no doubt became thoroughly wet after the concrete pour began if they were not already wet from the earlier, but slower, rain that morning.[7] I have no doubt that some were uncomfortable and possibly miserable because they were wet. I am also confident that the rain slowed, if it did not stop altogether, their work pace and made their jobs more difficult. As some of the witnesses noted, it was difficult working in wet gloves and one or two noted that rain on their prescription glasses hampered their sight and work activity. Nevertheless, I find neither the rain nor the wetness of the scaffold created an abnormally dangerous working condition. Uncontradicted testimony reflects that oil and water was present on the scaffold on a daily basis, the former as a result of the spraying of the concrete forms and the latter as a result of the frequent hosing off of spilled concrete from the scaffold.

I reject that testimony of the General Counsel's witnesses that the scaffold was made slick by the rain. It is undisputed that the pick boards, the walking surface of the scaffold, had a roughened surface which was designed to prevent slipperiness. Moreover, the pick boards had channels in them for draining off water. Although the channels may have been blocked in places, it is inconceivable that each segment of the picks all the way around the veil were so blocked as to create a general safety problem. There was no complaint regarding the slipperiness of the pick boards earlier in the day and substantially before the work stoppage even though they must have become wet from the rain earlier that morning. In addition, unrefuted employer records revealed that the ironworkers had worked before in the rain on a number of occasions on tower 4. The intensity of the rain may not have been as great on such occasions, but prior work under rain conditions demonstrates that rain per se did not decrease significantly the safety of the scaffold or the work.

Some of the General Counsel's witnesses suggested that the scaffold was more unsafe in the rain in view of raw materials and tools which cluttered the scaffold surface. This too appears to have been a normal condition. Rosser testified without contradiction that the scaffold was normally cluttered and it was "normally a hazard anyway."

Did the rain affect the visibility to the extent it rendered the job abnormally dangerous? I conclude that it did not. Those employees who stopped work and descended to the second scaffold level to escape the rain were not reprimanded by Respondent. They thus could avoid any hazard associated with attempting to work in poor visibility. Moreover, and in any event, I conclude the rain did not constitute a significant visibility problem even for those wearing glasses. In so concluding, I find incredible Smith's testimony that it was raining so hard he could not see his hand in front of his face. That testimony was contradicted by another credible General Counsel's witness, Rosser, who had no monetary interest in the outcome of the case and was less likely to be biased. Rosser testified that he could see across the veil, a distance of more than 150 feet during the rain.

Finally, although not dispositive, it is nevertheless significant that only 12 ironworkers left the job while 3 other ironworkers remained as well as the 17 laborers and 15 carpenters. It is further noteworthy that the latter two crafts, unlike the ironworkers, worked with electrical equipment in the rain in the performance of their jobs and, thus, conceivably encountered greater electrical risks by working in the rain. Apparently, however, they discerned no imminent peril and stayed on the job.

Considering all the foregoing, I find and conclude that the working conditions of the ironworkers on 26 August at the time of the work stoppage were not made "abnormally dangerous" by the then-existent weather situation. Nothing had changed from their normal working conditions except, perhaps, for their subjective perceptions of danger. Thus, the application of Section 502 does not render the work stoppage here protected. Therefore, the work stoppage remained unprotected, and the discharges for participation in the work stoppage did not violate the Act.

At the hearing the General Counsel sought to introduce evidence of a joint labor/management safety agreement between Georgia Power Company and the North Georgia Building and Construction Trades Council applicable to the Plant Scherer job, and allegedly applicable to contractors, including Respondent, on the project. In the absence of a clear explanation by the General Counsel of how the safety agreement related to the issues in the instant case, Respondent's objection based on relevance to the receipt in evidence of the agreement was sustained. The General Counsel was allowed to make an offer of proof, however. In her brief, the General Counsel requested reconsideration of my ruling on the subject, and, relying on the safety agreement, argued that the ironworkers engaging in the work stoppage were seeking to enforce that agreement. She claimed that under the safety agreement, the ironworkers were not required to work under unsafe conditions and concluded that in view of the "driving rain and thunder [which] created emergent conditions, it is unreasonable to require

[6] Dr. Steffes testified regarding a lightning "zone of protection" established by the National Bureau of Standards (NBS). According to Dr. Steffes, under the NBS standard, a reasonable zone of lightning protection extends in the form of a cone from the highest structure in an area with the diameter of the cone at its base being twice the height of the structure. The record shows that a 1000-foot tall chimney was located about 900 to 1000 feet from tower 4. Thus, tower 4, or portions of it, may have been within the zone of lightning protection from the chimney which was fully grounded even though tower 4 was approximately 150 feet tall. However, no exact measurements are reflected in the record, and I make no specific finding on this point.

[7] Some of the members of the composite crew had donned rainwear earlier. Apparently most of the ironworkers had not requested rainwear from Respondent until after the harder rain began.

or expect employees to follow grievance complaint procedures."

While not clearly articulated, it appears that the General Counsel is arguing that the safety agreement created an exception to Respondent's no-strike clauses in its agreements with the Iron Workers Union. This would make the safety agreement relevant to a determination of the protected nature of the walkout and make Section 502 and the objective test thereunder inapplicable. Accordingly, to address the issue, I shall reverse my ruling at the hearing and accept the General Counsel's offer of proof.

Based on the offer of proof, the safety agreement provides that employees shall not be required to work under unsafe conditions, and precludes disciplining employees for complying with company safety procedures or Government rules. No evidence was presented, however, that the employees were being asked or directed to breach any company policy of Georgia Power Company or Respondent or violate any specific Government rule.[8] Moreover, Respondent's counsel, in arguing at the hearing the irrelevance of the safety agreement, quoted without objection or contradiction from the General Counsel the following provision in the labor/management safety agreement; "The cooperative effort of a labor/management safety and health program is not intended to affect existing collective-bargaining agreements."

The General Counsel was unable to cite any authority at the hearing and cited none in her brief to support the no-strike exception she now claims. It is patently clear that the safety agreement does not expressly create an exception to Respondent's no-strike clauses and the General Counsel does not argue otherwise. Instead, she apparently seeks to create an implied exception which would justify employee use of a subjective standard here in determining the existence of dangerous working conditions. Exceptions to no-strike clauses are not to be lightly inferred. As the Supreme Court, in rejecting a subjective measure for establishing abnormally dangerous conditions of work for Section 502 cases, said in *Gateway Coal Co.*, supra at 386:

> Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be.

By logical extension the same strong public policy in favor of peaceful resolution of labor disputes militates against any implied exception of the no-strike clauses based on the labor/management safety agreement here. Such an inference is particularly unwarranted when the safety agreement specifically provides that it will not affect existing bargaining agreements of the contractors. In particular, it should not override an existing bargaining agreement containing its own safety provision.

The fact that a dispute on a safety complaint may not be immediately resolved through a grievance procedure also does not compel the implied exception the General Counsel seeks. If it were otherwise, all no-strike clauses would be rendered ineffective by the subjective perception of employees regarding safety concerns, and Section 502 of the Act, insofar as it applies to work stoppages for abnormally dangerous working conditions would become meaningless surplusage.

Finally, and in any event, it must be noted that the ironworkers who walked off the job on 26 August were not shown to be aware of a safety agreement, much less seeking to implement its terms. Thus, there is no factual basis for finding that they were protected under the theory that they were seeking to implement the terms of a labor/management safety agreement creating an exception to the no-strike clauses.

Considering the foregoing, I conclude no exception to the no-strike clauses has been established by the General Counsel. I find the employees who were discharged for walking off on 26 August were unprotected under the Act and their discharges, therefore, did not violate the Act.

CONCLUSIONS OF LAW

1. Respondent, Custodis-Cottrell, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent did not violate Section 8(a)(1) of the Act in the discharge of the employees named in the complaint, as amended, who engaged in the work stoppage on 26 August 1985.
3. Respondent did not violate the Act in any other manner set forth in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The complaint is dismissed in its entirety.

[8] The Plant Scherer project agreement which Respondent concedes is binding on it and which contains one of the no-strike clauses relied on by Respondent in its defense contains its own provision on safety at art. 14. There the employees agreed to be bound by the "safety rules and regulations as established by the Employer in accordance with the Construction Safety Act and OSHA." There was no evidence presented in this case reflecting or even suggesting that Respondent's operations on 26 August breached any such safety rules or regulations.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Joseph De Rario, DMD, P.A. ***and*** **Sandra Falcone.**
Case 22-CA-14083

10 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 14 October 1986 Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order.

The Respondent, Joseph De Rario, DMD, P.A., operates a dental office located in Oakhurst, New Jersey. De Rario employs between 12 and 15 people. Sandra Falcone began working for the Respondent as a hygiene assistant in May 1985 and performed the regular duties of a hygienist including preparing the room, taking and mounting X-rays, and discussing home care with the patients. In August 1985 Falcone received an above-average performance rating. At or about that time she also assumed two additional duties. The first was administering temporal mandibular joint or "TMJ" therapy, a form of facial and neck massage, to patients. The second was acting as a periodontal assistant to Dr. Chang, which entailed preparing the room for the periodontist and assisting him during the procedures.

On Thursday, 10 October 1985,[2] one of the dentists, Dr. Trufolo, held a meeting with the employees to express his displeasure at some of the work-related problems which had occurred that day. Sandy Falcone and a coworker, Lisa Manrodt, were sitting together on the same chair. During the meeting Manrodt interrupted Dr. Trufolo several times and disagreed with his comments. The Respondent's office manager, Vickie Devaney, was present at the meeting and, when it ended, she told Manrodt and Falcone that she wanted to see them in her office. Devaney then criticized both Manrodt and Falcone for what she considered to be their childish behavior during the Trufolo meeting. She stated that during the meeting they were giggling and punching each other and that she was very embarrassed by their behavior. She also reprimanded both Manrodt and Falcone because the two women had allegedly been spending too much time together socializing during working hours which was interfering with the performance of their jobs.

Falcone and Manrodt became very upset at what they perceived as unjust criticism and tried to discuss the matter quietly with Devaney. However, Devaney became increasingly distraught, began to yell, and slammed her hands on her desk. Falcone testified that she decided to "just agree with her because she's not going to listen to anything that we have to say." At that point Falcone and Manrodt left the room.

During the weekend following the 10 October meeting, Falcone and Manrodt discussed their meeting with Devaney and composed a summary of their account of the meeting. Falcone also telephoned three coworkers during the weekend and explained to each of them the unfair treatment she and Manrodt believed they had received from Devaney at the 10 October meeting with her. One of the employees Falcone called, Donna White, also expressed her dissatisfaction at the unfair treatment she was receiving from Devaney at work. During these telephone conversations, Falcone discussed with each of the three employees she called Manrodt's and her view that the employees should get overtime pay when they worked during their own time and that they should not have to pay anything toward the cost of their uniforms.[3] Falcone was told by these employees that she should go to see Devaney on Monday. On Monday, 14 October 1985,[4] the three employees whom Falcone had telephoned told Devaney, before Falcone arrived for work, that Falcone had telephoned them over the weekend and discussed various matters including the 10 October meeting Devaney had held with Falcone and Manrodt, overtime pay, and the cost of uniforms. These employees also told Devaney that they had told Falcone to talk directly to Devaney on Monday morning.

On the morning of 14 October 1985, Falcone asked to speak with Devaney, and they met shortly thereafter in private. Several items were discussed

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge inadvertently states that this meeting was held on Friday, 11 October 1985.

[3] De Rario's employees pay one-half the cost of their required work uniforms and, not infrequently, are expected to work during their own time, i.e., during lunch hours and after the normal workday, without receiving additional compensation.

[4] The judge erroneously refers to the date of this meeting as 15 October 1985 in his decision.

at that meeting. One of the first items discussed was that Falcone and Manrodt were very upset about the 10 October 1985 meeting they had with Devaney because they felt that Devaney was falsely accusing them of spending too much worktime together. Falcone then told Devaney that she was becoming ill during the times she assisted the periodontist because there was "a lot of blood" during some of the procedures and asked if she could be relieved of these duties to concentrate on areas in which she believed she performed better. Devaney told her that she could not hire another assistant to perform the work but that Falcone could ask another dental assistant to switch duties with her. Falcone also brought up the subject of her TMJ therapy duties. Falcone stated that while she enjoyed the work, she felt that she was entitled to some additional type of compensation for performing the therapy as it was not in her job duties when she was hired. At that point, Devaney threatened to take the TMJ duties away from Falcone, who objected. Falcone then brought up the subject of payment for overtime, to which Devaney responded by banging her hand on the desk and saying that she had no legal obligation to pay overtime as she had fought that matter out. Falcone stated that "by law De Rario is required to pay us for a hundred per cent of our overtime hours" and "a hundred percent for our uniforms." According to the credited testimony, it was at that point that Devaney stated: "That's it, Sandy. You're out of hand, you have an attitude problem, I can't deal with you anymore . . . you can have two weeks or stay till the end of the day." When Falcone asked Devaney if that meant she was fired, Devaney responded that it did.

At that point Falcone walked out of the office and went home. She returned to the office around noon and asked Devaney for her job back. Devaney denied the request and told Falcone that she would not rehire her "after what took place over the weekend and because of all the threats she made this morning."

Later that day Falcone then went to see De Rario who called Devaney into his office to hear her account. Devaney told De Rario that she fired Falcone "number one . . . because of [her] attitude. Number two, because [she] refused to do periodontal assisting. Number three . . . because [she] demanded to be paid for TMJ therapy. Number four . . . because . . . [she] demanded to be paid for overtime hours. Number five, because [she] demanded to be paid for your uniforms." Falcone told De Rario that she never refused to perform periodontal assistant duties or demanded to be paid for TMJ work. De Rario upheld the decision to fire Falcone. De Rario did not testify at the hearing.

For the following reasons, we find that Sandra Falcone was discharged as a result of her concerted activities protected by Section 7 of the Act. In *Meyers II*,[5] the Board reaffirmed its adoption of the following definition of "concerted activities" in *Meyers I*:[6] "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[7] Moreover, once activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the activity, the activity was protected by the Act, and the adverse employment action at issue was motivated by the protected, concerted activity.[8] In the present case, Falcone clearly acted on a collective basis "with or on the authority of other employees." As the judge found in his decision, Falcone received authorization from the employees to discuss various complaints including overtime pay and uniform allowances. The employees whom Falcone called over the weekend told her to talk to Devaney on Monday. Therefore her activities were concerted.

Furthermore, the Respondent was made aware of the concerted nature of Falcone's actions. On 14 October 1986 prior to Devaney's meeting with Falcone, the three employees to whom Falcone spoke over the weekend told Devaney that they had been called by Falcone over the weekend. They specifically informed her that Falcone had discussed the 10 October meeting Devaney had with Manrodt and Falcone, the Respondent's failure to pay overtime, and its failure to reimburse employees for the full cost of their uniforms. These employees told Devaney that they had advised Falcone to talk to Devaney about these matters on Monday. Devaney also admitted at the hearing that Falcone told her at the 14 October meeting that "she [Falcone] was the spokesperson for everyone because they were afraid to talk with me." Falcone's concerted activities are clearly protected under the Act since the subjects the employees discussed constitute terms and conditions of employment.[9]

We also find that the General Counsel satisfied the burden of proving by a preponderance of the evidence that the Respondent's discharge of Fal-

[5] 281 NLRB 882, 884 (1986).
[6] 268 NLRB 493 (1984).
[7] Id. at 497 (1984).
[8] Id.
[9] Member Johansen, who did not participate in *Meyers*, agrees that Falcone's activities were concerted, and that the Employer knew of that activity.

cone was based on Falcone's protected concerted activities. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court affirmed the test enunciated by the Board in *Wright Line*[10] for determining whether an employee was discharged because of the exercise of Section 7 rights. Under *Wright Line* the General Counsel, under Section 10(c) of the Act, has the burden of establishing a prima facie case that the employee's protected conduct was a substantial or motivating factor in the employee's discharge or other adverse action taken by the employer. Once the General Counsel satisfies this burden, the employer can avoid liability under the Act by proving by a preponderance of the evidence an affirmative defense that it would have taken the same action even if the unlawful motives had not existed.

In the instant case, the General Counsel established that at least three reasons Devaney gave for firing Falcone—Falcone's attitude,[11] her demand for payment of overtime compensation, and for payment of uniform allowances for the employees—involved protected concerted activities under the Act. At that point, the Respondent could only avoid being held in violation of the Act by proving by a preponderance of the evidence that even absent the improper motives, it would have discharged Falcone for legitimate reasons. While the Respondent proffered additional reasons for firing Falcone—that Falcone refused to assist the periodontist and that she demanded to be paid the full amount for performing TMJ therapy—the judge discredited these reasons and found them to be "pretextual."[12] Thus, the only credited reasons the Respondent gave for firing Falcone were based on her protected concerted activities.[13] The Respondent therefore failed to prove that even absent unlawful motivations, it would have discharged Falcone. Accordingly, we find that Falcone was unlawfully terminated for engaging in protected concerted activities in violation of Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Joseph De Rario, DMD, P.A., Oakhurst, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any of you for engaging in concerted activities for your mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Sandra Falcone immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her former seniority or any other rights and privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to her disciplinary discharge and WE WILL notify her that this has been done and that evidence of this unlawful discharge WILL not be used as a basis for future personnel actions against her.

JOSEPH DE RARIO, DMD, P.A.

---

[10] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[11] Devaney's first reason given for firing Falcone was her attitude problem. It appears that Devaney was referring to Falcone's attitude in voicing her group concerns regarding payment for employees' overtime and uniform allowances. Thus, as noted above, after Falcone told her that the Respondent was required "by law" to pay "for a hundred per cent of our overtime hours" and "a hundred percent for our uniforms," Devaney responded: "You're out of hand, you have an attitude problem, I can't deal with you anymore . . . you can have two weeks or stay till the end of the day."

[12] The judge credited Falcone's testimony that she only requested to be paid some compensation for performance of TMJ therapy, and that she did not demand that the Respondent pay her the full amount he received for the therapy sessions as Devaney testified. Since Falcone was making this demand on her own behalf and had not sought support from any other employees, her demand for additional compensation was not concerted activity under the Act. However, it is clear that the Respondent has not established that it would have discharged Falcone solely for making this request.

[13] As we note above, Devaney in citing "attitude" appeared to be referring to Falcone's complaints with respect to overtime and uniform allowances. However, even if "attitude" included matters related to work performance, we find the Respondent has not met its burden to establish that these matters would have resulted in Falcone's discharge even in the absence of her protected concerted activities.

Gary A. Carlson, Esq., for the General Counsel.
Laurence M. McHeffey, Esq. (Hanlon, McHeffey, Herzfield & Rubin), of Edison, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Joseph De Rario, DMD, PA (Respondent) discharged Sandra Falcone in violation of Section 8(a)(1) of the National Labor Relations Act. The General Counsel contends that Respondent discharged Falcone because of her role as employee spokesperson in seeking overtime pay and other employee benefits. Respondent asserts that she was discharged because she stated that she would refuse to perform assigned tasks.

I heard this case on 18 and 24 April 1986 in Newark, New Jersey. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings, as amended, establish and I find that Respondent is engaged in the practice of dentistry and that its operations meet the Board's jurisdictional standard for health care institutions.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent has about 12 employees at its dental office in Oakhurst, New Jersey. Sandra Falcone began working there as a hygiene assistant in May 1985. Respondent arranged to have her learn the technique in administering a form of neck and facial massage (TMJ therapy), and in late August 1985, that function was added to her duties. About the same time, she began to train as a periodontal assistant but she was hardly enamoured of that job because the sight of blood upset her. Also in August, she received an above-average performance review. She was told, however,that she would not receive a raise until her next evaluation as she had been hired at a salary higher than she previously earned.

As noted below, the employees discussed overtime pay and the money they spent on their uniforms." They contributed to the cost of their work uniforms and, not infrequently, are expected to work during their own time, (i.e., lunch hour, at the end of the normal workday) without receiving additional compensation therefor. Falcone and her coworkers, in August, discussed among themselves their view that Respondent should pay the full cost of uniforms and also overtime pay, but they did not then broach either of these subjects with Respondent.

On Friday, 11 October 1985, one of the dentists held a meeting of the employees to express his displeasure at the overall level of work performance. One of the employees, Lisa Manrodt, who was seated alongside Falcone during this meeting, interrogated the dentist several times, apparently to disagree with some of his comments. Respondent's office manager, Vickie Devaney, was present at the meeting and, when it ended, she told Manrodt and Falcone that she wanted to see them in her office.

Devaney told them in no uncertain terms that she was displeased with Manrodt's interruptions and with Falcone's actions which Devaney perceived as having encouraged Manrodt. Falcone and Manrodt were very upset over what they perceived as unjust criticism, intemperate and bordering on calumny.

B. *Falcone's Activities*

Over the weekend, Falcone and Manrodt composed a summary of their account of the meeting. In addition, Falcone telephoned several coworkers. She told each of the meeting with Devaney and also discussed with each Manrodt's and her view that the employees should get overtime pay when they work during their own time and that they should not have to pay anything toward the cost of their uniforms. She was told by those employees that she should go to see Devaney on Monday.

Three of the employees, whom Falcone had telephoned, told Devaney on Monday, 15 October, before Falcone arrived for work, that Falcone had telephoned them over the wekend and talked to them about the 11 October meeting, about overtime pay, and the cost of work uniforms.

C. *Falcone's discharge*

When Falcone arrived at work later on 15 October, she asked to speak with Devaney. They talked in private. Falcone's account is as follows. Falcone told her that she gets sick to her stomach when she sees a lot of blood during periodontal procedures and asked if she could be relieved of those duties to concentrate on areas to which she believed she did better. Devaney responded in effect that she would get used to the periodontal work but that it would take time. Falcone stated that she really felt sick doing that work. Devaney suggested that Falcone talk to one of the other assistants to see if they would switch with her and she told Falcone that she would not hire another assistant. Falcone then brought up the subject of TMJ therapy. She pointed out to Devaney that she was happy with that work as she treated the patients by herself. She pointed out to Devaney that Respondent charged those patients $20 for each of those visits and she said she was entitled to some additional compensation for TMJ work as that was not in her job duties when she was hired. Devaney's response was to tell her that she would be relieved of TMJ duties. Falcone became "very, very upset" at Devaney's taking away her TMJ function as she "didn't refuse to do anything." Falcone then "brought up the issue" of overtime pay. Devaney responded by banging her hand on the desk and she informed Falcone that she has no legal obligation to pay overtime as she has fought that matter out. Falcone stated that the employees are entitled to be paid for all overtime work and also that Devaney "is supposed to pay us a hundred percent for our uniforms." Devaney replied, "That's it Sandy. You're out of hand, you have an

attitude problem. I can't deal with you anymore . . . you can have two weeks or stay till the end of the day." Falcone asked if Devaney was firing her. Devaney responded that she was. Falcone left and returned later that day to appeal to Respondent's president, Dr. De Rario. He called Devaney in to hear her account. Devaney told De Rario that she fired Falcone "number one, because of [her] attitude . . . number two, because [she] refused to do periodontal assisting . . . number three because [she] demanded to be paid for TMJ therapy . . . number four . . . because she demanded to be paid for overtime . . . number five because [she] demanded to be paid for your uniforms." Falcone told De Rario that she never refused to perform periodontal assisting or demanded to be paid for TMJ work. De Rario excused Devaney, who left. De Rario then told Falcone that he has full faith in Devaney and he left. Devaney returned and accused Falcone of having undermined her by calling employees over the weekend. Falcone said she called them to try to work something out. Devaney kept "yelling and yelling" so Falcone left.

Devaney was called by General Counsel to testify pursuant to Rule 611(c) of the Federal Rules of Evidence." She acknowledged that she had no intention of discharging Falcone at the end of the meeting she had with Manrodt and Falcone on 10 October and that on 14 October several employees had told her that Falcone had discussed with them her dissatisfaction with Respondent's policy as to overtime hours and reimbursement for work uniforms. Devaney testified that she then spoke with Falcone and that Falcone told her that she, Falcone, was the spokesperson for the "front desk people" (i.e., the receptionists and other clerical employees) as they were afraid to confront Devaney themselves." Devaney's initial responses to the General Counsel's questions indicated that Falcone brought up the overtime and uniform reimbursement matters after she had been discharged. Her later response indicates that Falcone's references to those matters preceded her discharge. The chronology set out in her pretrial affidavit was quite detailed and reveals that Falcone's references to employee complaints about overtime pay and uniform reimbursement took place *before* Devaney discharged her. Devaney testified further that she discharged Falconein that interim because Falcone stated she could not perform periodontal duties and would not work for Respondent unless Respondent paid her $20 an hour for her TMJ work, paid her overtime pay, and reimburse her 100 percent for the cost of her uniforms. As to the meeting later that day with Dr. De Rario and Falcone, Devaney testified that De Rario called her into the meeting and asked her if she ever had made any personal comments about Falcone, not related to her work. When she denied doing so, De Rario told Falcone that Devaney's decision would stand and he left, according to Devaney.

Dr. De Rario did not testify.

In rebuttal, General Counsel recalled Falcone who testified without contradiction that Respondent bills $20 an hour for the TMJ work she performs. She denied ever telling Devaney she refused to do periodontal work or that she demanded $20-an-hour payment for TMJ work.

D. *Analysis*

I credit Falcone's testimony. Devaney's account would have me find that Falcone set forth a multipoint ultimatum on 14 October which gave Devaney no choice but to discharge Falcone." I find it highly improbable that a person of Falcone's demeanor would even think of presenting Devaney with any ultimatum." Devaney's account seems so unlikely that it is understandable why Dr. De Rario did not appear as a witness to offer corroboration of it. It is even more unlikely that Falcone would even suggest, let alone demand, that Respondent turn over to her its full payment for her TMJ work. Respondent contends that Falcone's testimony supports its contention that she had refused to perform periodontal work. The credited evidence discloses, however, that Falcone had asked Devaney to relieve her of that function, and that Devaney instead offered Falcone the opportunity to obtain a substitute whenever she was scheduled to assist the periodontist and that, when Devaney told her on 14 October she would take away her TMJ assignments, Falcone protested that she had never said she refused any assignment. In short, there is no probative evidence to support Respondent's assertion that Falcone had refused to perform periodontal duties.

In *Dayton Typographical Service*, 273 NLRB 1205 (1984), the Board held that an employee was engaged in protected concerted activity in protesting the employer's policy regarding overtime compensation, that the employer there was aware of that activity, and that the reason given for the employee's discharge was a pretext. The Board thus found that the discharge violated Section 8(a)(1) of the Act. As the instant case parallels that holding, I find that Respondent discharged Falcone because of her concerted protected activities and it thereby violated Section 8(a)(1).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has committed an unfair labor practice in violation of Section 8(a)(1) of the Act by having discharged employee Sandra Falcone because she engaged in activities protected by Section 7 of the Act.

The Remedy

Respondent having unlawfully discharged Sandra Falcone, I find it necessary to order it to offer her reinstatement and make her whole for lost earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Although the General Counsel had stated in the complaint in this case that she seeks as part of the remedy a visitatorial clause, the General Counsel did not pursue that request in her brief. I infer that such relief is no longer deemed warranted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Joseph De Rario, DMD, P.A., Oakhurst, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any of its employees because they engaged in protected concerted activities for their mutual aid and protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Sandra Falcone immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits she may have suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to anlayze the amount of backpay due under the terms of this Order.

(c) Remove from its files any reference to the discharge of Sandra Falcone, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(d) Post at its office in Oakhurst, New Jersey, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order, what steps the Respondent has aken to comply.

---

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

L. E. McGraw Construction, Inc. *and* Laborers Union Local No. 1130, affiliated with Laborers International Union of North America, AFL–CIO *and* Carpenters Local Union No. 1235, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 32–CD–98

10 April 1987

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

The charge in this Section 10(k) proceeding was filed 20 August 1986 by the Employer, alleging that the Respondent, Laborers Union Local No. 1130, affiliated with Laborers International Union of North America, AFL–CIO (Laborers Union), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Carpenters Local Union No. 1235, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Carpenters Union). The hearing was held 20 October 1986 before Hearing Officer David Dominguez.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a California corporation, with an office and place of business in Modesto, California, is engaged as a general contractor in the building and construction industry. It was undisputed and we find that during the past year, a representative period, the Employer purchased and received goods or services valued in excess of $50,000 directly from suppliers located outside the State of California. It is undisputed and we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. It is undisputed and we find that Laborers and Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In December 1985 the Employer entered into a contract to perform as general contractor over the construction of the Modesto Community Center Parking Garage. The Employer employs 12 carpenters to perform such duties as installing, assembling, setting, stripping, dismantling, and reusing concrete foundation forms. Apprentice carpenters size and pack timber and do general cleanup functions in addition to assisting journeymen carpenters with the foregoing duties.

The present dispute arose in August 1986. Business agents of the Laborers Union approached Larry E. McGraw, the president of the L.E. McGraw Construction Company, and stated that a portion of the work being performed by the carpenters on the Modesto Community Center Parking Garage Project was laborers' work and demanded that the work be assigned to its members. The work then being performed by the carpenters consisted of setting the forms into which the cement was poured, removing or "stripping" the forms which were designated to be moved to another location, and reinstalling the forms for the next cement pour. McGraw refused to assign the disputed work to the laborers. At that point, Richard Crispin, who had identified himself as a business representative of the Laborers Union, stated that if the Employer was refusing to assign the disputed work to members of the Laborers Union that the Employer was "not leaving us much choice except to picket the job." The jobsite was picketed by the Laborers Union from 20 August through 9 September 1986, at which time a preliminary injunction against the picketing was issued by the Federal district court in Fresno, California. One of the pickets, Amos Earl McElvanie, identified himself as a member of the Laborers Union, stated that his Union's business agent knew he was picketing this jobsite, and further stated that the reason he was picketing was because he wanted the Employer to assign the disputed work to members of the Laborers Union.

B. *Work in Dispute*

The disputed work consists of the fabrication, assembly, and/or installation of the wood and/or metal concrete foundation forms at the Modesto Community Center Parking Garage, 1101 9th Street, Modesto, California.[2]

[1] The Laborers Union and the Carpenters Union neither participated in the hearing nor filed posthearing briefs.

[2] Since no objection was made by any of the parties involved in this dispute, we adopt the description of the work in dispute set forth in the *Continued*

C. *Contentions of the Parties*

The Employer contends that the disputed work should be assigned to employees represented by the Carpenters Union, an intervenor in this case, because the Carpenters Union is certified as the collective-bargaining representative of its employees and because there exists a current collective-bargaining agreement between the Carpenters Union and the Employer. The Employer further argues that each of the factors which the Board considers in disputes of this nature weighs heavily in favor of such assignment to the employees represented by the Carpenters Union. In addition, the Employer requests an order awarding similar work in like projects to employees represented by the Carpenters Union, including any and all projects on which the Employer may now be working, or on which it may work, in any of the 46 counties covered by the collective-bargaining agreement to which it is signatory.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that there is no agreed-upon method for the voluntary adjustment of the dispute.

As noted above, in August 1986 business agents of the Laborers Union approached the Employer and demanded that the disputed work be assigned to its members. When the Employer refused to make such assignment, Richard Crispin, a business representative of the Laborers Union, threatened to picket the jobsite. Subsequently, the jobsite was picketed by the Laborers Union from 20 August through 9 September 1986. One of the pickets stated that he was picketing the jobsite because he wanted the Employer to assign the disputed work to the laborers and that his Union's business agents were aware of this conduct. Based on the foregoing, and the record as a whole, we find that reasonable cause exists to believe that the Laborers Union violated Section 8(b)(4)(D) of the Act.

There is no current agreed-upon method for the voluntary adjustment of the dispute to which all parties are bound. Accordingly, this dispute is properly before the Board for determination.

notice of hearing served on the parties. However, we note that the installation of the forms by the carpenters comprises a continuous process and necessarily entails stripping the forms so that they may be reused.

In addition to pouring the cement into the wooden forms, the cement masons may on occasion assist the carpenters in setting up the forms. There is no contention that any work performed by the cement masons is in dispute.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

It is undisputed that the employees of the Employer are represented either by the Carpenters Union or the Cement Masons Union, but are not represented by the Laborers Union. It is also undisputed that the Carpenters Union has been certified as the exclusive bargaining representative of the particular group of employees who are performing the disputed work. Moreover, it is undisputed that the carpenters are performing their work under a signed collective-bargaining agreement which for over 9-1/2 years has been interpreted by the parties thereto as covering the type of work which is in dispute.

The Laborers Union has never been a party to a collective-bargaining agreement with the Employer, nor have any of its members ever been employed by the Employer. We find that the Employer's collective-bargaining agreement with the Carpenters Union encompasses the disputed work. Accordingly, we conclude that the factors of certifications and collective-bargaining agreements favor the Employer's assignment.

2. Company preference and past practice

It is undisputed that the Employer has during the past 9-1/2 years used carpenters to perform the type of work in dispute. Furthermore, it is also uncontested that the Employer has never directly employed any members of the Laborers Union to perform the type of work in dispute or any other type of work. We therefore find that the Employer's past practice favors the assignment of the disputed work to employees represented by the Carpenters Union.

At the hearing, the Employer, through the testimony of its president, expressed its preference that the disputed work be awarded to its employees represented by the Carpenters Union. While we do not afford controlling weight to this factor, we find

that it tends to favor an award of the work in dispute to employees represented by Carpenters.

3. Area practice

The undisputed testimony of the Employer indicates that it is a common practice of construction companies on similar types of construction projects in the area in the State of California to assign work similar to that in dispute here to carpenters and not laborers. We therefore find that this factor tends to favor an award of the work in dispute to employees represented by the Carpenters Union.

4. Relative skills and safety

The undisputed testimony of the Employer indicates that the disputed work requires the skills of a carpenter, and that these skills are not possessed by laborers. Specifically, the testimony establishes that the Employer has trained the carpenters employed by it to set and strip forms. In this regard, the Employer testified that its carpenters have been employed by it for some years and are experienced working together as a unified crew. The uncontradicted testimony of the Employer also indicates that skill is required in dismantling the forms because 95 to 98 percent of them are reused.

Additionally, the Employer testified that safety is a factor it considers in assigning the work to employees represented by the Carpenters Union because the job requires the use of heavy tools which are typically not possessed by the members of the Laborers Union and which they are not authorized to use. We therefore find that the combined factors of relative skills and safety favor an award of the work in dispute to employees represented by Carpenters.

5. Economy and efficiency of operations

The Employer presented undisputed evidence that an award of the work in dispute to employees represented by Carpenters Union will result in greater flexibility in the utilization of its work force and in greater efficiency and economy of operations. As noted above, employees represented by the Carpenters Union have experience performing the work in dispute because in the past they have been assigned work similar to that in dispute. In addition, the disputed work is intermittent and when carpenters are not engaged in performing the disputed work, the Employer assigns related work to carpenters which it would be unable to assign to laborers. Accordingly, we find that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by the Carpenters Union.

6. Job impact

The Employer testified that if an award of the disputed work is made to employees represented by the Laborers Union, the Employer will be forced to lay off four carpenters. Accordingly, we find that the factor of job impact favors the Employer's assignment.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Carpenters Local Union No. 1235, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, are entitled to perform the work in dispute. We reach this conclusion relying on the facts that such an award is consistent with the Employer's current collective-bargaining agreement with the Carpenters Union; the employees represented by the Carpenters Union possess the requisite skills to perform such work and they can perform such work in a safe manner; such an award will result in greater economy and efficiency of operations and will not result in an adverse impact on jobs; the assignment is in accord with area practice; and it is consistent with the Employer's past practice and preference. In making this determination, we are awarding the work to employees represented by Carpenters Local Union No. 1235, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, not to that Union or its members. In consequence, we also find that Laborers Union Local No. 1130, affiliated with Laborers International Union of North America, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employer to assign the disputed work to employees it represents. The present determination is limited to the particular controversy which gave rise to this proceeding.[3]

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of L. E. McGraw Construction, Inc., who are currently represented by Carpenters Local Union No. 1235, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, are entitled to perform the fabrication, assembly, and/or installation of the wood and/or metal concrete foundation forms at the Modesto Community

[3] Since the facts do not demonstrate that the Laborers Union has a proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute, we deny the Employer's request to issue an award encompassing the geographical area of the 46 counties covered by the collective-bargaining agreement to which it is signatory.

Center Parking Garage at 1101 9th Street, Modesto, California.

2. Laborers Union Local No. 1130, affiliated with Laborers International Union of North America, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require L.E. McGraw Construction, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Laborers Union Local No. 1130, affiliated with Laborers International Union of North America, AFL–CIO shall notify the Regional Director for Region 32 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

ARA Services, Inc. *and* Communications Workers of America, AFL–CIO, Petitioner. Case 16–RC–8811

10 April 1987

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 12 November 1985 the Regional Director for Region 16 issued a Decision and Order in this proceeding in which he dismissed the instant petition based on his finding that jurisdiction should not be asserted over the Employer under the test set forth in *National Transportation Service*, 240 NLRB 565 (1979). In so doing, the Regional Director found that the relationship between the Employer and the Stephen F. Austin University,[1] a nonprofit educational institution operated by the State of Texas and exempt from the Board's jurisdiction, was such that the Employer did not exercise sufficient control over its employees' wages, hours, and working conditions to enable it to engage in meaningful bargaining with a labor organization.

In accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision, and a motion to remand and reopen the record for newly discovered evidence. The Board granted the Petitioner's request for review by unpublished order dated 24 March 1986,[2] and held in abeyance the Petitioner's motion to remand and reopen.

On 30 June the Board remanded the instant case to the Regional Director for further consideration consistent with its recently issued decisions in *ResCare, Inc.*[3] and *Long Stretch Youth Home*,[4] including, if necessary, a reopening of the record.[5] On 22 August, after the parties were afforded an opportunity to submit briefs on the issue, the Acting Regional Director issued a Supplemental Decision and Order reaffirming the findings and conclusions of the 12 November 1985 decision that jurisdiction should not be asserted over the Employer.

Thereafter, on 12 September, the Petitioner filed a timely request for review, contending that the Acting Regional Director erred in concluding that the control retained by the exempt entity over the essential terms and conditions of the Employer's employees is the type of direct economic control that precludes collective bargaining. By unpublished order dated 28 November, the Board[6] granted the Petitioner's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the entire record in this proceeding with respect to the issues under review and makes the following findings. In December 1984, the University was advised that state appropriations were going to be reduced, and it began looking for ways to increase revenue and reduce costs. It was determined that by contracting out food services formerly provided by the University itself (including the operation of two cafeterias, a catering service, and a banquet hall), a substantial savings would be realized. Bids were solicited and bidders were interviewed by a food service committee consisting of University administrators, faculty, and students.

The choice was narrowed to two companies, including the Employer, and these bidders were informed that certain benefits must be included in the bids as a result of a consent decree entered into between the University and members of a Federal class action suit alleging that the University violated Title VII of the Civil Rights Act of 1964.[7] Most of the food service workers were included as members of the class. To satisfy the University's obligations under the consent decree, the University required the bidders to agree to offer employment to all the then-current University food service employees at salaries equal to or greater than those they were receiving from the University, to attempt to accomplish any reduction in current staff by attrition rather than layoff, and to offer current employees a benefit package specified by the University. It was explicitly acknowledged, however, that the successful bidder would possess the right to terminate any employee for cause.

The benefit package mandated by the University included the same benefits (holidays, sick leave, and vacation policies) the University had provided, as well as the payment of a fixed percentage of Social Security taxes for all employees working in excess of 20 hours per week, the contribution of up to $85 per month to each employee's health and life insurance plan (coverage comparable to the University's plan), and the offer of a retirement

[1] Hereinafter referred to as "the University."

[2] All dates are in 1986 unless otherwise noted.

[3] 280 NLRB 670 (1986) (Member Stephens concurring and dissenting).

[4] 280 NLRB 678 (1986) (Chairman Dotson dissenting; Member Stephens concurring).

[5] The Petitioner's motion to remand and reopen was referred to the Regional Director in the Board's remand. Both the Petitioner and the Employer subsequently notified the Region that they did not desire a reopening of the hearing, and both filed supplemental briefs which were considered by the Acting Regional Director.

[6] Chairman Dotson and Members Johansen, Babson, and Stephens.

[7] *Annie M. Carpenter v. Stephen F. Austin State University*, Civil Action No. TY–74–214–CA (E.D. Tex.), consent decree filed 28 April 1984.

program similar to that of the Teachers Retirement System of Texas, with payment of a specified percentage of the cost of such a program for each employee into an independently supervised retirement plan. The University also required that the successful bidder carry workers' compensation insurance and stated amounts of public liability and property damage insurance.

The University and the Employer executed a letter of agreement on 11 July 1985, and the Employer took over the University's food service operations in August 1985. At the time of the hearing in this case (October 1985), a formal contract between the parties was in effect, but had not yet been executed. The University specifies the hours of operation for the cafeterias and requires that certain types and quality of food be served. In addition, it reserves the right to approve or disapprove the Employer's selection of a food service manager, and the record shows that the University took an active role in interviewing applicants for that position, rejecting at least three before Douglas Goade was selected. In addition, the Employer utilizes University offices, telephones, appliances, and kitchen utensils; does not pay rent for any of the facilities; and requires that its employees adhere to the University's general employment rules and personal conduct rules.

The Acting Regional Director, after applying *Res-Care* and *Long Stretch*, concluded that "the control of employee wages and other benefits is more closely allied to that present in *Res-Care* than *Long Stretch*." Thus, he affirmed the previous order dismissing the petition. Contrary to the Acting Regional Director, we find that it would effectuate the purposes and policies of the Act to assert jurisdiction over the Employer.

In *Res-Care*, the Board reaffirmed the basic twofold inquiry enunciated in *National Transportation Service*,[8] for determining when assertion of jurisdiction over an employer providing services to or for an exempt entity is appropriate. Further, the Board stated that henceforth it would examine not only the control over essential terms and conditions retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer is capable of engaging in meaningful collective bargaining.

The Board concluded in *Res-Care* that it was the exempt entity (the Department of Labor) that, in every sense, retained the ultimate discretion for setting wage and benefit levels; thus, the exempt entity effectively precluded the employer from engaging in collective bargaining. Although the employer initially set the wage and benefit levels for each job classification in its operating budget, the Board noted that the budget required approval by the exempt entity and, once approved, became the basis for the contract price. In addition, the employer was required to obtain approval from the exempt entity of the wage ranges to be paid to the employer's employees, including a maximum for each classification, and the substantive terms of several employee benefits. The contract specifically provided that any proposed changes in the approved wage ranges or fringe benefit plans had to be submitted to the exempt entity for approval, along with any proposed changes in the staff manning table, labor grade schedule, or salary schedule.

In the instant case, the Acting Regional Director found that the University controls the base wages and benefits of all ex-University employees employed by the Employer, but that it does not exercise similar controls over new hires. However, he found no indication that the Employer will be in a position to hire new employees or to raise wages and fringe benefits of its current employees above the level mandated by the University. Thus, he noted that the food service operations were overstaffed when the Employer initiated its operations, and, therefore, there were no existing plans to hire new employees in the foreseeable future. He also noted that the base wages set by the University were higher than similar industry wages in the geographical area. Accordingly, he concluded that the Employer does not sufficiently control the employment conditions of its employees to enable it to engage in meaningful bargaining.

We disagree with the Acting Regional Director's conclusion. As the record clearly shows, there are no line-by-line budgetary controls imposed upon the Employer by the University, and there are no limitations or controls upon any expenditures by the Employer. Moreover, the circumstances under which the Employer agreed to offer employment to all then-current food service employees (at wages equal to or better than their current wages), as well as the "one-time only" benefit package it agreed to offer them, in no way prevents the Employer from exercising its discretion in these areas in the future, as both the Employer's food service manager and the University's general counsel testified. Thus, the initial wages and all amounts specifically set forth in the benefit package are "minimums," not maximums, and no one disputes that

[8] In *National Transportation Service*, the Board majority stated that the inquiry is "whether the employer itself meets the definition of 'employer' in Section 2(2) of the Act and, if so . . . whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." 240 NLRB at 565.

the Employer is free to pay more than the minimum wage mandated by the parties' agreement to ex-University employees or to any new employees it may hire, to add additional holidays and other benefits, or to offer other retirement options. Further, we note that although the Acting Regional Director speculated that the Employer most likely will not be in a position to hire any new employees for some time, the record contains testimony indicating that the Employer already may have done so.

In this case, we find that the exempt entity does not exercise such control over the Employer's labor relations policies as would oust the Employer of the final say over decisions affecting the "core group of 'basic bargaining subjects,'" and thereby prohibit meaningful bargaining. *Res-Care*, supra, slip op. at 12. Unlike the situation in *Res-Care*, minimum guidelines mandated by the University in order to comply with the consent decree are merely that—"guidelines." The Employer is free to determine for itself any increases in wages and/or benefits afforded ex-University employees, so long as they satisfy the specified minimums, and may establish and modify wages and benefits paid to its other employees without any limitations whatsoever. It is clear that these initial limitations imposed by the University on the Employer are designed to ensure that the obligations agreed to by the University in the consent decree are met, even though it has chosen to contract out the food service operation.

Based on the above, we find that the minimum guidelines imposed by the University do not affect the Employer's ultimate discretion over wage and benefit levels. *Long Stretch Youth Home*, supra, slip op. at 11. Indeed, the limitations imposed by the minimum guidelines constitute an even lesser constraint on the Employer's ability to engage in meaningful collective bargaining than was present in *Long Stretch*. We therefore conclude that the Employer retains substantial control over all economic matters which are central to the employer-employee relationship and which enable it to engage in meaningful collective bargaining, and that it will effectuate the purposes of the Act to assert jurisdiction herein. Accordingly, the Acting Regional Director's Supplemental Decision and Order is reversed, and we shall reinstate the petition and remand the proceeding to the Regional Director for further appropriate action.

ORDER

The petition in Case 16–RC–8811 is reinstated and remanded to the Regional Director for appropriate action.

Laborers' International Union of North America, AFL–CIO, Local 22 *and* Associated General Contractors of Massachusetts, Inc. and Perini Corporation *and* United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 218. Case 1–CD–759–1

10 April 1987

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

The charge in this Section 10(k) proceeding was filed on 30 October 1985 by Perini Corporation (Perini) and the Associated General Contractors of Massachusetts, Inc. (AGC). The charge alleges that the Respondent, Laborers Local 22, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Perini and its subcontractor Anastasi Brothers Corporation (Anastasi) to assign certain work to employees it represents rather than to employees represented by Carpenters Local 218. The hearing was held 10 March 1986 before Hearing Officer Robert A. Pulcini.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The AGC is an association which represents employers engaged in the building construction industry. Perini is a member of the AGC. Perini, a Massachusetts corporation with its principal place of business in Framingham, Massachusetts, is a general contractor in the building construction industry. Annually Perini receives goods valued in excess of $50,000 directly from points located outside the State of Massachusetts. Anastasi, a Pennsylvania corporation with its principal place of business in Marshfield, Massachusetts, is a masonry contractor in the building construction industry. It annually receives goods valued in excess of $50,000 directly from points located outside the State of Massachusetts.

The parties stipulated, and we find, that Perini and Anastasi are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers Local 22 and Carpenters Local 218 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

At all pertinent times, Perini, as a member of the AGC, and Carpenters Local 218 were parties to a collective-bargaining agreement which designated certain work, including the erecting and dismantling of all scaffolding for all trades, as being within the jurisdiction of the Carpenters. The agreement also required that Perini would not subcontract any work encompassed in the agreement to a subcontractor who was not a party to a collective-bargaining agreement with the Carpenters.

Perini, as the general contractor for the construction of the Charlestown Condominium Project in Charlestown, Massachusetts, subcontracted the project's masonry work to Anastasi. The subcontracted work included the erecting and dismantling of pipe scaffolding. Anastasi, who does not employ carpenters, is not a party to a collective-bargaining agreement with the Carpenters. It is, however, signatory to the AGC's contract with the Laborers, which describes the erecting and removal of all scaffolds as being within the jurisdiction of the Laborers.

Prior to the commencement of the scaffolding work on this project in June 1985,[2] Walter Chipman, a Carpenters Local 218 official, met at the jobsite with Perini's superintendent, O'Rourke. Chipman told O'Rourke that the scaffolding work belonged to the carpenters and that if Perini assigned it to Anastasi, the Carpenters would pursue the matter as a subcontracting violation and would not let carpenters work on the scaffold. Thereafter, Local 218's business agent, Green, requested that a meeting be set up at the jobsite to discuss the subcontracting of the work to Anastasi. The meeting took place around 3 July. In attendance were Chipman, Green, Perini's director of personnel Gross, Project Manager David Kibler, and Charles Schumb of the AGC. At that meeting, Local 218 representatives asserted that the scaffolding work belonged to the carpenters and that in their estimation the subcontracting of it to Anastasi was a violation of the subcontracting clause. Chipman and Green added that they would do what they had to do to protect their work. As noted, the scaffolding work commenced in June and it was erected and dismantled by Anastasi employees. As of the date of the hearing, the work was nearly completed.

[1] The parties stipulated that the transcript developed in *Laborers Local 223 (Anastasi Bros. Corp.)*, 272 NLRB 860 (1984), should be incorporated into the present proceeding.

[2] Hereafter, all dates refer to 1985.

Notwithstanding Chipman's earlier remarks, the carpenters did not refuse to work off the scaffolding. In the meantime, however, around mid-July, Local 218 filed a grievance against Perini concerning its subcontracting of the scaffolding work. In October, Gross learned that an arbitrator had ruled that Blount Brothers Corporation had breached its contract with another local of the Carpenters by subcontracting scaffolding work to a subcontrator who did not have an agreement with the Carpenters. Upon learning this, Gross became concerned because Local 218's pending grievance against Perini involved a similar dispute. Gross then contacted Lou Mandarini, the business agent for Laborers Local 22, to discuss the impact of the Blount arbitration award on the Charlestown project. Gross asked Mandarini to attend a meeting with Gross and a representative of the Carpenters to see if an accommodation, such as a composite crew or an adjusted work assignment, could be worked out. Mandarini said that he would not attend a meeting and that it was his Union's work and, if Perini wished to change the assignment, he would not supply any laborers at all to the project. Gross testified that if the laborers were pulled from the job it would, in essence, be shut down. Thereafter, Perini did not ask Anastasi to use carpenters on the scaffolding work and no laborers were withdrawn from the jobsite.

On 30 October and 15 November, respectively, Perini and AGC filed a charge and amended charge alleging that Laborers Local 22 violated Section 8(b)(4)(D). They filed a similar charge 30 October alleging that Carpenters Local 218 had also violated Section 8(b)(4)(D). This latter charge, however, was subsequently withdrawn.

B. *Work in Dispute*

The disputed work involves the erecting and dismantling of pipe scaffolding at the Charlestown Condominium Project in Charlestown, Massachusetts.

C. *Contentions of the Parties*

Perini and AGC contend that the disputed work was properly assigned to employees represented by the Laborers based on the Laborers' collective-bargaining agreements with both Perini and Anastasi, company practice, area practice, economy and efficiency of operation, skills, and safety. They further contend that a broad award is warranted covering the geographic area encompassed by the Boston District Council of Carpenters' agreement with AGC.

Carpenters Local 218 contends that no jurisdictional dispute exists. It argues that it is not claiming the disputed work but is merely pursuing a grievance seeking a declaration by an arbitrator that the subcontracting clause of its agreement with Perini has been violated. Local 218 contends that this conduct is not tantamount to a demand for the work because Local 218 has not sought any backpay remedy or money damages for breach of the collective-bargaining agreement.

At the hearing, Laborers Local 22 took the position that there is a viable jurisdictional dispute over the assignment of the work and that Local 218's attempted disclaimer at the hearing was ineffective.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

In October, Laborers Local 22 threatened not to supply any laborers to the project if the disputed work were reassigned to employees represented by Local 218. Further, the parties have stipulated that there exists no agreed-on method for the resolution of this dispute. We therefore find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-on method of voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.[3]

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

[3] As noted, in May, Carpenters Local 218 threatened to refuse to permit carpenters to work on the scaffolding at the Charlestown Condominium Project for the purpose of forcing Perini to assign the disputed work to employees represented by Carpenters. Carpenters, in July, later threatened to do what they had to do to protect their claim to the work. Carpenters Local 218 now indicates that it has disclaimed the work and contends that therefore no jurisdictional dispute exists. We find that Carpenters Local 218's attempted disclaimer of the work is not an effective renunciation which resolves the jurisdictional dispute. We note that Local 218's attempted disclaimer was first asserted at the hearing when the disputed work was almost completed. See, e.g., *Laborers Local 910 (Brockway Glass Co.)*, 226 NLRB 142, 143 (1976).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There is no evidence that the Board has certified either Carpenters Local 218 or Laborers Local 22 as the collective-bargaining representative for any of the employees involved herein. As noted, the Laborers, through the AGC, has an agreement with Anastasi which describes, at Appendix A, the "Erection, planking and removal of all scaffolds for lathers, plasterers, bricklayers, masons and other construction trades crafts. Building, planking or installation and removal of all staging, swinging and hanging scaffolds, including maintenance thereof" as being within the jurisdiction of the Laborers. The Carpenters does not have an agreement with Anastasi. Although Carpenters does have an agreement with the general contractor, Perini, that agreement is not germane to the instant work dispute. That is so because it is Anastasi, not Perini, that is the employer for the purposes of deciding the work dispute. In this regard, it is well settled that it is the company that ultimately controls and makes the job assignment that is deemed to be the employer. *Laborers Local 223 (Anastasi Bros. Corp.)*, supra, 272 NLRB at 862–863. In the present case, it is Anastasi who assigned the disputed work, and it is Anastasi that is the properly designated employer for the purpose of determining the award of the disputed work. Accordingly, because the Laborers have an agreement with Anastasi which indicates that the scaffolding work is under the jurisdiction of the Laborers, while the Carpenters have no agreement with Anastasi, we find that this factor favors an award of the disputed work to the employees represented by Laborers Local 22.

2. Company preference and past practice

Anastasi has assigned the disputed work to employees represented by Laborers Local 22 and is satisfied with their performance. In addition, Anastasi has had a past practice of assigning scaffolding work on other projects to employees represented by Laborers. Anastasi does not employ carpenters and always employs laborers to perform scaffolding work. Accordingly, we find that these factors favor an award of the disputed work to the employees represented by Laborers Local 22.

3. Relative skills

Anastasi's field superintendent, Michael Sneel, testified that the laborers skillfully and safely erect the scaffolding and that he is satisfied with their expertise. Sneel also testified that, in his experience, carpenters are insufficiently skilled and experienced to assist the hoisting crews in unloading and dismantling the scaffolding. Accordingly, on this record, we find that this factor favors an award of the disputed work to the employees represented by Laborers Local 22.

4. Economy and efficiency of operations

The laborers perform a variety of duties at the jobsite in addition to their duties in erecting and dismantling the scaffolding. If Anastasi were directed to assign the disputed work to carpenters, Anastasi would not be able to lay off any laborers and the laborers would have periods of idle time resulting from their not having the responsibility for the scaffolding. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Laborers Local 22.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Laborers Local 22 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between Anastasi and the Laborers; company preference and past practice; relative skills; and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Laborers Local 22, not to that Union or its members.

Scope of Award

Perini and the AGC request that the Board issue a broad award covering the entire geographic area encompassed by the Boston District Council of Carpenters' agreement with the AGC. Perini and the AGC argue that this is necessary to avoid the recurrence of similar work disputes between the Carpenters and the Laborers which entail work stoppages and threatened work stoppages. Perini and the AGC point out that the Board has previously considered two virtually identical disputes and determined that the work in dispute there be awarded to employees represented by the Laborers.[4] They further argue that the constituent locals of the Boston District Council of Carpenters have continued to claim the work through the use of allegedly unlawful means and that Laborers' local unions within the geographic area of the Boston District Council of Carpenters are also intent on threatening or engaging in work stoppages over similar disputed work.

[4] *Laborers Local 223 (Turner Construction Co.)*, 277 NLRB 99 (1985); *Laborers Local 223 (Anastasi Bros.)*, supra.

We conclude that the issuance of a broad award would be inappropriate and we shall limit our determination to the particular controversy that prompted the instant proceeding. In this regard, we note that there are two prerequisites for a broad, areawide award. First, there must be evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur. Second, there must be evidence demonstrating that the *charged party* has a proclivity to engage in unlawful conduct in order to obtain work similar to the work in dispute. *Iron Workers Local 433 (Crescent Corp.)*, 277 NLRB 670 (1985); *Electrical Workers IBEW Local 104 (Standard Sign)*, 248 NLRB 1144 (1980). In the present case, Laborers Local 22, not Carpenters Local 218, is the charged party. Finally, we note that in *Anastasi Bros.*, supra, there was no allegation of unlawful conduct by Laborers Local 22. In *Turner Construction Co.*, supra, Laborers Local 22 was not a party and was not alleged to have engaged in unlawful conduct in connection with that dispute. Since there is no showing of a proclivity of the charged party to engage in unlawful conduct to obtain work similar to the disputed work, we find insufficient grounds to issue a broad award, and we limit our determination accordingly.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Anastasi Brothers Corporation, represented by Laborers' International Union of North America, AFL–CIO, Local 22 are entitled to perform the erecting and dismantling of pipe scaffolding at the Charlestown Condominium Project in Charlestown, Massachusetts.

Jhirmack Enterprises *and* Sharron Kay Allison.
Case 20–CA–16935

13 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 9 March 1983 Administrative Law Judge William L. Schmidt issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel filed a letter in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, brief, and letter and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Jhirmack Enterprises, Redding, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The judge issued an errata to his decision on 18 March 1983.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In finding Allison's discharge to be unlawful, we rely also on the fact that her discharge was based, in part, on an unlawful disciplinary warning she was given approximately 12 days before her discharge. This fact is evidenced by the discharge form prepared by the Respondent, and quoted in the attached decision, that Allison's discharge was "based on her past record of aggravating situations" and that she had been "counseled repeatedly."

Members Johansen and Babson agree with the judge that Allison was engaged in a fundamental form of protected concerted activity when she advised employee Ramsey, in response to his inquiry, that some employees had complained to management at the attitude survey meeting about his slow job performance. The employee complaints were prompted by their concern that Ramsey's performance adversely affected their chances of winning the weekly production award and increased the possibility of overtime work. Allison's purpose in relaying the complaints to Ramsey was to encourage him to take corrective action to protect his job. Thus, they find that Allison's conduct was clearly undertaken for the mutual aid and protection of a fellow employee and therefore constituted actual concerted activity. They additionally find that Allison's conversation with Ramsey constituted a logical outgrowth of the concerted complaints of other employees about Ramsey's job performance and a continuation of that earlier protected concerted activity. See *JMC Transport*, 272 NLRB 545 fn. 2 (1984), and *Dayton Typographical Service*, 273 NLRB 1205 (1984), enfd. in relevant part 778 F.2d 1188 (6th Cir. 1985).

CHAIRMAN DOTSON, concurring.

I concur in my colleagues' finding that the Respondent violated Section 8(a)(1) of the Act by discharging employee Sharon Kay Allison because of her protected concerted activity. Unlike my colleagues, however, I find an adoption of the judge's decision inadequate to provide the necessary rationale for the finding of a violation.

The record reveals that at a February 1982[1] meeting of swing-shift packaging line employees with several of the Respondent's management officials, a discussion ensued concerning the inefficiency of packaging line mechanic Dan Ramsey. Ramsey's work affected the other line employees because if he was slow in repairing line malfunctions, the other employees could be required to work overtime on Saturday to meet production quotas and could fail to win the Respondent's award of free pizza at lunchtime to the week's most productive packaging line.

Following this meeting, Ramsey, who had not attended the meeting, had a conversation with Allison that resulted in Allison's discharge. At the hearing Allison and Ramsey presented different versions of this conversation. According to Allison, Ramsey approached her and asked if she had been at the meeting. When Allison said yes, Ramsey asked if anything had been said about him. Allison asked why, and he said that he had heard "the women were talking him down." Allison responded, "Yes. They did. Uh, they said you were pretty slow on the machines . . . . Don't get mad about it . . . . Just get in there and show the girls that, you know, that you're not slow, that you can do it."

According to Ramsey, Allison initiated the conversation about the meeting, told him that the employees talked about his work performance about "how bad it was, how slow you was," and then identified the two employees who had been the most vocal against Ramsey. It is undisputed that Ramsey, who was upset by what Allison had told him, spoke to Joyce Delgado, a quality control employee, about his conversation with Allison. Subsequently, Supervisor Jim Hay learned of the conversation and informed Plant Manager John Ruyle.

After conferring with Ramsey and several other employees,[2] Hay and Ruyle reported the incident to Personnel Manager Robert Honaker, who decided to discharge Allison. On 10 February Hay informed Allison of her discharge.

The Respondent admits, and the judge found, that Allison's discharge was motivated by her con-

[1] All dates are in 1982.

[2] Neither Hay nor Ruyle spoke with Allison about the incident prior to the discharge decision.

versation with Ramsey.[3] The Respondent contends, however, that the conversation did not constitute protected concerted activity because Allison, on her own initiative, informed Ramsey that he had been criticized by fellow employees, thereby breaching the confidentiality of the 5 February meeting and deliberately undermining the morale of Ramsey, Dionne Alger,[4] and other employees.

The Respondent's contention is supportable only if its witnesses are credited. The judge, however, discredited the Respondent's witnesses, and I, like my colleagues, will not disturb these credibility findings. See *Standard Dry Wall Products*, 188 F.2d 362 (3d Cir. 1951). Thus, the judge found that the Respondent did not impose a "general gag rule" concerning the discussion at the 5 February meeting. Further, the judge, crediting Allison's version of her conversation with Ramsey, rejected the Respondent's contention that Allison deliberately intended to hurt Ramsey by revealing that he had been the subject of discussion at the meeting. Rather, the judge found that Allison's "primary purpose in responding to the inquiry which Ramsey initiated was to confirm to him that adverse comments had been made to management about his work and to encourage him to take corrective action."

Based on this finding, I conclude that Allison's remarks to Ramsey constituted actual concerted activity.[5] Thus, the conversation consisted of Ramsey seeking information from Allison in an attempt to protect his job and Allison responding with the requested information and with words of encouragement to Ramsey to work faster and thereby protect his job. Such an interaction of two employees is actual concerted activity for "mutual aid or protection" clearly envisioned within Section 7, and therefore a discharge motivated by such activity violates Section 8(a)(1).

The inquiry, however, cannot stop at this juncture. The Respondent established through the testimony of its witnesses that it discharged Allison because of its good-faith belief that she had engaged in misconduct, namely, that she had breached the rule of confidentiality imposed at the 5 February meeting and that she deliberately inflicted emotional harm on Ramsey. To establish a violation under these circumstances, the General Counsel must prove that Allison did not, in fact, engage in such misconduct. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *Rubin Bros. Footwear*, 99 NLRB 610 (1952).

The General Counsel in this case met this burden. The General Counsel's witnesses testified that the events did not occur as the Respondent envisioned and that Allison was not guilty of any misconduct in the course of this concerted activity. As a result she did not lose the protection of Section 7 of the Act. As noted above, the judge credited the General Counsel's witnesses. Under these circumstances, the General Counsel established, and I find, that the Respondent violated Section 8(a)(1) of the Act by discharging Allison for her protected concerted activity.

Maxine Auerbach, Esq., for the General Counsel.
Ray Vetterlein (Labor Relations Associates), of Brisbane, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. This matter was heard by me on December 9 and 10, 1982,[1] at Redding, California. The proceeding is based on a charge filed against Jhirmack Enterprises (Respondent) by Sharron Kay Allison (Allison) on March 2, and a complaint issued by the Regional Director for Region 20 of the National Labor Relations Board (the NLRB) alleging that Allison's February 10 discharge violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent's timely answer denies that the Respondent engaged in the alleged unfair labor practices.

On the entire record,[2] my observation of the demeanor of the witnesses, and my careful consideration of the posthearing briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and the answer admits, that the Respondent, a corporation, was engaged in the manufacture of personal care products at Redding, California, and that during the calendar year preceding the issuance of the complaint the Respondent sold and shipped products, goods, and materials valued in excess of $50,000 directly to customers located outside the State of California. On the basis of the foregoing, I find in accord with a

[3] I am puzzled by my colleagues' statement that in finding Allison's discharge to be unlawful, they also rely "on the fact that her discharge was based, in part, on an unlawful disciplinary warning she was given approximately 12 days before her discharge." Although I agree with their adoption of the judge's finding that the prior warning was unlawful, the judge found no connection between the warning and the discharge.

[4] According to the Respondent, Alger was upset by Allison's disclosure to Ramsey that Alger had been highly critical of Ramsey at the 5 February meeting.

[5] In light of this conclusion, it is unnecessary to apply the *Meyers* definition of when the act of a single employee is or is not concerted. See *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986). I note, however, my disagreement with my colleagues' "logical outgrowth" theory. See my dissenting opinion in *Every Woman's Place*, 282 NLRB 413 (1986).

[1] Where not specified, dates refer to the 1982 calendar year.

[2] The transcript and all formal papers are corrected, sua sponte, to reflect the proper spelling of Allison's given name as reflected by her signature on the original charge.

further allegation in the complaint that was admitted by Respondent that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that it would effectuate the purposes of the Act for the Board to assert jurisdiction over the labor dispute involved here.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Relevant Facts*

The complaint, as amended, alleges that Allison was discharged in violation of Section 8(a)(1) of the Act on February 10 and that she was unlawfully reprimanded on January 29. The answer admits that Allison was discharged on the aforementioned date but the Respondent argues forcefully that her discharge was for cause. It is undisputed that Allison was discharged because she spoke to a packaging line mechanic, Dan Ramsey, about matters involving Ramsey that were discussed at a company attitude meeting on February 5. Essentially the issue in the discharge aspect of the case boils down to whether Allison's conduct in speaking with Ramsey was protected conduct or was, as the Respondent claims, an aggressive verbal assault by Allison on Ramsey which was not protected by the Act.

Allison was hired by the Respondent as a packer on May 11, 1981, and she remained in that position until her discharge. At the times relevant here Allison was working on the swing shift. The scheduled worktime for that shift is from 3:15 p.m. to 12:15 a.m. The shift supervisor for Allison's area was James Hay. The employees at the Redding plant are not represented by any labor organization.

The Respondent's personnel manager, Robert Honaker, testified that he perceived Allison as an instigator of trouble on her shift. Honaker's perception was grounded on complaints that Allison had made to the management that Shift Supervisor Hay on the swing shift packaging line had shown favoritism toward Joyce Lewis, a relatively junior employee in the department, by Hay's work assignments to Lewis and by Lewis' selection as a leadlady.[3]

Other employees in the department shared Allison's complaint and it was sufficiently vocalized so as to result in an admonition to Hay from his superior when Hay received his annual evaluation in November 1981, to avoid showing favoritism. However, in Allison's view, Hay's favoritism toward Lewis was not discontinued and in mid-January 1982, Allison went to Plant Manager John Ruyle's office where she spoke with him about what she perceived as Hay's continuing display of favoritism toward Lewis.[4] In addition, Allison spoke with other employees in the department and urged them to voice their displeasure of Hay's activities to Ruyle also.

Apparently the Respondent's officials were growing weary of Allison's complaints about Hay and Lewis. Allison was summoned to Ruyle's office on January 29 where she was verbally reprimanded by Ruyle in Hay's presence for "causing trouble in packaging with one of the employees." In addition, a written reprimand was placed in Allison's personnel file. That reprimand recited that the interview with Allison was initiated because of "bad feeling and irritation growing on shift which was was felt to be fed by Kay." Hay provided further details for the written reprimand that read as follows:

> Thru observation and comments it was felt that *Kay was stirring up ill feelings among herself and other packagers toward Joyce Lewis.* She was confronted with this and claimed it not to be true. *I was aware that Kay and other packers felt favoritism was being shown toward Joyce Lewis and I told them I would review the situation but I did not feel that Kay was leaving it at that.* She denied saying anything that would have caused trouble and felt she was being singled out because of her past record. It was suggested that she just do her own job and only worry about herself. Will review situation in 30 days. [Emphasis added.]

The Respondent's brief summarized its impression of Allison as a "disturbing influence" who was involved in a lot of agitation concerning how lead employees were selected, who was selected, whether overtime was mandatory, how overtime was assigned, and what job assignments were to be given "and so forth and so on." Respondent concedes that the employees "legally have a right to gripe" about the foregoing matters and that Allison was a "prime instigator in the griping." However, the critical issue from the Respondent's viewpoint was whether Allison's activities were, as the General Counsel in effect claims, for the mutual aid and benefit of employees or whether Allison's actions were, as the Respondent in effect claims, for other motives disruptive to production that are not protected. The Respondent is candid in its assertion that by the time the events of early February occurred, it was just plain tired of Allison's attitude.

On February 4 and 5, certain of the Respondent's managers conducted small group meetings with employees to report the results of an attitude survey that had been administered to employees in late 1981. Allison attended one of these meetings on February 5. The Respondent was represented by Vice President Robert Cox, Ruyle, and Honaker. There is a dispute whether employees were told that matters discussed in the meeting were to be treated as confidential and not discussed outside the meeting room or whether employees were invited to vocalize their complaints on the promise that they would be treated as confidential vis-a-vis the employees' supervisors who were not present for the attitude meetings.

---

[3] In addition, Allison had been vocal in her complaints about the Respondent's policy of making holiday and vacation payments to second- and third-shift employees on the basis of the hourly rate of pay for day-shift workers that did not include the shift differential.

[4] Allison's visit with Ruyle in January appeared to have resulted from the recent announcement that Lewis was going to become a leadlady. In discussing matters concerning lead employees with Allison and other employees, Respondent's officials appeared to regard lead personnel as a part of the "management team." However, there is insufficient evidence in this record to warrant the conclusion that the Respondent's lead employees are supervisors or agents within the meaning of the Act or managerial employees.

Allison testified that at the meeting she attended, employees received the following admonition:

> He [Cox] first wanted everyone to feel like you could say whatever you wanted to say. He said that this was a—more or less a gripe session than anything, uh, for us to let all of our angers out toward our supervisors, if there was any—anything that had to do with, uh, with the, uh . . . inside packaging conditions, uh, against other packers, anything, and we were all just supposed to tell everything the way it was and that there'd be nothing held against us and our jobs wouldn't be in jeopardy, that this [was] what this meeting was about. There had been too many gripes been brought, evidently, to the head of departments and they wanted to get everything out in the open, and so everybody could say whatever they had on their minds.

Several other employees testified about this matter. Sharon Brown testified that at the outset of the meeting, employees were told to "let it all hang out, all of our gripes." Brown said that no one told those in attendance that they could not talk among themselves about the meeting and that "[the meeting] was talk in the department from the time it began until the time it ended . . . it was just constant." Similar testimony was given by Christina Wolff. Ann Sjostron testified that she attended the same attitude meeting that Allison had attended and that after the meeting was over she thought "everybody was talking about it." Michelle Ramos testified that at the attitude meeting she attended, a company official, whose name she could not recall addressed the group for the purpose of inviting the employees to speak up about their gripes and to advise them that none of what they said would get back to their supervisors. Ramos said that nothing was said about employees talking among themselves about matters discussed at the attitude meeting and after she returned to work, she heard other employees (Wolff in particular) talking about what had been said in another of the attitude meetings. Honaker testified that he did not really expect the employees not to talk among themselves about matters that were discussed at the attitude meetings.

It is undisputed that in the course of the atttitude meeting that Allison attended there was a discussion about the speed and abilities of the packaging line mechanic, Dan Ramsey. Those who spoke up about Ramsey complained about his lack of speed in repairing the packaging line breakdowns and, as a consequence, the efficiency of the line was impaired by Ramsey's ability or lack thereof. Ramsey's work had a direct bearing on the work lives of the other packaging line employees. If Ramsey took too long to repair line malfunctions, the chances for the swing-shift packaging employees receiving the Company's free pizza award on Friday night would be greatly diminished.[5] And if a line was closed down for repair too long, there was always the possibility that Respondent would require the packaging line employees to work Saturday overtime in order to meet production quotes. In short, Ramsey's role had the potential of affecting all the packaging employees and there was a feeling among a significant group of employees that, at that particular time, Ramsey was slowing up the operation.[6]

It is undisputed that following the attitude meeting that Allison attended, she spoke to Ramsey (who had not attended the meeting) and apprised him of the complaints that had been made about him at the meeting. Allison's version of the manner in which her conversation with Ramsey arose and the substance of that conversation was as follows:

> A. I was working on the line that Dan was a mechanic on and he came over to me and he asked me that—if I had been to the meeting that was held that afternoon, and I told him yes, that I had been there. And he asked me if the—there had been anything said at the meeting about him. And I asked him "Why?" And he said he had heard that there was—the women were talking him down. And I said, "Yes." I said, "They did. Uh, they said that you were pretty slow on the machines." And I said, "Don't get mad about it." I said, "Just get in there and show the girls that, you know, that you're not slow, that can do it." And he says, "Okay." He said, "Thanks for telling me," and he left.
>
> Q. Why did you tell him?
>
> A. Because the things that was being said in the meeting about him, I felt like his job was in jeopardy. He's my friend. I like Dan. I feel sorry for him. He had a wife and two kids and jobs were hard to find. So I told him. And, uh—for that reason plus the reason that if it would speed him up, it's going to get our production out, for us, we won't have to work Saturdays, and we'll beat the day shifts and we'll get the pizza.[7]

Ramsey, who was still employed by the Respondent at the time of the hearing, was called as a witness by the Respondent to give his version of his February 5 exchange with Allison. According to Ramsey, he was going along the packaging line adjusting the torque on the capping machines. Before approaching the area where Allison was working, Ramsey had been in the area where Dee Alger worked and had been speaking with Alger as he was performing his job. Alger had been particularly vocal in the attitude meeting about Ramsey's deficiencies. When Ramsey approached Allison's work area, Ramsey said that Allison remarked: "I don't see how people can laugh and joke with you after what they said." Ramsey's testimony about the remainder of his conversation with Allison at this time was as follows:

[5] On Fridays, the Company treated the week's most productive packaging line to free pizza at lunchtime.

[6] Ramsey had worked for the Respondent for about 5 years at the time but only recently had been promoted to the line mechanic's job.

[7] Other testimony establishes that Allison had known Ramsey as a youth. Allison had been a personal friend of Ramsey's mother when she was living and often visited Ramsey's childhood home.

A. Okay. I was surprised and then she came out: "I'm going to tell you this as a friend that the girls and me was talking about your work performance, how bad it was, how slow you was." And then she made a statement like, "There is too [sic] girls especially who was doing all the talking."

Then I asked her who it was. She said Dee Alger and Faithhope [Castellanos].

Q. Anything further that you recollect about the conversation?

A. Just that right now. Kind of lapse my memory right now.

Ramsey testified that he was upset by what Allison had said to him and that it continued to bother him as he worked the remainder of the evening. According to Ramsey it was "an upsetting thing" to learn that his fellow workers did not believe that he was doing a good job.

Ramsey testified that later that evening he spoke to Joyce Delgado, a quality control employee, in Delgado's office, about the substance of Allison's conversation with him. Apparently, Delgado passed that information along to others. On Monday, February 8, Hay spoke to Ramsey about Allison's conversation with him. Alger also found out about Allison's conversation with Ramsey and, on Tuesday, February 9, she discussed the matter with Hay. Alger complained to Hay about Allison's action in speaking to Ramsey concerning those matters that she had raised about Ramsey at the attitude meeting. Hay testified that he set out to investigate Alger's allegation. His investigation consisted of asking Ramsey if Allison had talked to him and when Ramsey acknowledged that that was the case, Hay asked Ramsey to tell him what Allison had said. Hay did not provide any testimony with respect to Ramsey's response. Hay did testify that he next went to Ruyle with the information concerning the Allison-Ramsey conversation.

According to Allison, on Wednesday, February 10, Rosemary Lewis, the head lead employee on her shift, approached her about 6 p.m. and told her that Hay wanted to speak to her in the lunchroom. Allison complied and, when she arrived at the lunchroom and had seated herself, Hay began by saying, "Kay, you're terminated." Allison testified that the conversation continued as follows:

I asked him "Why? What did I do?" And he said, "You were talking. You're being terminated for talking." And I said, "I—that I didn't understand what he was talking about, you know, that there wasn't a rule that we couldn't talk." And he said, "I'm referring to the attitude meeting." He said, "You told Dan Ramsey what was said about him at the meeting." And I said, uh, "Yeah, I did. I—there was nothing at the meeting that said we couldn't talk to the other employees. The meeting stipulated that we could not—what we had to say at the meeting wasn't going to get back to you and we could say whatever we had to say about anything or anybody." And he said. "No, that you told Dan Ramsey what was said and you violated the confidentuality [sic] of an employee and you're terminated."

. . . .

A. And I said, "Well, then if you're going to terminate me for talking about the meeting, then you should go in and get everybody in the packaging room and terminate them because we were all talking about it at break and at lunch." And he said, "I'm not worried about the others. I'm worried about you."

Q. Did he give you any other reason for your termination?

A. No. He told me that he had told me at a prior meeting with John Ruyle and himself and me that he had warned me then to mind my own business and worry about Kay Allison, and he said I didn't do that, so I'm terminated.

Hay did not testify about the substance of the discharge conversation that he had with Allison on February 10.[8] However, the discharge form dated February 11 that Hay prepared is in evidence. On that form, Hay listed "violation of policy" and "inability to get along with fellow employees" as the bases for Allison's discharge. The handwritten details recite:

Breach of confidentially [sic] of attitude survey meeting and undermining morale and harmony of shift. Referring to meeting of Jan 29th 1982, main point that Kay was left with was "just worry about Kay Allison and no one else."

Incident—some girls in attitude meeting brought up ability of one of the mechanics on swing shift. That evening Kay took it upon herself to inform that mechanic (Dan Ramsey) of the girls' feelings. This lowered the self esteem and morale of Dan plus washed away the feeling of freedom the girls had to speak out at meeting without repercussions. This, based on her past record of aggravating situations and disrupting harmony, it was felt in the best interest of Jhirmack to terminate her. Kay's work ability was fine but she had been counseled repeatedly to only worry about herself and avoid confrontations. She failed to do this.

B. *Additional Findings and Conclusions*

Section 7 of the Act provides, inter alia, that:

Employees shall have the right . . . to engage in other concerted activities for the purpose of . . . mutual aid or protection . . . .

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer.

to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .

[8] Ramos testified that Hay told her a day or two later that Allison "got fired because she was talking when she wasn't supposed to be."

An employer is not at liberty to punish an employee by discharging her for engaging in concerted activities that Section 7 of the Act protects. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

The findings in section II,A, can lead to only one conclusion, namely, that Allison was discharged by Hay because she told Ramsey some of the other employees had complained about his work at the attitude meeting on February 5. Although Hay's written explanation on the Respondent's discharge form, Allison's version of the discharge conversation, and Ramos' testimony about Hay's postdischarge explanation for Allison's termination all suggest that Allison was fired because Hay believed that she had violated a confidentiality rule regarding the attitude meeting, the Respondent's brief all but abandoned that argument in favor of an assertion that Allison's purpose was to deliberately inflict deep emotional pain on Ramsey in order to retaliate against leadlady Faithhope Castellanos and employee Dee Alger.[9] Thus, the Respondent's brief asserts:

> What Ms. Allison willfully did to Mr. Ramsey is cruel, and hurtful, and in the Employer's viewpoint, much more serious than if she had walked up and struck Mr. Ramsey in the face.

In effect, the Respondent argues that Allison's actions were so destructive of employee morale as to merit her discharge. For these reasons, Respondent contends that Allison's disclosure was unprotected and that her discharge was for cause.

The Respondent's argument that Allison's underlying motive for informing Ramsey about the discussion at the attitude meeting that she attended was to retaliate against Castellanos and Alger is grounded on the testimony of leadlady Rosemary Lewis. According to Rosemary Lewis, Alger reported to her during the evening of February 5 that Ramsey was upset and would not speak with her. Lewis said that later that same evening Castellanos approached her and said that she *felt* that Allison told Ramsey about what had been said at the attitude meeting because Castellanos had directed Allison to load an entire skid of packages earlier that evening after Allison had, in effect, duped Alger into loading a whole skid (which would have involved doing half of Allison's work at that particular time).

At the outset, the Respondent's contention requires a credibility resolution favoring Ramsey's version of the exchange that he had with Allison on the evening of February 5. Ramsey was not a convincing witness. In addition, the General Counsel demonstrated on cross-examination that Ramsey had cooperated with the Respondent's prehearing preparation of its case against Allison in several significant respects. Moreover, in the prehearing affidavit provided by Ramsey to the General Counsel's investigating agent only a month after the relevant events, Ramsey did not indicate that Allison had told him that Alger and Castellanos were the individuals who had complained about him at the attitude meeting. Ramsey attempted to explain his recent recollection of this vital centerpiece to the Respondent's case by making a clumsy assertion that his recollection had improved by the time of the hearing, notwithstanding that at another point in his testimony, Ramsey acknowledged a "lapse" in his memory with respect to the February 5 conversation with Allison.

By contrast, Allison was a convincing witness who appeared to be making a sincere, earnest effort to truthfully relate the events to the best of her ability. However, Allison was insistent that the attitude meeting had occurred on February 3 and the Respondent asserts that Allison's error in this regard is a deliberate effort to cover up the fact that the whole incident was part of a plot by Allison to get even with Alger and Castellanos. I reject that argument. Allison's testimony on several matters was consistent with the available extrinsic evidence and the Respondent's evidence that Allison was angry with Alger and Castellanos over the loading of the skids is grounded solely on the hearsay testimony of Rosemary Lewis concerning Castellanos' speculation. Indeed, Castellanos was not even called to testify nor was her absence explained. This circumstance alone merits an adverse inference about the Respondent's contention. This is especially true where, as here, Alger was called as a witness and gave no indication that Allison exhibited or harbored any ill feelings over the loading of the skids as the Respondent contends. Accordingly, I find that Allison's error in her testimony about the date of the attitude meeting is an insignificant mistake and that, in general, Allison's testimony is as reliable as one could reasonably expect considering the passage of time. For these reasons, I have credited Allison's testimony where it conflicts with the testimony of the Respondent's witnesses.

In view of the foregoing, I reject the Respondent's contention that Allison set about to deliberately injure Ramsey by confirming the fact that there had been complaints about his job performance at the attitude meeting. Although it is very likely that Ramsey was disturbed by this news, especially in view of the limited time he had been working in the mechanic's position, the only fair conclusion from the record before me is that Ramsey's reaction was the product of the fragile human ego and not the handiwork of an evil woman scheming to avenge an affront by Castellanos. Allison's professed affinity for Ramsey resulting from her friendship with his deceased mother is a far more logical explanation for her motive in making the disclosures about the job performance crit-

[9] In any event, I am satisfied that there is no meritorious, factual, or legal basis justifying Allison's discharge on the ground that the matters discussed at the attitude meetings were confidential. Thus, it is my conclusion that Cox's remarks at the attitude meeting that Allison attended were intended as a promise by the officials present not to discuss the substance of employee remarks with the employees' supervisors rather than as a general gag rule. Such a finding is consistent with Honaker's testimony that the Respondent did not expect that employees would not discuss what occurred at the meeting after they left the meeting room and the testimony of several employees that there was widespread discussion of the meetings on the production floor. Moreover, in view of the ultimate finding here that Allison's true object was to respond to Ramsey's inquiry as to whether there had been criticism of his work and to encourage him to a better performance, I find that the Respondent's business need for such a prohibitive rule is insufficient to override Allison's right to make this type of disclosure to Ramsey in an effort to protect Ramsey's job. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *NLRB v. Washington Aluminum Co.*, supra; *American Hospital Assn.*, 230 NLRB 54 (1977); *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217 (1976).

icism that had been leveled at Ramsey than is the sinister explanation propounded by the Respondent. As I am satisfied that Allison's explanations of her motives in talking to Ramsey are truthful, I find that her primary purpose in responding to the inquiry that Ramsey initiated was to confirm to him that adverse comments had been made to management about his work and to encourage him to take corrective action. Viewed from this perspective, it is clear that Allison's discussion with Ramsey on February 5 was a fundamental form of concerted activity in aid of a fellow employee and, hence, it was conduct protected by Section 7 of the Act. *Bullocks*, 247 NLRB 257 (1980). And see *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). As it is undisputed that Allison was discharged as a direct consequence of that discussion with Ramsey, I find that her discharge violated Section 8(a)(1) of the Act.

In addition, it is concluded that as the written warning entered in Allison's personnel file following the January 29 disciplinary interview discloses that Respondent's officials had identified Allison as an "instigator" of employee complaints concerning Hay's alleged favoritism toward Joyce Lewis and, as the warning was issued for Allison's role concerning this complaint, the Respondent's disciplining of Allison on this occasion also violated Section 8(a)(1) of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section II, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the affirmative remedial action, it will be recommended that the Respondent be ordered to offer Allison immediate and full reinstatement to her former or substantially equivalent position of employment, discharging if necessary any individual hired after her termination, without prejudice to the seniority or other rights and privileges enjoyed by her prior to her February 10 discharge. It will be further recommended that the Respondent be ordered to remove from its records any reference to Allison's termination and her January 29 reprimand. *Sterling Sugars*, 261 NLRB 472 (1982). It will also be recommended that the Respondent be ordered to make Allison whole for the losses which she suffered as a result of her unlawful discharge. The amount of backpay due Allison shall be computed in the manner provided by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as provided by the Board in *Olympic Medical Corp.*, 250 NLRB 146 (1980), and *Florida Steel Corp.*, 231 NLRB 651 (1977). And see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Finally, it will be recommended that the Respondent be ordered to post the notice to employees attached hereto as an appendix for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Respondent's obligation to remedy the unfair labor practices found above.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. By confirming Dan Ramsey's inquiry as to whether there had been a criticism of his job performance at the Respondent's February 5, 1982, attitude meeting, and by complaining to management about supervisors favoring certain employees, Sharron Kay Allison was engaged in a form of concerted activities guaranteed to employees by Section 7 of the Act.

3. By discharging Sharron Kay Allison because she engaged in the activity specified in paragraph 2, above, involving Ramsey, and by placing a written warning in Sharron Kay Allison's personnel file following a disciplinary interview on January 29, 1982, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Jhirmack Enterprises, Redding, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or disciplining any employee for exercising rights guaranteed by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees because they choose to exercise the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to reinstate Sharron Kay Allison and make her whole in the manner specified in the remedy section of the decision.

(b) Remove from its files any reference to the discharge of Sharron Kay Allison on February 10, 1982, or the reprimand of Allison on January 29, 1982, and notify her in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against her.

---

[10] All outstanding motions inconsistent with the recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to a determination of the amount of backpay due under the terms of this Order, the propriety of any offer of reinstatement made to Sharron Kay Allison, and Respondent's compliance with, in order to comply with paragraph 2, subparagraph (b), of this Order.

(d) Post at its plant in Redding, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

The Act gives all employees the following rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or discipline any employees because they choose to exercise any of the rights that are guaranteed by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees because they choose to exercise the rights set forth above that are guaranteed by Section 7 of the National Labor Relatins Act.

WE WILL offer to reinstate Sharron Kay Allison to her former position, and WE WILL reimburse her for any losses resulting from her discharge on February 10, 1982. We are required to do this because the National Labor Relations Board found that we violated the law by discharging Sharron Kay Allison on February 10, 1982, for engaging in activities that are protected by the National Labor Relations Act.

WE WILL remove from the records of Sharron Kay Allison any written reports, notations, or memoranda reflecting her February 10, 1982 reprimand, and WE WILL notify her in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against her.

JHIRMACK ENTERPRISES

Millwright and Machinery Erectors Local Union 720, United Brotherhood of Carpenters and Joiners of America (National Maintenance Corporation and Tero-Technology) *and* Samie W. Ousley. Case 15–CB–3197

13 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 29 December 1986 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Millwright and Machinery Erectors, Local Union 720, United Brotherhood of Carpenters and Joiners of America, Baton Rouge, Louisiana, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Charlotte N. White, Esq., for the General Counsel.
Jerry L. Gardner, Jr., Esq. (Gardner, Robein & Healey), Metairie, Louisiana, for the Respondent.
Mr. Samie W. Ousley, appearing pro se.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. Samie W. Ousley (Ousley) filed a charge against Millwright and Machinery Erectors, Local Union 720, United Brotherhood of Carpenters and Joiners of America (Respondent or the Union) on 23 April 1986 and withdrew it on 22 May 1986.[1] Ousley filed the instant charge on 27 May, and complaint issued on 2 July. As amended on 26 September and as further amended at the hearing, it alleges that the Union failed and refused to refer Ousley for employment with National Maintenance Corporation (National Maintenance) on 15 and 16 March, and with Tero-Technology on 13 May, for arbitrary, invidious, discriminatory, and/or irrelevant considerations. Further, the complaint alleges, the Union by its business agent Joe Wase Bennett (Bennett) on 8 May during a union meeting solicited union members to inflict bodily injury on Ousley because the latter had filed an unfair labor practice charge against the Union, and to persuade Ousley to withdraw the charge. This conduct, the complaint alleges, is violative of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act).

A hearing was held before me on these matters in Baton Rouge, Louisiana, on 6 and 20 October. Thereafter, the General Counsel and the Respondent submitted briefs. On the entire record and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint and answer, as amended at the hearing, establish that National Maintenance and Tero-Technology are both Louisiana corporations with offices and places of business in Baton Rouge, Louisiana, that the former is engaged in the industrial contract maintenance business and the latter in the building and construction industry, that during the 12-month representative period preceding issuance of the complaint the corporations individually purchased and received goods and materials valued in excess of $50,000 shipped directly to their Dow Chemical and Borden Chemical jobsites, respectively, from points located outside the State of Louisiana. The pleadings further establish, and I find, that National Maintenance and Tero-Technology are, individually, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings further establish, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Exclusive Hiring Hall*

The exhibits and pleadings, as amended at the hearing, establish, and I find, that the Union, acting on its own behalf and through the Baton Rouge Building and Trade Council, and National Maintenance and Tero-Technology, each individually, have been parties to and/or abided by the provisions of collective-bargaining agreements pertaining to the Dow and Borden Chemical jobsites, respectively, and/or a practice in existence that provides, inter alia, for exclusive referral for employment of persons in millwright classifications from a hiring hall operated by the Union.

[1] Jt. Exhs. 8 and 9. All dates are in 1986 unless otherwise specified.

The Board has previously agreed with findings that describe the operating procedures of the hiring hall,[2] and that are reaffirmed by evidence in the instant proceeding. In summary, a job applicant's right to employment is established by his signing a master out-of-work list and being assigned a master list number, which he retains until he is referred to a job that lasts 5 or more days. After such employment, the applicant is assigned a new and higher master list number.

The Union's referral procedures require that each individual desiring employment must report "that morning" to the hiring hall and sign a "Day List" showing his or her name and master list or "registration" number.[3] However, the exhibits show that persons desiring employment in fact sign a *weekly* out-of-work list,[4] and Business Representative Bennett testified that a signature on Monday was good through the following Sunday.

The master list or registration numbers shown on the weekly out-of-work list are not in sequential order, and there are gaps between numbers—not all members with master list numbers put their names on the out-of-work list each week. The referral rules require that applicants must be referred for jobs in sequential order beginning with the lowest master list number.[5] However, an employer may request an individual on the master list by name and thus bypass other individuals with lower numbers.[6] When employer orders for employees are called in on weekends or after 10 a.m. on weekdays, the most recent out-of-work list is used to make referrals. When this list is exhausted, the master list is utilized.[7]

The complete procedure is more completely detailed in the record in a former proceeding. According to findings adopted by the Board, most millwrights sign the out-of-work list on Monday, and must be in the hall to be referred on that day. Union Business Representative Bennett or his staff prepares a separate list that "unscrambles" the out-of-work list, so that the master list numbers are in sequential order. Millwrights do not have to be in the hall from Tuesday through Friday, because Bennett calls them on the telephone. *Carpenters Local 720 (UMC of Louisiana)*, supra, 276 NLRB at 63.

[2] *Carpenters Local 720 (UMC of Louisiana)*, 276 NLRB 59 (1985), set aside on other grounds and remanded 798 F.2d 781 (5th Cir. 1986); *Carpenters Local 720 (Stone & Webster)*, 274 NLRB 1506, 1508 (1985).

[3] Jt. Exh. 1, par. 5(a).

[4] All signatories on a "Weekly Out-of-Work List" for the week beginning 10 March (a Monday) signed only on that day, and every signatory for the week beginning 12 May (a Monday) signed only on that day (Jt. Exhs. 5 and 6).

[5] Jt. Exh. 1, par. 5(c).

[6] Ibid., par. 5(e). The General Counsel sought to cast doubt on the integrity of the referral system by eliciting testimony from union member Webb Wax. Thus, Wax testified that Business Representative Bennett referred Wax to a job out-of-turn in October 1985 (G.C. Exh. 2). Wax affirmed that Bennett told him to answer any inquiry about this referral by saying that Wax had been "called by name." In fact, this was false, according to Wax—the employer's representative did not even know him.

Bennett agreed that he signed Wax's referral slip, but claimed that he had a letter to prove that Wax had been called by name.

Wax appeared to be the more credible witness, and may have been testifying against his own best interest. I credit his testimony.

[7] Ibid., par 5(f).

B. *Evidence of Bennett's Animus Against Ousley*

As indicated, Bennett was the Union's business representative. He was also the financial secretary and the pleadings establish that he was a union agent. In his capacity as business representative, Bennett was authorized by the union bylaws to refer applicants for employment.[8]

The General Counsel elicited evidence for the purpose of showing that Bennett had animus against Ousley. Thus, Ousley testified that he campaigned for an opponent of Bennett's in 1985 (Tillman Palmer), wore campaign stickers, and passed out literature. On the Monday before the election, Bennett looked "straight at" Ousley in the union hall when the latter was wearing a Palmer sticker, according to Ousley. Bennett first denied knowledge of whether Ousley ever supported a political opponent of Bennett's and then said that he was "sure" that Ousley had done so. I credit Ousley.

Ousley affirmed that the union membership, in mid-February, voted to require Bennett to turn in his credit cards, to leave his car at the union hall at night, and to discharge two secretaries. Ousley was present at this meeting, and voted with the majority. His testimony was partially corroborated by Bennett, who acknowledged that he saw Ousley at the meeting.

On the next day, according to Ousley, he stopped at a coffeepot in the union hall and engaged in conversation with one of the secretaries. Bennett came out of the office and told the secretary that she had no business talking to Ousley because he was one of the "sorriest motherfuckers who voted to get rid of" the secretary. Ousley was talking to another secretary about a week later and Bennett said the same thing.

Bennett testified that he "probably" saw Ousley at the coffeepot the next day, but said that he did not remember the statements attributed to him by Ousley. I credit the latter as to both conversations.

Ousley also affirmed that he testified at two previous unfair labor practice hearings involving charges against Bennett and the Union by other union members,[9] and that Bennett saw him on those occasions.

C. *The Events of 15 and 16 March*

1. Recent political history of the Union—election of Union President Ronald Kinchen

The amended complaint alleges unlawful refusal to refer Ousley on both 15 and 16 March. It also alleges that Union President Ronald Kinchen, who assertedly passed over Ousley on 15 March, and Bennett, who allegedly did so the next day, were both union agents. The Union admits that Bennett was an agent but denies that conclusion with respect to Kinchen. Accordingly, the Union argues, it was not responsible for any referrals Union President Kinchen may have made.

Bennett was elected union president about 1967. He testified that, as president, he referred individuals for em-

[8] Jt. Exh. 10, sec. 21(D)(4).

[9] Supra, fn. 2. It is unclear whether Ousley is the same person as the "Oursley" mentioned at 274 NLRB at 1510.

ployment "at one time" under what he said was "a different referral system."

Bennett relinquished the post of president in 1975, and was elected financial secretary and business representative.[10] Jerry Sibley was elected president, and continued in that position until about 1985. Sibley was also an assistant business representative, appointed by Bennett, until 1984. During this period, Sibley made referrals from the hiring hall.

Kinchen, who had previously been a vice president and had unsuccessfully run for the presidency against Sibley, defeated the latter in the 1985 election. Ousley supported Kinchen during this campaign and, as noted, also supported Bennett's opponent for the position of financial secretary-business representative.

As indicated, the Union's bylaws give the business representative authority to make referrals.[11] The bylaws also provide that the president shall conduct meetings, preserve order, enforce the bylaws, and have duties listed in section 33 of the International constitution.[12] The latter specifies a few additional functions and "such other duties as are required by the office."[13]

2. The referrals on 15 March

Bennett was out of town on 15 March, a Saturday, and did not designate anybody to make referrals in his absence. Kinchen received a call on Saturday from Phil Dozier, National Maintenance superintendent for the Dow Chemical jobsite. Dozier told Kinchen that he needed employees immediately—there was an emergency, and Dozier could not reach Bennett. If the Union could not fill the positions, National Maintenance would fill them from other sources.

Kinchen first tried to reach Bennett himself, unsuccessfully, and then called Dozier back. The latter asked for eight millwrights by name, of which Kinchen could only get one ("Keith Schafer").[14] Dozier also asked for Kinchen, but the latter said he was not working that day. He did go out the next day.

Kinchen did not have an out-of-work list, but did have a membership list with telephone numbers. In addition to Shaffer, Kinchen said that he referred Eddie Hill, Alden "Persac," Doug Harper, and one other person whose name he could not recall. Although Bennett asserted that Gary Palmer was also referred on Saturday, Kinchen testified that Palmer (and Kinchen) reported for work on Sunday. National Maintenance records show that W. W. Harper, M. E. Hill, and A. E. Persick were referred on Saturday, that Shaffer was called by name, and that Palmer and Kinchen were called by name on Sunday.[15] I accept the National Maintenance records as accurate. Harper, Hill, and Persick are the only employees with respect to which the issue of Kinchen's agency status is relevant. Because they and Shaffer were the only members referred by Kinchen. Inasmuch as Shaffer was called by name, his referral could not have been a violation of the referral procedure.

Kinchen testified that he did not call Ousley, a friend of his, because he got "the four people he needed" before getting to Ousley's name on the membership list.[16] Kinchen also agreed that there were persons on the out-of-work list who were entitled to referral prior to the individuals sent out by Kinchen. However, Kinchen did not have, at the hearing, the master list numbers of those persons—Harper, Hill, and Persick. Although Ousley's master list number was 318,[17] there is no evidence to show whether Harper's, Hill's, or Persick's numbers were higher or lower than Ousley's. Shaffer had a higher number, 396,[18] but Shaffer was called by name. As noted above, the referral rules allow an individual called by name to be referred out of turn.

I conclude that the evidence is insufficient to establish that Ousley was passed over by the referrals on 15 March.

The Union uses referral slips when referring individuals.[19] Kinchen credibly testified that he did not have any referral slips with him on Saturday, that those individuals who were referred did not get one "that day," but did receive them later. Bennett denied that he issued referral slips for the individuals referred by Kinchen, and suggested that the latter may have done so. However, because Bennett told Kinchen on Sunday, as appears hereinafter, that Kichen had no authority to make the referrals, it is unlikely that Kinchen thereafter signed the referral slips. The only other possible signatory on the referral slips was Bennett, who signed the only slip in evidence.[20] If Bennett did sign the referral slips, that fact would raise the issue of whether the Union, by its agent Bennett, ratified Kinchen's actions regardless of the latter's agency status. Bennett did not withdraw the Kinchen referrals and did not immediately inform the membership that Kinchen had acted without authority—such information was not divulged until the next membership meeting.

However, because the evidence is insufficient to establish that Ousley was passed over by any of the Kinchen referrals on 15 March, I consider it unnecessary to determine Kinchen's agency status.

3. The referrals on 16 March

a. *Summary of the evidence*

National Maintenance Superintendent Dozier called Kinchen again the following morning, Sunday, and said that he needed 16 more referrals. Kinchen agreed to send them out if Dozier could not reach Bennett.

Dozier did succeed in reaching Bennett and asked for the referrals. Bennett went to the union hall, obtained the out-of-work list, and sent 10 individuals to the job-

[10] The Union's bylaws combine the functions into one position entitled "Financial Secretary-Business Representative" (Jt. Exh. 10, sec. 19).
[11] Jt. Exh. 10, sec. 21(D)(4).
[12] Id., sec. 21(C).
[13] Jt. Exh. 11, sec. 33.
[14] Identified as "D. K. Shaffer" in the National Maintenance records (Jt. Exh 4(B)).
[15] Jt. Exh. 4(B).
[16] As noted, Kinchen also testified that Dozier asked for eight referrals.
[17] Jt. Exhs. 5 and 6.
[18] Jt. Exh. 6.
[19] G.C. Exh. 2, signed by Bennett.
[20] G.C. Exh. 2.

site.[21] He also called Kinchen and told him that he, Kinchen, had no authority to make referrals.

Four of the individuals referred by Bennett were called by name.[22] Of the remaining six, three had master list numbers higher than Ousley's number of 318.[23] Accordingly, Ousley would appear to have been passed over by three of the 16 March referrals.

Bennett, however, contended that he reached Ousley's name on the daily (weekly) list and called him at 12:42 p.m. on 16 March. There was no answer, according to Bennett.

Ousley, however, testified that he was home on Sunday, but did not receive a call from Bennett. Ousley affirmed that he was repairing an automobile in his carport, and that his portable telephone was just a few feet away from him.

The only telephone conversations Ousley had were with Leland Johnson, according to Ousley. He had called Johnson earlier in the day to inquire about work, and Johnson called him back at 1 p.m. to inform him that Bennett had referred Johnson for employment. Leland Johnson himself testified, and corroborated Ousley concerning this call. As shown above, Johnson in fact was referred out on 16 March. Johnson testified that Bennett called him on 16 March, and Bennett testified that he referred Johnson to the job.

Ousley also stated that union member Webb Wax helped him with his auto repairs on Sunday. Wax testified on this issue and corroborated Ousley. He arrived at Ousley's house between 10 and 10:30 a.m. and helped Ousley until about 3 p.m. Wax overheard Ousley's side of the conversation with Johnson about 1 p.m. He affirmed that this was the only call, and corroborated Ousley on the location of the phone.

b. *Factual analysis*

Ousley, an apparently truthful witness, was corroborated by two other witnesses who appeared credible. The fact that Johnson was referred on 16 March by Bennett is well established, and lends credence to Johnson's and Ousley's testimonies about their telephone conversation. In addition, their report of this call is corroborated by Wax.

On the crucial issue of the asserted attempt by Bennett to call Ousley on 16 March, the consistent testimonies of Ousley and Wax have more probative value than Bennett's assertion that he tried to call. Although Bennett claimed to be reading from a list he had made, some of his other assertions, based on the same list, are demonstrably incorrect when compared with the National Maintenance business records.[24]

I credit Ousley and Wax, and find that Bennett did not attempt to call Ousley on 16 March. It follows that Ousley was entitled to referral on that day, that a job was available, and that the Union referred other persons with lesser entitlement to employment.[25]

D. *Bennett's Alleged Solicitation of Union Members on 8 May to Inflict Bodily Injury on Ousley*

1. Summary of the evidence

Ousley testified that he attended a general membership meeting on 8 May, at which 30–40 members were present. After the opening ceremonies, the recording secretary read a charge that Ousley had filed with the Board.[26] Business Representative Bennett then took the floor and said that somebody ought to take Ousley "outside [and] work him over." Bennett added that he would do so himself, except for his position with the Union.

Leland Johnson testified that, at this meeting, Bennett said that somebody "ought to take Samie Ousley outside and whip his ass until he drops those charges that he brought against the hall." On cross-examination, Johnson agreed that his pretrial affidavit did not contain "whip his ass" language. Instead, as elicited from Johnson by Respondent's counsel, Bennett said that "somebody ought to take Samie Ousley out and work him over and make him withdraw the charges." Johnson first reaffirmed his testimony on direct examination, and then stated that "whip his ass" and "work him over" meant the same thing. Ousley did not recall Bennett using the former terminology.

Bennett denied the accuracy of Ousley's charge, but agreed that he spoke at a membership meeting on 8 May. There were about 60 members present, according to the business representative. After the recording secretary referred to charges filed with the Board against Bennett and the Union, Bennett said that it cost the Union money to hire a lawyer to fight the charges. The Union had incurred over $50,000 in legal fees in the past several years. Bennett called Ousley "by name," and asked him why he did not use the Union's grievance procedure before taking the matter to the National Labor Relations Board.[27] He invited individuals with grievances to come to his office before going to the Board.

---

[21] Jt. Exh. 4(B).

[22] Ibid.

[23] Don R. Avants, 333, James F. Foreman, 386; and Leland Johnson, 387 (Jt. Exhs. 4(B), 6, and 7—the latter two documents are out-of-work lists that contain each applicant's master list number, as required by the referral rules). The General Counsel sought to supplement the evidence with respect to Johnson by eliciting testimony from Ousley that he signed an out-of-work list on 17 February (G.C. Exh. 4), and from Leland Johnson that he worked a 7-day job in February and obtained a new master list number in March (as required by the rules). Accordingly, Ousley was entitled to referral before Johnson.

Bennett asserted that Avants did not answer Bennett's call on 16 March, but the National Maintenance records show that Avants was referred on that day. I accept the business records as accurate (Jt. Exh. 4(B)).

Bennett also contended that Wilson Watts was called by name, and that Charlie Blocker was referred on 16 March. Bennett said that he was reading from a list prepared "that day." However, the National Maintenance records show that Watts and Blocker did not start work until the next day, 17 March (id.).

[24] Ibid.

[25] The National Maintenance records show that there were other referrals on 17 and 18 March (Jt. Exh. 4(B)). However, there is no complaint allegation with respect to these referrals.

[26] As noted above, although the charge that originated this proceeding was filed on 27 May, and thus subsequent to the 8 May membership meeting, Ousley had filed an earlier charge on 23 April, which he withdrew on 22 May, after the union meeting.

[27] The referral rules contain a provision allowing a member who believes that he has been discriminatorily denied employment to appeal to the Union within 24 hours (Jt. Exh. 1, sec. 6).

Bennett denied that he told the membership that somebody should take Ousley outside and "whip his ass" or "work him over." However, he agreed that he "did say . . . that some of the members needed to talk to Mr. Ousley and more or less let him know what it was costing."

Bennett further testified that Leland Johnson stood up and said "that it was terrible that you couldn't come to the union hall without being threatened to 'get your ass kicked,' or something." At that point, according to Bennett, the union president (Kinchen) told Johnson that he was out of order for using profane language.[28]

Union member Bert McGowan denied that Bennett suggested that somebody should take Ousley outside and "whip his ass" or "work him over." Instead, McGowan affirmed Bennett said that "somebody should have a talk with Mr. Ousley and tell him about the birds and the bees." Union member Thomas Shaffett also denied that Bennett used any "threats." According to Shaffett, Bennett said that "somebody ought to talk to him and try to get him to do [it] the right way . . . by the proper channels." Shaffett also recalled a protest from Johnson about union members being threatened with having their "asses whipped." Union members Wallace Goetzmann and Matthew Gautreau gave similar testimony, the latter repeating the "birds and bees" remark attributed to Bennett by McGowan, and the fact that Johnson was called down for using vulgar language.

2. Factual analysis

There is no doubt that Bennett spoke about an unfair labor practice charge that Ousley had filed, and it is clear that it was the first such charge filed in April—the 8 May meeting was held prior to the filing of the instant charge on 27 May.

It is also clear that Bennett criticized the filing of charges because of their expenses to the Union, and that he called Ousley by name and solicited union members to talk to Ousley. Finally, from the testimonies of Bennett, Shaffett, and Gautreau, there is no doubt that Johnson stood up and protested that union members should not have to receive threats at union meetings about getting their "ass[es] whipped."

Johnson's protest during the hearing is the only evidence of spontaneous reaction, at the time, to whatever it was that Bennett said. There is no evidence that Johnson's interpretation of Bennett's remarks was denied by the latter at the meeting. All that happened after Johnson's comment was that Union President Kinchen called him out of order for using profane language.

It is unlikely that Johnson would have said what he did if Bennett had merely invited the union membership to talk to Ousley about the "birds and the bees," and the grievance procedure. Such solicitation by Bennett could not reasonably have been interpreted as a threat. Ousley and Johnson appeared to be trustworthy witnesses, although the latter on direct examination confused what *he* said at the meeting with what *Bennett* said. Nonetheless, Johnson's pretrial affidavit, evidence of which was elicited by the Respondent, is consistent with Ousley's testimony.

I accept Bennett's testimony that he protested the cost of unfair labor practice charges. What is in issue is the nature of his remarks about Ousley. Almost all of Ousley's testimony and the affirmations in Johnson's pretrial affidavit are acknowledged by the Union's witnesses. All that is contested is the substance of Bennett's remarks about Ousley. Because of Johnson's reaction at the meeting to Bennett's statements, the substantial consistency of Ousley's testimony and Johnson's affidavit, and the fact that Ousley and Johnson appeared to be the most credible of the witnesses, I accept their and, in part, Bennett's version of what Bennett said—that unfair labor practice charges against the Union are expensive, that somebody ought to take Ousley outside and work him over to make him withdraw the charges, and that Bennett would do it himself except for his position as a union official.

As indicated, Ousley in fact withdrew the first charge on 22 May, about 2 weeks after the union meeting and filed the instant charge a week later, on 27 May. Although there are differences in the charges, the 16 March allegation appears in both of them. On cross-examination, Ousley said that the Board agent told him to withdraw the first charge because he was running out of time and needed witnesses.

According to Ousley, Bennett told him in June that he was costing the Union money, and that he was "nothing but a damned dog." Ousley replied that it was Bennett who was costing the Union money because he was "not running it right." Bennett denied calling Ousley a dog. I credit Ousley.

E. *The Alleged Refusal to Refer Ousley to Tero-Technology on 13 May*

Leland Johnson worked for about 3 weeks for National Maintenance at the Dow Chemical job. Accordingly, under the referral system, he should have been assigned a new master list number higher than the 387 number that he had when assigned to the National Maintenance job. Ousley was not referred for work between March and May, and thus retained his 318 master list number. Bennett acknowledged that Johnson had a higher number.

Business Representative Bennett referred Johnson to a job with Tero-Technology on 13 May. According to Johnson, Bennett called him between 4:30 and 5 p.m. that day and offered him the job. Further, according to Johnson, Bennett told Johnson to call Ousley and tell the latter that Bennett had tried to call Ousley. Johnson responded merely by saying that he would take the job.

Bennett contended that he tried to call Ousley three times between 4:15 and 5:15 p.m. but that Ousley was not at home. Bennett stated that he told Johnson of these asserted attempts and told Johnson to inform Ousley. Further, Bennett testified that he told Johnson, "You guys don't need to trump up something now and go back to the Labor Board."

Johnson testified that he knew Ousley's telephone number, recited it at the hearing, and affirmed that he

[28] The International constitution provides that a member using profane language at a meeting "shall be admonished by the chair" (Jt. Exh. 11, sec. 33(C)).

called Ousley about 15–20 minutes after Bennett's call to Johnson, i.e., about 5 p.m. or shortly thereafter on 13 May. Johnson informed Ousley about Bennett's alleged effort to reach Ousley on the phone. Ousley replied that he "was there."

Johnson's averment of the time of Bennett's call is confirmed by the latter's testimony. Thus, Bennett explained that he did not receive word about the Tero-Technology job until he returned home from his office. He then called back to his office and had a secretary read the names off an out-of-work list. Johnson's and Bennett's testimonies thus establish that Bennett called Johnson in the late afternoon.

Ousley confirmed that he was home all day on 13 May. The only call he received was from Johnson, who told him that Johnson had received a referral from Bennett, and that Ousley should "stick by the phone." However, no call came from Bennett, according to Ousley.

On cross-examination, Ousley said that Webb Wax was with him on 13 May, but corrected himself on redirect examination to affirm that Wax was with him in March rather than May. Ousley also stated on cross-examination that Johnson called him at 1 p.m.—the same time that Johnson had called Ousley on 16 March.

Ousley asserted that he did not protest to Bennett about the failure to refer him on 13 May because it would not have done any good—he had been "on his [Bennett's] shit-list too long."

Factual Analysis

As on 16 March, the issue is whether Bennett attempted to call Ousley and refer him to a job. I credit the testimonies of Johnson and Ousley that *they* had a telephone conversation on that day, and that Ousley was at home during this conversation. I credit Johnson's testimony that this conversation took place about 5 p.m. or shortly thereafter, rather than Ousley's belief that it took place at an earlier time. The fact that Bennett's call to Johnson took place in the late afternoon is established by the testimonies of both Bennett and Johnson—and it is obvious that Johnson's call to Ousley informing him of Bennett's call had to take place thereafter. Ousley for a moment confused Johnson's 13 May call with his 16 March call.[29]

It follows that Ousley was at home on 13 May, with an operating telephone at the same time, according to Bennett, that the latter tried without success to reach him. This fact casts doubt on Bennett's testimony. Because of this doubt and the fact that Bennett did not appear to be a truthful witness, I conclude that he did not in fact attempt to call Ousley and that the latter was passed over for referral on 13 May.

F. *The Union's Defenses*

Business Representative Bennett testified that he offered Ousley several jobs in July and September and that Ousley rejected all except one on the ground that he had a doctor's appointment. Further, according to Bennett, Ousley canceled the one job he accepted because he had to have a urinalysis.

On cross-examination, Ousley acknowledged having been offered and rejecting some jobs, although not all those alleged by Bennett. Ousley credibly testified that he is on medication and had to reject some of the jobs for this reason. One of them was refused because it would have lasted only a few days.

The Union in its brief argues that Ousley is "undoubtedly a malingerer who is more interested in stirring up political discord . . . than in accepting gainful employment." and "perhaps would have rejected the [16 March and 13 May] jobs" if they had been offered to him.

This argument is speculative and without merit.

At the hearing, Bennett testified that Ousley was on a "Not for Rehire" list at National Maintenance, and would not have been employed even if he had been referred to the job. On the other hand, Bennett also testified that it is never certain whether a member on a "Not for Rehire" list will in fact be rejected by the employer—some applicants get the problem resolved on the jobsite. Ousley credibly testified that he was on a National Maintenance "Not for Rehire" list at one time, but that this restriction was removed, with Bennett's assistance, and that he has worked for the Company since that time. These events do not assist the Union's case.[30]

G. *Legal Analysis and Conclusions*

It is well established that a union threat of physical violence intended to restrain a member's right to use the Board's processes violates Section 8(b)(1)(A) of the Act.[31] Bennett's solicitation of union members, at a meeting where many members were present, to take Ousley outside and "work him over" in order to make him withdraw the first unfair labor practice charge, constituted unlawful coercion. Although proof of the effect of a threat is not necessary to establish a violation, Ousley in fact did withdraw the first charge after having been threatened. His explanation of the reason for withdrawing and almost immediately refiling the charge is implausible; that the withdrawal was caused by the threat is a permissible inference.

It is well established that a union fails to fairly represent its members when it departs from objective criteria in the operation of an exclusive hiring hall, including, as here, the failure to refer applicants entitled to referral. Evidence of intent to discriminate is not necessary to establish a violation of Section 8(b)(1)(A) of the Act.[32]

---

[29] Although Ousley's testimony on redirect examination did not correct his imperfect recollection of the time of Johnson's call—as it did about the date that Wax was present—it is apparent that Ousley's testimony concerning the time of his conversation with Johnson on 13 May is based on his confusion of that date with 16 March.

[30] Ousley stated that Bennett "at one time" said that Ousley "got fired for exposing [himself] in the ladies' restroom at Kaiser Aluminum," and was placed on a not-for-rehire list. Bennett testified that Ousley was placed on the "Not for Rehire" list at Kaiser, but does not assert the reason. This evidence has nothing to do with the issue of whether Ousley was unlawfully denied referral to National Maintenance and Tero-Technology.

[31] *Oil Workers Local 2-947 (Cotter Corp.)*, 270 NLRB 1311 (1984).

[32] *Iron Workers Local 601 (Papco, Inc.)*, 276 NLRB 1273 (1985), enfd. 122 LRRM 2576 (4th Cir. 1986).

The Union's refusal to refer Ousley for employment on the National Maintenance and Tero-Technology jobs constituted a violation of this section of the Act.

Where discriminatory motivation is established, the Union additionally violates Section 8(b)(2) of the Act. The Board has relied on intraunion political strife in which the alleged discriminatee participated, and a member's filing of an unfair labor practice charge against the Union, both of which took place herein, to support a finding of discriminatory motivation.[33] I conclude that there is ample evidence of discriminatory motivation in this case, as shown by Ousley's political opposition to Bennett within the Union, Ousley's participation in other unfair labor practice hearings directed against Bennett and the Union, his filing of the first unfair labor practice charge in this case that led to the threat at the 8 May union meeting, and Bennett's abusive and obscene statements to Ousley on other occasions. Accordingly, I find the Union's failure to refer Ousley also violated Section 8(b)(2) of the Act.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. National Maintenance Corporation and Tero-Technology are both employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Millwright and Machinery Erectors, Local Union 720, United Brotherhood of Carpenters and Joiners of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening a physical assault on Samie W. Ousley in order to induce him to withdraw an unfair labor practice charge, the Respondent thereby violated Section 8(b)(1)(A) of the Act.

4. By refusing to refer Samie W. Ousley for employment with National Maintenance Corporation on 16 March 1986, and to Tero-Technology on 13 May 1986, to which employment he was entitled pursuant to Respondent's hiring hall procedures and its collective-bargaining agreements with employers, in retaliation for Ousley's political opposition to the business representative, his participation in other unfair labor practice proceedings against the Respondent and the business representative, and his filing of an unfair labor practice charge against the Respondent, the latter thereby violated Section 8(b)(1)(A) and (2) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of the Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action that will effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to refer Ousley to a job with National Maintenance Corporation on 16 March 1986, and with Tero-Technology on 13 May 1986, I shall recommend that the Respondent refer Ousley for employment on an equal and nondiscriminatory basis, and make him whole for any loss of earnings suffered by him as a result of the Respondent's unlawful refusal to refer him. Backpay and interest is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[34] I shall also recommend that the Respondent notify Ousley in writing that the referral system is available to him on an equal and nondiscriminatory basis.

Because this case represents the second time that the Respondent has engaged in conduct violative of the Act, it has demonstrated a proclivity to violate the Act. Because the conduct herein, particularly the threat of assault against Ousley, constituted a serious unfair labor practice demonstrating a general disregard for employees' fundamental rights, the cease and desist order will be a broad one requiring the Respondent to cease-and-desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act.[35]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, Millwright and Machinery Erectors, Local Union 720, United Brotherhood of Carpenters and Joiners of America, Baton Rouge, Louisiana, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening to assault Samie W. Ousley or any of its members for engaging in union political activity, filing unfair labor practice charges, or otherwise engaging in protected activity.

(b) Refusing to refer Ousley or any employee or applicant for employment through its employment referral system in disregard of the provisions of its collective-bargaining agreements with various associations and employers or in disregard of its published rules and regulations regarding such referrals.

(c) In any other manner restraining or coercing employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Refer Samie W. Ousley for employment to positions for which he is qualified on an equal and nondiscriminatory basis with other employees and applicants and notify him in writing that the referral system is available to him on this basis.

(b) Make Samie W. Ousley whole for any loss of earnings he may have sustained because of the Respondent's

[33] *H. H. Robertson Co.*, 263 NLRB 1344, 1362 (1982).

[34] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[35] See *Iron Workers Local 601 (Papco, Inc.)*, 276 NLRB 1273 (1985), and authority cited therein.

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

unlawful failures to refer him for employment, by paying him a sum of money equal to that which he would have earned absent the Respondent's unlawful conduct, plus interest, as provided in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its business offices, meeting halls, and dispatch halls copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to assault Samie W. Ousley or any of our members for engaging in union political activity, filing unfair labor practice charges, or otherwise engaging in protected activity.

WE WILL NOT refuse to refer Ousley or any employee or applicant for employment through our employment referral system in disregard of our collective-bargaining agreements with employers and our published employment referral system.

WE WILL NOT in any other manner restrain or coerce employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL refer Samie W. Ousley for employment to positions for which he is qualified on an equal and nondiscriminatory basis, and inform him in writing that our referral system is available to him on that basis.

WE WILL make Ousley whole for any loss of earnings he have sustained because of our unlawful refusal to refer him for employment, with interest.

MILLWRIGHT AND MACHINERY ERECTORS, LOCAL UNION 720, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

The Armstrong Rubber Company *and* International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 670, AFL–CIO–CLC. Case 26–CA–11586

14 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 13 November 1986 Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Armstrong Rubber Company, Madison, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(h):

"(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Although no exceptions were filed to the judge's granting of the General Counsel's request for a visitatorial clause, the Board, sua sponte, has determined to reverse the judge's recommended Order in this respect because the circumstances of this case do not warrant such a remedy. *Westwood Industries*, 280 NLRB No. 12 (May 30, 1986) (not reported in Board volumes). Accordingly, we have modified the recommended Order.

Jane V. Goldman, Esq., for the General Counsel.
Charles Hampton White, Esq., of Nashville, Tennessee, for the Respondent.
Don P. Copass, of Madison, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard in Nashville, Tennessee, on 29 and 30 July 1986 pursuant to a charge filed on 11 April 1986 by International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 670, AFL–CIO–CLC (the Union); an amended charge filed by the Union on 2 May 1986; and a complaint issued on 5 May 1986 and amended on 29 July 1986. The complaint alleges that Respondent Armstrong Rubber Company violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) about 8 April 1986 by discharging seven employees and by converting the position of quality control technician to that of quality area supervisor, all for the purpose of discouraging activity on behalf of the Union. Respondent contends that the seven terminated employees (with whose termination Respondent ceased to employ any employees whom Respondent's records classified as quality control technicians) were discharged because of poor business, and that the job classification of quality area supervisor is a new position which is more responsible than the job classification of quality control technician. The General Counsel contends that the seven quality control technicians were discharged, the position of quality control technician was converted to that of quality area supervisor, and personnel were hired or transferred into jobs bearing that classification because Respondent had learned that the Union had filed with the Board a representation petition seeking a unit of quality control technicians.

On the entire record, including the demeanor of the witnesses, and after due consideration of the helpful briefs filed by counsel for the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation that manufactures tires in Madison, Tennessee. During the 12-month period ending 30 April 1986, Respondent's Madison facility sold and shipped directly to, and purchased and received directly from, points outside Tennessee products, goods, and materials valued in each case at more than $50,000. I find that, as Respondent concedes, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background; Respondent's Lawful 7 April 1986 Decision to Terminate Five Quality Control Technicians*

The Union has represented a unit of hourly paid production and maintenance employees at the Madison

plant[1] since 1962. When the Union first organized the plant, it was owned by Gates Rubber Company. Respondent has recognized the Union as the representative of the hourly paid unit since buying the plant in 1973. In addition to having a contract with the Union and/or its parent International at the Madison plant, Respondent also has contracts with affiliates of the Union at Respondent's tire plants in Des Moines, Iowa; Natchez, Mississippi; and Hanford, California.[2] All four of these plants are in the area of responsibility of Richard Twickler, who is Respondent's vice president of manufacturing. Although some employees not in the production and maintenance unit at the Madison plant are in fact hourly paid, all the personnel excluded from that unit are referred to by Respondent, and will be referred to herein, as salaried personnel.

Respondent's Madison plant (the plant involved here) produces passenger radial tires. During August through November 1985, Respondent's production schedule at that plant called for production of 14,500 tires a day, and actual production was close to that figure.[3] During this 4-month period, Respondent's hourly work force ranged between 549 (August) and 570 (October) employees. About late November 1985, Vice President Twickler told Bryant Reed, who is the general manager and "head honcho" of the Madison plant, to reduce the tire production schedule to 12,500 tires a day effective in December 1985. This was in fact done.[4] As of 1 December 1985, the hourly paid work force totaled 574. During December 1985, Respondent effected about 65 layoffs among the hourly paid employees, thereby causing the hourly work force to diminish to 512 as of 1 January 1986. The complaint does not allege that these December 1985 layoffs constituted a violation of the Act. Between December 1985 and 1 April 1986, no more hourly layoffs were effected. Between 1 January 1986 and 1 May 1986, a period that encompasses the salaried terminations at issue here, the hourly work force remained fairly constant in size.[5]

Notwithstanding the December 1985 cutback in production and the concomitant December 1985 layoffs of hourly employees, the complement of salaried personnel at the Madison plant remained fairly constant between March 1985 (when production was 16,000 tires a day) and 1 April 1986.[6] There is no contention or evidence that any of them was terminated during this period because of the production cutback. In late March or early April 1986, on the basis of inventories, Twickler directed Reed to reduce tire production still further, to 9000 a day, effective 1 May 1986. The General Counsel does not allege that these instructions were unlawfully motivated.

Vice President Twickler testified that shortly after issuing these instructions, but before 8 April 1986, he encouraged General Manager Reed to "look very closely" in the "area" of salaried personnel at the Madison plant, "to look towards an organization of his staff, to try to eliminate any areas of redundancy, and to move in that direction." Twickler further testified that he did not specify to Reed the number of salaried personnel who should be terminated. About 8 April 1986, 54 salaried people were eliminated from Respondent's corporate headquarters in New Haven, Connecticut. In late spring 1986, about 35 salaried people were terminated from Respondent's corporate office in Natchez, Mississippi. No contention is made that the New Haven or Natchez terminations were unlawfully motivated.

Effective the week beginning 31 March 1986, to preserve the existing work force while adjusting to then business conditions, Respondent's Madison plant cut its 5-day workweek to 4 days. About 1 April, Reed decided that the Madison salaried complement should be cut by a total of 21 people. Together with the division managers, who report directly to him, he decided that 10 salaried people would be cut from the manufacturing division; 3 from the engineering section; 1 each from the industrial relations section, the distribution section, and the accounting/purchasing section; and 5 from the technical and quality control division. At meetings of salaried personnel on 1 and 2 April, Reed announced that 21 salaried employees would have to be terminated effective 11 April; that the terminations would be distributed in the manner described above; and that those to be terminated would be notified by 7 or 8 April. Further, Reed said that any person who volunteered to retire would be included among the 21 people who had to be severed, and that anyone who was eligible for and interested in retirement should see Russell Weymouth, Respondent's manager of industrial relations. Reed went on to say that the specific people to be laid off had not yet been pinpointed; and that, after the retirees were subtracted, Respondent intended, all other things being equal, to terminate the junior personnel. Also, Reed said that in May there might be more production cuts, and consequent layoffs of eight or nine salaried personnel, probably from the manufacturing division. Reed further said that cutbacks would probably be made if the plant returned to a 5-day week. Reed testified that, when he made the foregoing remarks, he believed that any salaried cuts in the manufacturing division would be directed at line foremen.

On 1 April Reed asked his division managers (including Kim McAllister, the head of the technical and quality control division) to recommend to Reed by 7 April what job classifications should be used to fill the quota of personnel to be severed. On Friday, 4 April, McAllister advised Quality Control Superintendent Don Dickenson (who reports to McAllister) that the technical and quality control division was going to lose five people, and asked Dickenson for a recommendation after the weekend on how to handle any cutback in his department. On the morning of Monday, 7 April, McAllister

[1] Frequently referred to in the record as the Nashville plant. The two cities are about 10 miles apart.

[2] But see *Armstrong Rubber Co.*, 273 NLRB 233 (1984) (involving Respondent's Hanford plant); and *Armstrong Rubber Co.*, 209 NLRB 1 (1974), enfd. in part and remanded in part 511 F.2d 741 (5th Cir. 1975) (involving Respondent's Natchez plant). About July 1986, Respondent decided to close down the Natchez plant permanently.

[3] Actual per-day production averaged 14,465 tires in August; 14,510 in September; 14,171 in October; and 13,857 in November.

[4] Actual production for December 1985 averaged 12,020 per day.

[5] The number varied between 508 (1 May) and 513 (1 February, 1 March, and 1 April).

[6] Between 1 July 1985 and 1 April 1986, the number varied between 157 (1 February 1986) and 164 (1 August and 1 September 1985).

told Dickenson that McAllister had decided to let five quality control technicians go. Dickenson recommended that the five junior quality control technicans be selected for termination because such a "formula" was "easier for everyone to understand."

Later that same day, 7 April, Reed met with division managers, including McAllister and Industrial Relations Manager Weymouth. At this meeting, Weymouth reported that one quality control technician in the technical division, Peggy Clark, had elected to take an early retirement. Then, McAllister recommended that the four remaining people to be severed from the technical division should also be quality control technicians. According to Reed's credible testimony, McAllister stated that he was so recommending because the remaining seven quality control technicians could perform their duties, after the other five were gone, by deleting the performance of checks that at an earlier stage of production had been performed by the foremen in the manufacturing division.[7] Reed agreed with McAllister's recommendation. McAllister did not give the names of the persons who would be severed. He, Weymouth, and Reed all testified, in effect, that they assumed the persons to be severed would be selected according to senoirity. The four junior quality control technicians were advised, during their respective 8 April shifts, that Respondent had decided to separate them. The complaint does not allege that any of these four was unlawfully separated.[8]

B. *Respondent's Allegedly Unlawful 8 April Decision to Terminate the Remaining Seven Quality Control Technicians, the Technicians' Termination on 10 April, and Subsequent Terminations*

1. Respondent's 8 April notice of the Union's representation petition with respect to the quality control technicians

Meanwhile, on 7 April, the Union filed with the Board's Regional Office a representation petition seeking a unit of the quality control technicians at Respondent's plant. About 10 or 11 a.m. on 8 April, Weymouth received a telephone call from a Board employee in that office. She identified herself as a Board employee, told him that the Union had filed a petition that covered the quality control technicians, and asked him whether he had received it. He said no. Weymouth testified that, at the time he received that call, he was aware of the severance of five quality control technicians, and was not aware of any other planned severances at that exact moment.

2. Respondent's 8 April decision to terminate the seven remaining quality control technicians

At or shortly before noon on that day, 8 April, Weymouth went to Reed's office. Weymouth told Reed that Weymouth had received a call from the Board asking him whether Respondent had received a petition respecting the quality control technicians, and that Weymouth had replied no. Reed admittedly inferred that such a petition had been filed with the Board. About 2 p.m. that afternoon, Reed telephoned Twickler.[9] Reed told Twickler that Reed had just heard that the quality control technicians had petitioned for "joining the Union."[10] Twickler remarked that he was a little surprised at the Union's petition and that "it sounded like an efort to move under the umbrella of the Union to protect their job, that unfortunately was not available to them." What else was said in this conversation is discussed infra in section II,B,5.

Reed testified that he decided in the afternoon of 8 April to cut the seven remaining quality control technicians. Immediately after his conversation with Twickler, Reed told McAllister that the remaining seven quality control technicians would be severed. Reed told McAllister that in the future the quality control foremen were to do the quality control work.[11] This was the first time that McAllister had heard of Reed's idea to eliminate the quality control technicians and also the first time McAllister had heard about changing the quality control function over to be performed by supervisors. Shortly before 3:30 p.m. that day, Reed told Quality Control Superintendent Dickenson that Reed had just been notified that further cuts had to be made and that he was going to have to lay off the rest of the quality control technicians. Reed further told Dickenson that whatever of these technicians' functions continued to be performed would have to be performed by Dickenson, Quality Control Foreman Ernest Axley, and Senior Quality Control Foreman Rodney Griffin, with one of them working on

[7] Although McAllister did not recall so stating to Reed at that time, McAllister testified that this was in fact one of the reasons for his recommending the termination of five technicians.

[8] These four were James D. Sisk, Ernest J. Carpenter Jr., Morton H. Sadler, and Marie W. Ford. They were named in the Union's original charge, filed on 11 April 1986, but not in the Union's amended charge, filed on 2 May 1986.

[9] My finding that Reed initiated this call is based on Twickler's testimony; for demeanor reasons, I do not accept Reed's testimony that Twickler called him. My finding as to the hour is based on Reed's testimony that the call took place between 2 and 3 p.m. and McAllister's testimony that his conversation with Reed later that day (see infra), which Reed admittedly held after his conversation with Twickler, took place about 2 p.m. To the extent that it is inconsistent with Reed's and McAllister's testimony, I do not accept Twickler's testimony that his conversation with Reed occurred in "middle or late afternoon."

[10] The quotation is from Twickler's testimony.

[11] My finding in this sentence is based on McAllister's testimony, indirectly corroborated by the evidence (infra) that later that same day Reed made a similar statement to Quality Control Superintendent Dickenson. Because of this corroboration and for demeanor reasons, I do not accept Reed's testimony that during this conversation he told McAllister that Reed wanted to replace the quality control technicians with six quality area supervisors. Nor do I credit Reed's testimony that during this 8 April conversation he said he was making this decision because the quality control technicians were duplicating the foremen's checks, and that Reed "would be using a new system, using the quality area supervisor and he would be using SPC and the SAS programs [see infra, sec. II,D,1], although we had not all developed them, we would move in that direction and these people would input their data into the computers and eliminate duplication of many checks and be much more efficient." I so find for demeanor reasons; because McAllister testified that he did not know on 8 April (other than a need to cut more people out of the factory operation) why Reed had made the decision to terminate the remaining technicians; and because Reed (as well as McAllister) testified that elimination of duplicate checks was the basis for McAllister's recommendation, accepted by Reed on 7 April, to terminate the five quality control technicians not named in the complaint.

each shift.[12] Also in the afternoon of 8 April, Reed told Weymouth that Reed had decided to terminate the remaining seven quality control technicians. The complaint alleges as a violation of Section 8(a)(1) and (3) of the Act the termination of these seven—namely, Lee Roy Kemp, Roy Dailey, William Douglas, Eugene Kincaid, James Mason, James Hurley, and Lizzie Mae Watson.

3. The termination notices given to the quality control technicians

a. *The notices given to the technicians whom Respondent had lawfully decided on 7 April to terminate*

Respondent operates three shifts. During the shifts which operated on 8 April, Weymouth advised quality control technicians Carpenter, Sisk, Ford, and Sadler (none of them alleged to be discriminatees) that their last day of work would be 10 April. Inferentially, because of vacation and severance pay, Sisk and Sadler, at least, were scheduled to remain on Respondent's payroll through 18 April at the earliest.

b. *The notices given to the alleged discriminatees whom Respondent had decided on 8 April to terminate*

The seven alleged discriminatees were all advised on 9 or 10 April that their last day of work would be 10 April. All of them received severance pay whose amount was based on their service with Respondent. Thus, about 10 a.m. on 9 April, alleged discriminatee Dailey was called into the office. Weymouth said that "they" had decided that all the quality control technicians were going, and that "it was total and permanent, no recall." Then, Personnel Director Shirley Pike told Dailey that he would get 2 weeks' pay in lieu of notice; that he would receive 24 weeks of severance pay, to be paid every other week, until 13 October 1986; that he would get paid for 27 days of unused vacation, plus 52 hours' accrued vacation pay, which would pay him through 27 November 1986; and that for 90 days after 11 April 1986 Respondent would pay for his $15,000 life insurance benefits and for his hospital, surgical, medical, dental, vision, and prescription-drug insurance. As of 29 July 1986, the day that Dailey testified, he had in fact been receiving all these benefits. In addition, he received a lump-sum payment from Respondent's profit-sharing plan. Laying to one side his benefits and his profit-sharing payment, the payments thus promised him totaled more than $16,000.[13]

Inferentially, before noon on that same day, alleged discriminatees Mason and Kincaid were also advised that they were to be severed. About noon that day, Dailey, Mason, Kincaid, and then quality control engineer Robert Meyers met with Dickenson in the X-ray office. Mason asked Dickenson what was going on. Dickenson said that he did not know, that he did not like it any better than the employees did, but that it was something that he had no control over, and that he had not heard about it until he was getting ready to go home on the previous day. Mason asked Dickenson whether it would not have been better if the employees had not been represented. Dickenson said that he could not agree with that.

About 7:15 a.m. on the following day, 10 April 1986, Weymouth and Pike told quality control technician Hurley that he was going to be severed. Pike told Hurley that he would be receiving checks, equal to his paychecks and consisting of vacation pay and severance pay, until 18 August 1986.[14] These payments would amount to about $9600. She further told him how long his insurance benefits would run. Pike offered to assist Hurley in drafting his resume, and also offered to prepare a letter of recommendation. Hurley's attendance had been perfect for at least 10 years, and he had received a job performance rating of "M-plus" (that is, excellent), the second highest rating possible. He asked that the letter of recommendation include a reference to his perfect attendance. Weymouth and Pike agreed. Hurley asked about being rehired. Weymouth and Pike said that this was possible, but could not be promised, and that "things were looking very bad." Hurley asked why so many quality control technicians were being laid off. Weymouth said that he had to do what his "bosses" told him, and that he had received a call from corporate headquarters that week. Hurley asked whether corporate headquarters had told Weymouth to lay off all of quality control. Weymouth said no, that this decision had been made by Reed and the department heads.[15] About 2 hours later, Hurley thanked Reed for the opportunity of working at the plant. Reed said that he was sorry that it had taken him so long to cut the salaried employees, that he had tried to avoid this as long as he could, and that about a month earlier he had tried to prevent this by ordering that there be no overtime. Hurley thanked Reed for issuing this order.

4. Terminations after April 1986

The last day of active work as quality control technicians for all 12 of the technicians was 10 April 1986. One individual in Respondent's salaried manufacturing supervision was terminated for cause on 2 May 1986, and was not replaced. In June 1986 Respondent terminated four line foremen. Between 1 January 1986 and 30 July 1986,

[12] My finding that Reed so told Dickenson is based on Dickenson's testimony. My finding as to the date and hour is based on employee Roy Dailey's testimony that on 9 April Dickenson said that he had not heard about the layoff of the remaining quality control technicians until he was getting ready to go home on 8 April and on Dickenson's testimony that he first learned about this from Reed during a conversation that included the remark to which this footnote is attached.

[13] Dailey had been working at the plant for 24 years, since 1962. He had been working for Respondent since it bought the plant from Gates Rubber in 1973.

[14] Hurley had been working in the plant during all or most of the 13-year period when Respondent owned it.

[15] My finding that Weymouth so advised Hurley is based on Hurley's uncontradicted testimony. Weymouth, who was not asked about this conversation, testified that Reed told him that Reed had made this decision, and did not testify that Reed said anything about the department heads. Technical Services Manager McAllister testified without contradiction that Reed did not consult him before the 8 April decision to terminate Hurley and the other alleged discriminatees was made, and there is no evidence of any consultation with any other department head regarding this decision.

25 salaried personnel were terminated (voluntarily or otherwise) and not replaced.[16] Between 1 May 1986 and 28 July 1986, the hourly payroll fell from 508 to 388.[17] In May 1986 scheduled production fell to 9000 tires per day from the 12,500 scheduled for April 1986, and in June 1986 scheduled production fell to 7500. In none of these 3 months did actual production reach scheduled production.

On two occasions in the spring of 1986, Respondent's Des Moines plant shut down for 1 week. During undisclosed periods, Respondent's Natchez and Hanford plants went on a 4-day week. About July 1986 Respondent decided to shut down the Natchez plant permanently.

On an undisclosed date before the hearing in late July 1986, Respondent's Madison plant returned to a 5-day week. As of the time of the hearing, that plant had in its employ seven or eight quality area supervisors, depending on whether Ernest Axley was employed as such.[18] These included four of the individuals who had been terminated as quality control technicians—namely, Sisk, Sadler, and alleged discriminatees Kemp and Douglas.

5. The content of the telephone communication between Reed and Twickler on 8 April 1986

Twickler testified that in the middle of the morning of 8 April he telephoned Reed and suggested that he might have to cut five or six more salaried employees than Reed's current schedule called for. However, Reed did not testify to any conversation with Twickler that morning. Moreover, Twickler testified that, as of the time when he made this call, Reed had scheduled a cutback of about 18 employees, whereas Reed and Weymouth (as well as all the other witnesses who testified about this matter) testified that, as of the morning of 8 April, 21 salaried employees were scheduled for cutback. For these and demeanor reasons, I do not credit the testimony of Twickler summarized in this paragraph.

. Twickler testified that during his alleged morning telephone conversation with Reed on 8 April, which conversation I have found did not take place, Twickler suggested that Reed terminate five or six more salaried employees than were already scheduled for termination; and that that afternoon the two men probably reviewed their earlier conversation. On the basis of this testimony, I find that on the afternoon of 8 April Twickler suggested that Reed terminate five or six more people than were already scheduled for termination; and I do not credit Reed's testimony that Twickler did not tell him how many more people to cut.

. Twickler testified, in effect, that he could not recall any 8 April discussion specifically about terminating quality control technicians. Moreover, Reed testified that Twickler did not tell him whom to cut. Nevertheless, I find that, during the conversation between Reed and Twickler on the afternoon of 8 April, Twickler did in fact at least recommend that Reed terminate five or six of the seven quality control technicians not already scheduled for termination. I so find on the basis of the witnesses' demeanor[19] and the following considerations: The testimony of Reed and McAllister established that it was during or immediately after Reed's conversation with Twickler, when Reed admittedly told Twickler about the representation petition involving the quality control technicians, that the termination of the remaining quality control technicians was decided on. Further, the testimony of McAllister and Dickenson (the respective heads of the division and department where the quality control technicians worked) establishes that they were not consulted before the decision to terminate the remaining quality control technicians was made, even though on 1 April Reed had consulted with McAllister and the other division heads before deciding which salaried employees to terminate. Moreover, in denying to quality control technician Hurley that corporate headquarters had ordered these terminations, Industrial Relations Manager Weymouth untruthfully (as shown by Reed's and McAllister's testimony) attributed the decision partly to the department heads.[20] Further, as discussed infra, sec. II,C, it was not until after the last day of active work by all 12 of the quality control technicians that Madison management engaged in discussions and conduct which would normally be expected to precede the termination of the seven whom Respondent had initially planned to retain—namely, discussions and conduct which looked toward performing through other personnel the functions which, before Twickler's conversation with Reed, Respondent had anticipated performing with these seven. I note, moreover, that the number of alleged discriminatees (five) who were never rehired corresponds to the number of employees (five or six) whose addition to the already scheduled terminations was allegedly recommended by Twickler to Reed on the morning of 8 April.

---

[16] This figure does not include four salaried quality control technicians (Sadler, Sisk, and alleged discriminatees Kemp and Douglas) who were terminated as technicians on 10 April but began to work for Respondent as quality area supervisors on 21 April 1986 (see infra, sec. II,C). Because Respondent keeps employees on the payroll for about a week after they receive their notice of severance, and because these four employees resumed working for Respondent as quality area supervisors at the beginning of the second week after their severance as technicians, these four were never actually off the payroll. Nor does this figure include alleged discriminatees Dailey, Hurley, Kincaid, Mason, and Watson; as discussed infra, the General Counsel contends that they were replaced by Sadler, Sisk, and others.

[17] In July 1986 it increased from 370 to 388.

[18] McAllister testified in July 1986 that he did not know whether Axley's title was "quality control foreman" or "quality area supervisor," but that both jobs were the same and Axley had no authority over the quality area supervisors. Dickenson testified that Axley's title had been "quality control supervisor" at all material times both before and after the quality control technicians' termination; when asked what Axley was presently doing, Dickenson replied, "He is a quality control supervisor, the same as the others." On 29 July 1986 the parties stipulated that Axley "holds" the position of quality control foreman, and that he "is now and has been at all times material to this proceeding, a supervisor of Respondent within the meaning of Section 2(11) of the Act." At the hearing, Respondent's counsel stated that he had signed this stipulation after the General Counsel had stated that Axley was not going to be alleged to be an agent of Respondent. The General Counsel thereafter stated that she was making no agency contention.

[19] See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

[20] See *Shattuck Denn Mining Corp. v. NLRB.*, 362 F.2d 466, 470 (9th Cir. 1966).

C. *Respondent's Selection of Quality Area Supervisors, Its Preparation of a Job Description, and Related Matters*

Reed testified that during the afternoon of 8 April he decided to reorganize the quality control function, and replace it with the quality area supervisors. Because on 8 April he told McAllister and (shortly before 3:30 p.m.) Dickenson that in the future the quality control foremen (referring to Dickenson, Axley, and Griffin) would have to perform the quality control work, I infer that Reed made that replacement decision after these conversations. Between the afternoon of Tuesday, 8 April, and Monday, 14 April, Reed, McAllister, and Dickenson engaged in various discussions about having the work performed by persons in addition to Dickenson, Axley, and Griffin.[21] By 10 or 11 April Reed decided that the work should be so performed at the pay grade level of 14 (3 grade levels above the quality control technicians' jobs). Reed testified, in effect, that by that time he had decided to use six quality area supervisors to replace the seven quality control technicians allegedly discriminated against (supra, fn. 11). When asked by company counsel, "What did you calculate you saved in the way of salaries, by eliminating the Quality Control Technicians?" Reed replied, "Eliminating 12 quality control technicians at their base rate, would be somewhere in the vicinity of $400,000 a year." At the base rate for their jobs, the 12 quality control technicians would have been paid a total of about $236,000 a year; their yearly salaries would have totaled about $345,000 if all 12 had been paid (as they were not) at the maximum. The total wages of the seven alleged discriminatees was about $194,000 annually. As discussed infra, this sum exceeded by about $18,000 the total to the 6 quality area supervisors, whom Reed decided no later than 11 April to pay at the grade 14 level—3 levels higher than the quality control technicians. Moreover, as previously noted, all 12 of the quality control technicians were to receive severance pay, and the cash payments which Respondent promised in connection with the severance of Dailey and Hurley alone exceeded $25,000.

No earlier than the afternoon of Wednesday, 9 April, and no later than Monday, 14 April, Reed instructed Weymouth to find individuals to fill the quality area supervisors' jobs.[22] On 14 April Respondent's industrial relations department, which is headed by Weymouth, posted the following notice in the plant:

CANDIDATE SPECIFICATIONS

Due to a reorganization, several positions of "quality area supervisor" are available. Interested candidates should apply to personnel no later than Wednesday, April 16, 1986 by 7:00 a.m.

EXPERIENCE: Supervisory and/or quality assurance

EDUCATION: College helpful

This notice was not distributed outside the plant. Weymouth testified that the notice was "probably" drafted by Dickenson and someone in the industrial relations department. Dickenson was not directly asked about this matter, and some of his testimony is difficult to square with any conclusion that he participated in drafting it (see supra, fn. 21, and infra, fn. 26).

A total of 10 persons applied for the posted quality area supervisor's job. Of these applicants, four—all of whom were hired—consisted of the only four terminated quality control technicians whom Personnel Director Pike telephoned about the notice posted in the plant.[23] The six remaining applicants were all working in the plant when the notice was posted there. Of these six, Respondent selected two line foremen—Bobby Richardson and Don Murphy—for the job. Richardson was probably among the line foremen scheduled for inclusion in the 11 April salaried layoff, and Murphy may also have been in that group.[24] The layoff of line foremen, which on 1 and 2 April Reed had anticipated would occur in May, did not in fact occur until 20 June. On that date, Respondent laid off four line foremen, rather than the eight or nine Reed had anticipated before line foremen Richardson and Murphy were selected as quality area supervisors.[25] McAllister credibly testified that the six successful applicants for the quality area supervisors' jobs were selected about 14 April. At least as of 28 April 1986 no decision had been reached as to what authority, if any, Axley

[21] This finding is based on credible parts of the testimony of Reed and McAllister. Dickenson testified that any such discussions began no earlier than Wednesday, 16 April, when he and Reed "started talking about SAS and SPC [see infra. sec. II,D,1] and getting some people in there that we could put those kinds of programs into our plant." I do not credit this testimony in view of the fact that the quality area supervisor's job was posted on 14 April (see infra) and the 14 April date on a memorandum by Reed to Twickler which stated, inter alia, that Respondent intended to have two "Quality supervisors" per shift who "would input quality data from the Manufacturing areas into the computer."

[22] My finding that these instructions were given is based on the testimony of Reed and Weymouth, neither of whom gave a date. My finding as to the dates is based on the fact that the job was posted on 14 April and on the evidence that as of noon on 9 April (as shown by Dickenson's remarks at that time in the X-ray office) Dickenson still believed that the quality control technicians' function would have to be performed by himself and the two incumbent quality control foremen.

[23] In response to questions by me, Weymouth gave some testimony about why only these four, and not the remaining seven, had been alerted to the vacancy and interviewed for the job. Weymouth testified that the interviews were conducted by him and Dickenson, and that Dickenson's opinions about these seven technicians played a part in the decision not to interview them for the job. Dickenson was not asked either whether he had taken part in the interviews or what part (if any) he played in the decision not to tell seven of the technicians about the vacancies; his testimony about the kind of people he wanted for the job is directed to intramanagement discussions after the successful applicants had been selected and, perhaps, after they had started work. I make no findings about Respondent's real reason for selecting these particular four for consideration.

[24] Seven line supervisors were terminated on 11 April, and five more were terminated on 18 April—4 days after Richardson and Murphy were selected for the quality area supervisors' jobs. R. Exh. 4, which Weymouth identified as a list of terminations of individuals "from January 1, 1986 through [30 July 1986] who are no longer employed with" Respondent, does not include Richardson or Murphy, but does include the names of all four of the quality control technicians who stopped working as such on 10 April and, without being dropped from the payroll, began to work as quality area supervisors on 21 April.

[25] As previously noted, a line foreman had been terminated for cause on 2 May.

would have over the six quality area supervisors (see supra, fn. 18).

The record shows that the job description for quality area supervisor was not formulated until after the jobs had been posted, Weymouth and Dickenson had selected the successful applicants, and such applicants had been hired. Reed testified that the job description did not exist as of 8 April, and that it was created by Dickenson "around April 14th [or] the 15th. In that area." Weymouth testified that during the week ending Friday, 11 April, he was not involved at all in formulating a job description for that position, and that he did not review the job description with Dickenson until "sometime after that period . . . . It could have been" 14 or 15 April. Dickenson was not asked when, or even whether, he created the job description. However, inferences about the earliest date he could have prepared it can be derived from his testimony about the dates of his discussions regarding the SPC system (explained infra, sec. II,D,1), which is specifically mentioned in that job description. Thus, he testified that it was not until "like the mid-week after all the technicians were gone" (they last worked on Thursday, 10 April) that he started talking to Reed about SPC and the Statistical Analysis System (SAS, explained infra, sec. II,D,1). Moreover, Dickenson went on to testify that it may have been as late as 4 days later (that is, perhaps as late as on or after 21 April, the quality area supervisors' first day of employment as such) when he and Reed started talking about whether statistical analysis could be effectively brought into the plant.[26] Although the job description recites that the quality area supervisor's duties include "Directing and training of production supervision in Standard Practice [Specifications] and Quality Control Procedures" and "Alerting and reviewing factory supervision of process or product defect problems which are presently occurring," at least as of 28 April Respondent had not yet decided what authority, if any, the quality area supervisors would have over the manufacturing foremen and over the line foremen.[27]

Twickler testimonially authenticated as a "reorganization plan" for the quality control function a memorandum to him from Reed dated 14 April and specifying "Quality Control Reorganization" as a subject. On the basis of the date on this memorandum, Twickler testified that he received it in the mail about 16 or 17 April. He testified that he thereafter approved the plan; he was not asked for a date. Reed's covering memorandum states, inter alia, "The Quality supervisor at [shift's] end, would input quality data from the Manufacturing areas into the computer, thus streamlining Quality data output to management." This is the only reliable evidence as to the earliest date when Respondent decided to require quality area supervisors to learn to operate computers (cf. supra, fns. 11 and 21). Other portions of this memorandum are discussed infra.

By memorandum dated 17 March to Reed, McAllister, and Production Manager Ernest Custer, Respondent's corporate headquarters confirmed that the annual corporate quality audit of the Madison plant would be conducted during the week beginning 14 April. This audit was to include floor verification of the system. Alleged discriminatee Hurley credibly testified that the number of checks made by the quality control technicians was very important for the annual corporate audit. As previously noted, the decision to terminate 10 salaried personnel from the manufacturing division was made by 1 April, the decision to terminate 5 quality control technicians was made on 7 April, and the decision to terminate the rest of the quality control technicians was made in the afternoon of 8 April. On an undisclosed date subsequent to the afternoon of 8 April but before 12 April, Reed and Custer decided to postpone the audit to the week of 9 June. Reed was not asked why this decision was reached, Custer did not testify, and McAllister (whose only appearance on the stand was as an adverse witness called by the General Counsel) was not asked anything about the audit. Quality Control Superintendent Dickenson testified that the technical department was ready for the quality audit the week of 14 April, that he and "quality" wanted to have it then because "we had already collected the data that affected my department," but that the "factory" was "pretty well disrupted." Dickenson went on to testify that during the week of 14 April there had been changes in the manufacturing department in that "some people had been laid off there, a reduction in ticket and scheduling so . . . it was pretty disrupted." The termination of 10 salaried personnel in the manufacturing division, which termination had been decided on 1 April, became effective as of 14 April. However, no more than 5 of Respondent's 513 hourly employees were laid off in April, the April production schedule was the same as the March schedule, and actual production in April was almost as great as it had been in March.[28] Moreover, much of Dickenson's description of the events on the manufacturing floor "in April" is directed at the consequences of an hourly layoff (which did not occur in March or, to any great extent, April) rather than a salaried layoff ("job bidding, reassignment, people going even from one area to another area of the plant, probably at jobs they had never worked before . . . bids up, people trying to get to their new job and stay long enough to train people on their old job"). In May 1986, the month preceding the week (June 9–13) when the audit in fact took place, the scheduled and the actual production had been substantially cut as compared to April,[29] and 97 hourly employees and 1 salaried individual were terminated.

[26] Reed testified that, during his conversation with McAllister on the afternoon of 8 April, Reed referred to the job title "quality area supervisors." Furthermore, this is the job title used in the 14 April job posting. Moreover, the "Quality Control Re-Organization" memorandum from Reed to Twickler dated 14 April (see infra) refers to such persons as "quality supervisors." However, Dickenson testified that his conversations with Reed, which according to Dickenson began about 16 April, included "quite a few discussions about the title for these people. 'Statistician' didn't seem to fit, you know, that type of thing. We came up with supervisor."

[27] Nor is the record clear as to any such authority as of the hearing in late July 1986. See infra, sec. II,D,3.

[28] Daily production averaged 12,519 in March and 12,189 in April.

[29] May scheduled production was 9000 a day, compared to 12,500 in April. Actual production averaged 7406 in May as compared to 12,189 in April. Scheduled production in June was 7500 a day, and actual production averaged 7015.

Quality area supervisors have a salary grade of 14, ranging between $24,336 and $35,880 annually.[30] Although the wages paid to all 7 of the alleged discriminatees fell within this range, their classification (quality control technician) had a salary grade of 11, ranging between $19,604 and $28,548 annually. Alleged discriminatees Douglas and Kemp are both paid about 5 percent more as quality area supervisors than they had been paid as quality control technicians.[31] Douglas had been the highest paid among the quality control technicians allegedly discriminated against, and as of 21 April 1986 was also the highest paid quality area supervisor.[32] The lowest paid quality area supervisor (Sisk) had a lower salary than had been received by any of the quality control technicians allegedly discriminated against. The average salary paid to the quality area supervisors as of 21 April 1986 was about $1600 higher than the average salary which had been received by the quality control technicians allegedly discriminated against. The total wages paid as of 10 April 1986 to the seven quality control technicians who were allegedly discriminated against exceeded by about $18,000 the total wages of the six quality area supervisors as of 21 April 1986, the day they began working as such. This $18,000 was about $8000 less than the salary of the lowest paid alleged discriminatee (Mason) as a quality control technician and about $7000 less than the salary of the lowest paid quality area supervisor (Sisk) as of 21 April 1986.

D. *The Duties and Supervision of the Quality Control Technicians and the Quality Area Supervisors*

1. Background, Respondent's acquisition of computer equipment, and the SPC and SAS systems

Respondent produced tires at five plants, including the Madison plant involved in this proceeding. Reed credibly testified that some sort of quality control program is necessary in a business such as his. At all material times, Respondent has had a corporate quality assurance group, based in New Haven, Connecticut, which administers a companywide program for checking on the quality control program conducted by each of the five tire plants. Throughout the 1-year period between August 1985 and the hearing in late July 1986, the corporate quality assurance group has been assisting the Madison plant in implementing a statistical process control program (SPC, described infra) and in setting up a statistical analysis system (SAS, described infra). The purpose of these data processing systems is to turn data into a form which gives Respondent more usable results than it could obtain from merely inspecting the data.

Reed described the SPC program as involving a series of checks and plotting checks on graphs to determine whether components produced by Respondent are trending toward out-of-tolerance weight or dimensions. On an undisclosed date in late summer or early fall 1985, Dickenson and other members of management talked about setting up some SPC teams. Inferentially, thereafter, and on undisclosed dates before 7 April 1986, Senior Quality Control Foreman Griffin attempted to obtain some information about SPC, traveled on one occasion to New Haven corporate headquarters for that purpose, and obtained some brochures and books on that subject. In December 1985 he started learning to operate a computer to learn about SPC. Thereafter, he bagan to enter data into a computer with a keyboard and a screen, which was installed in the Madison technical office. Reed testified that Griffin did so to generate computer reports, and also that he "was establishing the model." Between Thanksgiving and Christmas 1985, Joe Herrin and other personnel from the New Haven corporate office came to the Madison plant to give "SPC classes" attended by Dickenson and by whom he described as "some people . . . from other plants and our own people." In early or mid-February 1986, the Madison quality control office acquired an additional computer with a keyboard and a screen, and also acquired a printer shared by both computers. Reed testified that these two computers were "SPC units," and that before April 1986 they were being used on tread length control and on belt width control, respectively. He went on to testify that as of 7 April 1986 the plant had not installed any new data processing equipment, and that these same units (the two computers and the printer) were being used as of the date of his testimony (30 July 1986) for the SPC system, "plus we are using the SPC functions in plotting other operations."

Quality control technicians were required to enter the results of their checks, audits, and inspections onto 6 to 15 forms that they filled out every day. Dickenson credibly testified that the originals of these forms were all sent to Griffin, who put out weekly or monthly quality ratings based on an accumulation of all the checks which had been made. Dickenson did not testify about the extent, if any, to which these quality ratings constituted or were based on the computer reports which (according to Reed) were being generated by Griffin's operation of the SPC units. However, I conclude that data set forth in the quality control technicians' reports were entered into the SPC units by Griffin for the purpose, at the very least, of maintaining tread length control and belt width control, purposes for which (according to Reed) these units were used before April 1986. Thus, Dailey, a quality control technician in the finishing department until his termination on 10 April 1986, credibly testified that some of the forms filled out by him were "fed through computers, I don't know how much." Hurley, a night-shift control technician in the millroom until his termination on 10 April 1986, credibly testified that the scrap weight tickets were put in the "data processing box." Moreover, the quality control technicians' reports included information which would have been useful for the purposes which the computers (according to Reed) were actually serving (see infra, fn. 33). Furthermore, after 28 April 1986 at least some of this same information was entered into these same computers by quality area supervisors whom Griffin had instructed in computer operation (see infra, sec. II,D,4). Finally, Reed testified that until

[30] Axley (see supra, fn. 18) is also in salary grade 14. The record fails to show what he is actually paid.

[31] As of 21 April 1986, their last day as quality control technicians, they were paid about $31,000 and $28,000, respectively.

[32] My findings in this sentence, and in the rest of this paragraph, exclude consideration of Axley (see supra, fns. 18 and 30).

April 1986 Griffin performed the same data-entry function thereafter performed at least partly by quality area supervisors, who entered into these same computers data of the same kind as that collected by quality control technicians (see infra, sec. II,D,4).[33]

The SAS system is a statistical analysis computer program that, on the basis of data put into the computer, gives the percentages of Respondent's production which are in tolerance or out of tolerance. Dickenson testified that "we" started getting information on SAS about December 1985. Before Christmas 1985, Herrin gave some information about SAS to Dickenson and other persons whose names are not shown by the record but who, inferentially, were also members of management. Reed testified that on unspecified dates before mid-April 1986, the plant technical department had a "model" of the SAS system, which Griffin had been doing some work with. Respondent developed and installed the SAS system itself in mid-April 1986 after the alleged discriminatees' termination.

The quality area supervisors' job description (drawn up no earlier than 14 April) stated, inter alia, that they were to "Become active Statistical Process Control team members"—teams whose setting up had been discussed by management in late summer or early fall 1985. During the first week that the quality area supervisors were working as such, all of them spent all their working hours attending training sessions on statistics control, with Griffin and Herrin as instructors. These training sessions included instruction on how to operate the two computers that had been in the technical office since December 1985 and February 1986, respectively, and that Griffin had operated during this period. During the week following the quality area supervisors' week of full-time instruction, instruction was combined with operations on the floor. Thereafter, and as of the second day of the hearing (30 July 1986), the quality area supervisors continued to receive additional training, including training on how to enter data into the computer. Dickenson testified on that hearing day "Most of them can enter quite a bit of their own data." This procedure comsumes 15 to 60 minutes a day per man. As discussed infra, the quality area supervisors spent most of the rest of their time collecting statistical data on tires and their components, and noting such data on audit sheets or other paper. As discussed infra, the quality contol technicians had also collected such data, and noted them on audit sheets.

Dickenson testified that Respondent began using the SPC system soon after the quality control technicians were laid off (cf. supra, sec. II,D,1). He testified that it "does take time" (he did not specify how long) to "establish" the SPC system, but that, once it is established, comprehensible results can be reached with much smaller samples, and for a much longer timeframe, than was possible with "the old way of gathering data." He further testified that when data are entered by computer into the SAS system, the computer can produce charts showing "where you are today or last week, last month, compared to where you are right now." Reed's explanation of the SAS system shows that Dickenson was referring to charts showing the percentages of production which are in tolerance or out of tolerance.

I infer that, until deciding on 8 April 1986 to terminate all the employees classified as quality control technicians, Respondent planned to give them about the same kind of statistical and computer training administered to the quality area supervisors on and after 21 April 1986, and, on the basis of such training, to require quality control technicians to perform the same king of computer work which was in fact performed by the quality area supervisors. I so infer from the following evidence: Respondent had been planning since August 1985 to implement the SPC system and to set up an SAS system. A significant portion of the quality control technicians' duties (like the principal duty of the quality area supervisors) was to compile the data which were put into the computers when SPC and SAS were introduced. Reed testified that, when Senior Quality Control Foreman Griffin (the supervisor of the quality control technicians and, later, the quality area supervisors) entered into a computer some of the data complied by the quality control technicians, he "was establishing the model." Reed further testified that Respondent's entire data processing equipment consisted of two computers (which he described as "SPC units") and a printer, all of which Respondent was using before the quality control technicians were terminated and which Respondent thereafter used for the SPC system and the SAS program. Finally, when selecting quality area supervisors, Respondent hired mostly former quality control technicians, but did not (so far as the record shows) make any effort to ascertain whether applicants had any statistical or computer training or aptitude.[34]

2. The supervision and general duties of quality control technicians

During the first 3 months of 1986, each quality control technician covered one of three areas—namely, (1) the millroom, (2) tire assembly, and (3) finishing, curing, and the warehouse. When the plant was operating on three shifts, one technician would be assigned to each of the three areas on each shift, except that two technicians would be assigned to area 3 on the day shift. In addition, Respondent employed one "floater," who filled in for technicians who were absent or on vacation, and helped out when production was picking up. On occasion, Quality Control Superintendent Dickenson asked quality control technicians to change areas, and in most cases these employees were willing to do so.[35] These 11 quality control technicians reported directly to Quality Control Foreman Ernest Axley. Axley reported directly to Senior Quality Control Foreman Rodney Griffin, who reported directly to Quality Control Superintendent

[33] Thus, both quality control technicians and quality area supervisors collected data on the width and length of tread.

[34] As previously noted, among the terminated quality control technicians whom Respondent did not advise of the quality area supervisor's jobs was Hurley, whose college major was mathematics and who in 1970 had had a college course in computers. However, Hurley has never run an SPC computer on the SPC program, and does not know what the SAS program is.

[35] Both of the quality control technicians who testified had worked as such in two areas.

Dickenson, who in turn reported directly to Technical Services Manager Kin McAllister. As previously noted, each quality control technician submitted at the end of each shift a number of written reports. The original copies were sent to Senior Quality Control Foreman Griffin, who used them to prepare a weekly or monthly quality rating. A copy of each such report was sent to the superintendent of the area in question, to corporate headquarters in New Haven, to the "technical department," to Production Manager Ernest Custer, to Quality Control Superintendent Dickenson, and (sometimes) to Technical Services Manager McAllister. General Manager Reed testified that, if these reports showed that most of the checks were within specification, Respondent "assumed" that the product was satisfactory. Dickenson testified that he "would glance at [the reports] and look and see if there was any circles around there, denoting something that was out of spec. If there was no circle, I would probably [throw] them away." There is no evidence as to what corporate headquarters, the "technical department," Custer, or McAllister did with these documents.[36]

3. The supervision and general duties of quality area supervisors

Quality area supervisors are directly supervised by Senior Quality Control Foreman Griffin and (perhaps) by Axley, who had been the immediate superior of quality control technicians and, as such, had directly reported to Griffin.[37] Griffin still reports directly to Quality Control Superintendent Dickenson, who in turn still reports directly to Technical Services Manager McAllister.

Two quality area supervisors are assigned to each shift. All 6 of them perform their duties throughout the plant; Dickenson testimonially attributed at least partly to their limited numbers the difference between their work areas and the more limited work areas in which each of the 11 quality control technicians respectively worked. The quality area supervisors' job description, prepared on an undisclosed date after they started to work as such, states, inter alia, that they are expected to "Monitor all phases of our performance and adherence to the following: specification, standard practice specification, equipment checks, hold release, set-ups, and local procedures." Reed testified that as of 8 April 1986 he intended to confer on quality area supervisors' "supervisory privileges," which he explained as "to stop an operation if it was found out of control, to work within the other manufacturing supervisors, superintendents that would be on the floor at that time." He went on to testify that these were the only "supervisory privileges" he had had in mind. McAllister credibly testified that as of 28 April it had not yet been decided what authority, if any, the quality area supervisors would have over the manufacturing foremen and line foremen. He further credibly testified that as of that date the quality area supervisors did not discipline employees, and that at no time had they authority to recommend discipline.[38] Industrial Relations Manager Weymouth testified in late July that, when the quality area supervisors were first hired, Respondent planned that they would usually go through the manufacturing foreman to effect a change, but in the unusual circumstance quality area supervisors "will have authority" to do it themselves. On the following day, Dickenson testified at one point that quality area supervisors, if they find a defective product or improper operation, have authority to stop it without finding the production foreman. However, he elsewhere testified that, when the quality area supervisors find such deficiencies, "[w]e would notify the manufacturing people and help wherever we could to stop that operation from going on . . . . Tie if off if necessary . . . you're reacting to the conditions you find." When quality control technicians (not contended to be supervisors) found a defective product or improper operation, they could not ordinarily stop production, or take corrective action, without the approval of the foreman in that department. However, if the problem was serious and the foreman was not readily available, quality control technician Hurley, at least, would tell the operator to shut down the operation, and would then find the foreman and tell him about the problem.[39] Like quality control technicians, quality area supervisors do not have any employees under them.[40]

In the course of the quality control technicians' work, they carried with them a clipboard holding audit forms, a tape measure, a tread gauge, and on occasion a mill knife. They used chalk to mark defective tires, but the record fails to show whether they carried chalk with them. Quality area supervisors carry with them a clipboard to hold audit forms or slips of paper, a gauge, a tape measure, a mill knife, a flashlight, and chalk to mark defective tires.

4. The nature of the checks performed and the data collected by the quality area supervisors and the quality control technicians

In the millroom, the quality area supervisors recheck chemical weights of the rubber mixture which comes out of the "Banbury" mixer; collect data on the width, length, and gauge of the treads; collect data on the gauge and width of the sidewalls; check fabric dimensions and the splice width of ply; and perform random audits on the mixer setups. Also, the quality area supervisors initially collected, but later stopped collecting, data as to strands, turns, and diameter of beads. Quality con-

[36] McAllister was called by the General Counsel as an adverse witness, and was not asked about this matter. Custer did not testify.

[37] See supra, fns. 18 and 30. At least as of 28 April 1986, 3 months before the hearing, no decision had been reached as to what authority, if any, Axley would have over quality area supervisors.

[38] For demeanor reasons, I do not credit Dickenson's testimony that they have authority to recommend discipline.

[39] Hurley had been a quality control technician for 13 years. He impressed me as having a good deal more self-confidence than Dailey, who had been a quality control technician for 5 years and who credibly testified to the belief that he had no authority to stop the machines or to tell an employee how to operate his machine. Dickenson, who testified that quality control technicians had no such authority, was in general an unreliable witness; see supra fns. 21 and 26.

[40] In view of the evidence summarized in the text, I conclude that "quality area supervisors" are not "supervisors" within the meaning of Sec. 2(11) of the Act. Indeed, Respondent has not contended otherwise.

trol technicians had collected all these data and had made similar random audits.

In the tire assembly area, quality area supervisors inspect the inside and outside of tire carcasses to determine whether the correct carcasses have been used, whether the correct specifications have been imprinted on the tires, whether the tread had been correctly identified, and whether the tires have such defects as improper splices, wide liners, whitewall splices, wrinkled turn-ups, or trapped air. Also, quality area supervisors perform random audits of the tire assembly machine setups. The quality control technicians had performed all these inspections and had made similar random audits.

In the finishing, curing, and warehouse area, the quality area supervisors perform audits on samples of finished goods. On occasion, if an audit suggests that a defect is "running" in a particular kind of tire, the quality area supervisors check each of these tires individually. Except that the quality area supervisors seldom use the optimizer, the audit of the tires which are in fact checked is the same as the one which had been performed by the quality control technicians on the tires checked by them. The quality control technicians had audited all tires, except that they audited only samples of "some catalog numbers that are proven that they were okay." Each tire in "price club" orders had been checked by quality control technicians and is now checked by quality area supervisors.

The quality control technicians' duties included tracking down tires already in the warehouse when a check of similar tires suggested a defect common to all of them. Quality area supervisors have these same duties.

A significant proportion of the quality control technicians' workday had been devoted to making checks of work which was at least supposed to have been checked by the foreman and/or the operator.[41] From time to time, these "double checks" had disclosed mistakes made by the foreman and/or the operator—on very rare occasions of a possibly dangerous nature. Dickenson testified that if a mistake was not caught by the operator, the foreman, or the quality control technician who checked it, all three would be considered blameworthy, although the technician would be less to blame than the others. In the millroom, these "double checks" had included checking each setup and each changover of the mixers; checking each setup of the extruders (tubers); and checking three setups per shift of the gum calender. In tire assembly, these "double checks" had included checking each changeover of the bead forming operation; checking each tire assembly setup; and checking the cutting operation. Although the quality area supervisors do make such checks on a random basis, their regular performance either has been eliminated or is the responsibility of the foreman or the operator.

Before 11 April 1986, oil connections were made in the presence of a quality control technician (who was responsible for seeing to it that the connection was made properly) and the pipefitter; normally, the maintenance foreman was not present. Thereafter, the pipefitter and the maintenance foreman were responsible for the correct coupling, for which the quality area supervisors had no responsibility.

For an undisclosed period which continued after 21 April 1986, employee Meyers was classified as a quality control engineer, and performed certain tests required by the Department of Transportation. At least some of these tests required the use of an X-ray machine, and at least some of them called for checks on the dimensions of cross sections, circumference, and tread radius on a certain number of tires. Thereafter, and on an undisclosed date before 30 July 1986, Meyers was reclassified as a quality area supervisor, and the quality area supervisors were all taught to perform these DOT-required tests. There is no evidence that the particular X-ray operation initially performed by Meyers was ever performed by the quality control technicians. However, the quality control technicians had used an X-ray machine to perform random tests in the finishing operation.

E. *Analysis and Conclusions*

In *Birch Run Welding*, the court held:

> [A]lthough the General Counsel must usually show that the employer knew about individual employees' union activities before the Board may conclude that the employer violated § 8(a)(3), the General Counsel may also prevail by showing that the employer ordered general lay-offs for the purpose of discouraging union activity or in retaliation against its employees because of the union activities of some. This theory is viable even though some employees who actually opposed the union . . . were laid off with their pro-union counterparts.

Birch Run Welding v. NLRB, 761 F.2d 1175, 1180 (6th Cir. 1985), and cases cited. I conclude that the General Counsel has shown by a preponderance of the evidence that Respondent decided on 8 April 1986 to terminate the seven alleged discriminatees because Respondent had just found out that the Union had filed a petition seeking to represent them. Although there is no evidence whether any of the employees in the proposed unit had in fact engaged in any union activity, Respondent clearly believed that some or all of them had. Thus, immediately after learning about the petition, General Manager Reed telephoned Vice President Twickler and (according to Twickler) said that Reed had just heard that the quality control technicians had petitioned for "joining the Union." Moreover, during this conversation Twickler admittedly remarked that "it sounded like an effort to move under the umbrella of the union to protect their job." If (as I find) such a belief motivated the termination of the seven alleged discriminatees, their termination was unlawful whether or not Respondent was correct in that belief. *Gulf-Wandes Corp.*, 233 NLRB 772, 778 (1977), enfd. in relevant part 595 F.2d 1074 (5th Cir. 1979), and cases cited; *Crucible, Inc.*, 228 NLRB 723, 729 (1977), and cases cited; *Hedison Mfg. Co.*, 249 NLRB 791, 808–809 (1980), enfd. 643 F.2d 32 (1st Cir. 1981).

[41] Dickenson testified that such tasks consumed 70 to 80 percent of the quality control technicians' time. I believe this figure to be somewhat overstated because elimination of most of these checks had been proposed by McAllister on 7 April as a concomitant to the termination of about 42 percent of the quality control technicians.

Persuasively pointing to Respondent's unlawful motive is the timing of Respondent's decision to terminate the seven alleged discriminatees. The credible evidence shows that as of 7 April, and until Reed learned around noon on 8 April about the Union's petition and called to tell Twickler about it shortly before 2 p.m., Respondent had every intention of retaining these seven employees, and that the termination decision was reached by 2 p.m. on 8 April. There is no credible evidence that anything at all intervened during this period of less than 2 days, other than Respondent's receipt of notice about the petition, to account for the change in Respondent's plans.[42] Particularly in view of this sequence of events, such timing points to the conclusion that the decision to terminate these seven employees was motivated by the Union's petition. *Birch Run Welding*, 761 F.2d at 1180–1181; *Jim Causley, Inc. v. NLRB*, 620 F.2d 122, 125 (6th Cir. 1980); *NLRB v. Tennessee Packers*, 390 F.2d 782, 784 (6th Cir 1968); *Lebis Contracting*, 267 NLRB 49, 50 (1983). Lending further support to such an inference is that by Reed's own testimony the alleged discriminatees, who had been classified as quality control technicians, were "replaced" by personnel who had the newly denominated job classification of quality area supervisors;[43] such persons were selected about the working day following the last day when the seven alleged discriminatees worked as quality control technicians. *Fedco Freightlines*, 273 NLRB 399, 401 (1984); *Sumco Mfg. Co.*, 251 NLRB 427, 438 (1980), enfd. 678 F.2d 46 (6th Cir. 1982); *B. J. & R. Machine Co.*, 270 NLRB 267, 269 (1984). As compared to the work that Reed and McAllister planned as of 7 April to assign to the seven alleged discriminatees after the remaining quality control technicians were terminated as of 11 April, the only difference of any significance between such technicians' work and the work performed by the quality area supervisors is that, to the extent that the data compiled by them were entered into the computer, all the data compiled by the quality control technicians were entered by Senior Quality Control Foreman Griffin, whereas some of the data compiled by the quality area supervisors were entered by them.[44] I regard this change as insubstantial in view of the following: When selected, the quality area supervisors did not (so far as the record shows) have any knowledge about operating computers; indeed, four of them were former quality control technicians. Further, there is no evidence that when selecting them Respondent made any effort to ascertain whether they had any experience in, or aptitude for, statistics or the operation of computers. Moreover, the evidence indicates that before terminating the quality control technicians Respondent had been taking steps looking to the performance by them of the computer function now performed by the quality area supervisors. Finally, at the time of the hearing (more than 2 months after the quality area supervisors began work as such), their ability to enter their compiled data into the computer was somewhat limited (in Dickenson's words, "Most of them can enter quite a bit of their own data"). Further pointing to the essential identity of the two jobs is the action of Respondent's Madison management in terminating the quality control technicians, and hiring the quality area supervisors, before Vice President Twickler had even received (much less approved) a purported reorganization plan supposedly calling for such action and before drawing up the job description for the quality area supervisor's job. Indeed, when Respondent got around to drawing up this job description, Respondent drew up a fair description of the quality control technicians' jobs with the addition of certain computer duties.[45] Moreover, the authority of and the supervision over the quality area supervisors had not been fully determined as of the date of the hearing, more than 3 months after the quality area supervisors began to work as such.

Further indicative of Respondent's unlawful motive is Respondent's failure to make, before terminating the seven alleged discriminatees, the arrangements which it eventually did make for the continued performance of quality control functions previously performed by the quality control technicians. Although Reed admitted that some sort of quality control program is needed in Respondent's business, and although Respondent performed after the technicians' termination the work which as of 7 April Respondent had intended the seven alleged discriminatees to perform after 11 April, until 9 April at the earliest Respondent did nothing at all (so far as the record shows) looking toward obtaining other persons to perform such work. Although creating an appearance of common motive for the termination of all 12 of the quality control technicians, Respondent's termination of the 7 alleged discriminatees effective the same day as the termination of the 5 quality control technicians whose termination had been decided on for lawful economic reasons before Respondent learned of the Union's petition[46] meant that during the next 2 weeks only 3 people—Griffin (when he was not instructing the quality area supervisors), Axley, and Dickenson—were available to perform the quality control work which Respondent had planned as of 7 April to be performed by the 7 alleged discriminatees and which, 2 weeks after their termination, began

[42] Indeed, the only evidence even suggesting any other factor is Twickler's uncorroborated and discredited testimony that on the morning of 8 April he suggested to Reed that the already scheduled cutback be increased by five or six. However, Reed testified that the decision to terminate the seven alleged discriminatees (which he testified was made by him) was not until the afternoon of that day.

[43] As Respondent's able brief puts it (p. 7), "Reed determined that the Company would use a quality assurance supervisor, rather than quality control technicians."

[44] The record fails to show how much was entered from the quality control technicians' compilations as compared to the quality area supervisors' compilations.

Although it is true that the quality area supervisors perform substantially fewer "double checks" than the quality control technicians in fact performed, Respondent had planned such a change in the remaining technicians' duties at the time that it decided on 7 April to terminate four technicians and before Respondent's 8 April decision to terminate the rest of them.

[45] More specifically, quality area supervisors were to be "completely trained on Statistical Process Control Methodology," to be "active Statistical Process Control team member[a]," "to do all data entry," and to "review all chart plotting and procedures."

[46] This common termination date may have been the reason all the quality control technicians were named in the original charges filed by the Union, which at that time may not have suspected that the decisions to terminate the technicians were not simultaneous.

to be performed by the quality area supervisors. Furthermore, Respondent's termination of the seven alleged discriminatees before making any arrangements for the performance of the work Respondent had intended them to do imposed on Respondent the further inconvenience of having to postpone the quality audit from the week of 14 April to the week of 9 June. That this was the reason for the rescheduling is shown by Reed's testimony that the quality audit was not rescheduled until after Respondent's 8 April decision to terminate the seven alleged discriminatees; by the probability that the audit would have been rescheduled before 8 April if the decision to reschedule it had been motivated by events which occurred before 8 April; and by the demonstrable falsity of Dickenson's testimony that the rescheduling was motivated by confusion due to an hourly layoff, although the most recent substantial hourly layoff had occurred more than 3 months earlier. Moreover, Respondent's conduct after deciding to terminate the remaining seven quality control technicians indicates that Respondent was attempting to resume the performance of their work as quickly as possible, while at the same time to conceal the fact that the quality area supervisors were essentially quality control technicians with a different job title. Thus, Respondent posted the quality area supervisor's job on the next working day (14 April) after the day that the quality control technicians lost routine access to the plant bulletin board, and about that same day selected all the successful applicants. Further, the job posting contained no job description from which the technicians (or anyone else) could infer that the supposedly new jobs were essentially the same as the ostensibly discontinued ones; and, by controlling the number and identity of technicians who learned about these vacancies before they were filled, Respondent controlled the number and identity of the technicians who would have been included in the unit sought by the Union and who filled the quality area supervisors' jobs.

Finally, the evidence shows that the reasons advanced by Reed for the termination of the seven alleged discriminatees were not the real reasons. Reed testified that he decided on 8 April to terminate these seven because the quality control technicians were basically performing double checks and the technicians' termination would save money. Although the record does show that these were the reasons for Reed's 7 April decision to terminate the five quality control technicians not named in the complaint, the record further shows that these were not the real reasons for the termination of the seven alleged discriminatees. Rather, the evidence shows that Respondent's decision to eliminate most of the double checks had been reached on 7 April, before Respondent learned about the Union's petition; that the work which on 7 April Respondent had decided to have performed after 10 April by the seven alleged discriminatees was in fact performed after 28 April by the quality area supervisors; and that this change at best saved Respondent little money and may well have cost it more.

Nothwithstanding the foregoing, Respondent contends that no finding of unlawful termination can be made because there is no independent evidence that Respondent did not want its quality control technicians to be represented by the Union; indeed, Respondent points to the fact that it has recognized the Union as the representative of the hourly paid employees since buying the Madison plant in 1973, and also has contracts with affiliates of the Union at three other plants (see supra, fn. 2, and attached text). However, the evidence shows that, within about 2 hours after learning on 8 April of the Union's petition, Respondent decided to terminate the seven quality control technicians whom on 7 April it had decided to retain; that Respondent thereafter replaced them with personnel whose total cost to Respondent was almost as high as (and perhaps higher than) the cost of the seven alleged discriminatees; and that the reasons advanced by Respondent for its action are not true. Moreover, nothing in the record shows any reasonable explanation, other than the union petition that Reed found out about around noon on 8 April, for Respondent's decision by 2 p.m. on 8 April to terminate the alleged discriminatees whom on 7 April it had decided to exclude from the salaried layoff to be effective on 11 April. From these circumstances, I infer that Respondent acted out of union animus and with the purpose of procuring the withdrawal or dismissal of the Union's petition on the basis of the seeming abolition of the petitioned-for jobs. See *Ames Ready-Mix Concrete v. NLRB*, 411 F.2d 1159, 1161 (8th Cir. 1969); *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698–699 (8th Cir. 1965); *NLRB v. Ri-Del Tool Mfg. Co.*, mem. 486 F.2d 1406, 84 LRRM 2630, 2631 (7th Cir. 1973);[47] *Shattuck Denn*, 362 F.2d at 470; *Postal Service*, 275 NLRB 510, 511 (1985); *Cedar Falls Health Care Center*, 276 NLRB 1300, 1302 (1985); *Halloran House*, 249 NLRB 759 (1980); *Aker Plastics*, 262 NLRB 1128, 1134 (1982).

As to cases in which an employer asserts permissible reasons for an allegedly unlawful discharge, the Board requires an analysis under *Wright Line*,[48] even when (as in this case) the reasons asserted by the employer have been found to have played no part in the discharge decision. *Taylor & Gaskin*, 277 NLRB 563 (1985). Cf. *Squire Distributing Co. v. Teamsters Local 7*, 801 F.2d 238, 242 (6th Cir. 1986). Accordingly, I find, for the same reasons that underlie my finding that Respondent's tendered reasons for the seven terminations are purely pretextual, that Respondent has failed to sustain its burden of showing that Respondent would have terminated the alleged discriminatees for such reasons in the absence of the Union's petition.

For the foregoing reasons, I find that Respondent violated Section 8(a)(1) and (3) by terminating quality control technicians Lee Roy Kemp, Roy Dailey, William Douglas, Eugene Kincaid, James Mason, James Hurley, and Lizzie Mae Watson.

I have found that Respondent converted the position of quality control technician to that of quality area su-

[47] The court stated:

> Where the employee is a leading union advocate whose discharge would tend to undermine the union organizational effort and where the Company had previously indicated that it valued the employee's service, the discharge itself is sufficient evidence of antiunion animus.

[48] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

pervisor in furtherance of Respondent's scheme to continue performance of work performed by the technicians while ridding itself (in violation of Sec. 8(a)(1) and (3)) of employees bearing that job title, and thereby to procure withdrawal or dismissal of the Union's petition for an election among the employees with that job title. Accordingly, I find that by such conversion Respondent violated Section 8(a)(1) and (3). *Honda of San Diego*, 254 NLRB 1248, 1263 (1981); *Martin-Brower Co.*, 261 NLRB 752, 758–759 (1982), enfd. 716 F.2d 896 (4th Cir. 1983); *Amber Delivery Service*, 250 NLRB 63 (1980), enfd. 651 F.2d 57 (1st Cir. 1981); *Emerson G. M. Diesel, Inc.*, 258 NLRB 1242, 1247–1248 (1981).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act by terminating employees Lee Roy Kemp, Roy Dailey, William Douglas, Eugene Kincaid, James Mason, James Hurley, and Lizzie Mae Watson about 11 April 1986.

4. Respondent has violated Section 8(a)(1) and (3) of the Act by converting the position of quality control technician to that of quality area supervisor.

5. The unfair labor practices set forth in Conclusions of Law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent had engaged in certain unfair labor practices, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action in order to effectuate the policies of the Act.

When, as here, an employer has unlawfully terminated employees, the Board ordinarily requires the employer to offer the employees reinstatement to the jobs of which they were unlawfully deprived or, if no such jobs exists, substantially equivalent jobs. In the instant case, Respondent no longer employs employees who perform precisely the same combination of tasks which was performed by the discriminatees before their unlawful termination. Because Respondent's creation of this situation constituted an unfair labor practice and was motivated by an effort to conceal Respondent's unlawful motives for ridding itself of the discriminatees, and because all of the work that Respondent had intended them to perform before it learned of the Union's petition is still being performed by Respondent's personnel, the fact that the discriminatees' exact same jobs no longer exist would not necessarily preclude an order requiring Respondent to offer such jobs to the discriminatees. *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215–216 (1964); *Alert Medical Transport*, 276 NLRB 631, 673 (1985). However, I conclude that it would be more appropriate to require Respondent to offer the discriminatees reinstatement in the quality area supervisors' jobs, which, for purposes of this case, I find to constitute substantially equivalent employment (see supra, sec. II,D). The only work performed by quality area supervisors but not quality control technicians consists of entering data into the computer and certain X-ray work, neither of them tasks which consume a large proportion of the workers' time. Because Respondent gave on-the-job training in such procedures to all the persons hired about 14 April as quality area supervisors, and because the failure of the discriminatees (other than present quality area supervisors Kemp and Douglas) to receive such training is a direct result of their unlawful termination, Respondent is in no position to claim that mere lack of such training renders inappropriate an order requiring the other discriminatees to be offered jobs as quality area supervisors. To be sure, such an order would be unjust to both Respondent and the discriminatees if they could not be trained for such new tasks. However, I conclude that they can be so trained. Thus, so far as the record shows, all four of the quality control technicians who were selected as quality area supervisors learned such tasks at a rate satisfactory to Respondent. Further, so far as the record shows, in selecting the quality area supervisors, Respondent did not take into consideration either their experience in operating computers or their aptitude in learning such work (the only tasks then performed by quality area supervisors which had not been performed by quality control technicians). Finally, the record indicates that before the Union filed its petition Respondent was planning to train its quality control technicians to enter their data into the computer and to require them to do so. I conclude that the discriminatees are capable of being trained for these new tasks and would in any event have eventually been required to learn how to enter their data into the computer. In determining after the reinstatement of any discriminatees (except Kemp and Douglas) whether they have made satisfactory progress in learning these new tasks, Respondent must, or course, evaluate them on the basis of the training which they have had an opportunity to receive, rather than comparing them with other quality area supervisors whose opportunity for training has not been affected by discriminatory denial of employment.

As previously noted, the discriminatees were all being paid at a level which fell within the salary range attached to salary grade 14. I agree with the General Counsel that the required offers of employment should be to the salary grade 14, which Respondent has attached to the quality area supervisors' jobs, rather than to the salary grade 11, which Respondent had attached to the job classification of quality area technicians. Such a requirement is analogous to the routinely issued requirement that reinstatement offers include wage increases and other improvements afforded to incumbents in the discriminatee's old job during a period when that job was unlawfully withheld from him. *Chem Fab Corp.*, 275 NLRB 21, 22 (1985); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1159 (1980).

Accordingly, Respondent will be required to offer jobs as quality area supervisors, with the salary grade 14, to discriminatees Roy Dailey, Eugene Kincaid, James Mason, and James Hurley, dismissing, if necessary,

Morton Sadler, James Sisk, Don Murphy, Bobby Richardson, Robert Meyers, and any other individual (except discriminatees Lee Roy Kemp and William Douglas) hired or transferred into such a job since 12 April 1986, without prejudice to the seniority, or other rights and privileges, they would have enjoyed if they had not been terminated about 11 April 1986. Because at the time of the July 1986 hearing discriminatees Kemp and Douglas were in fact working for Respondent as quality area supervisors, Respondent will not be required to offer them employment as such, but will be required to afford them the seniority, and other rights and privileges, they would have enjoyed if they had not been unlawfully terminated about 11 April 1986.

Up to this point, I have failed to discuss any affirmative relief to be afforded to the seventh discriminatee, Lizzie Mae Watson. She is the discriminatee with the lowest seniority, and the record affirmatively shows that Respondent customarily uses seniority as the basis for determining the identity of salaried employees to be terminated for economic reasons within a particular job classification. Although Respondent unlawfully terminated seven quality control technicians, Respondent may have initially employed only six persons to replace them (see supra, fn. 21). Moreover, when Respondent did add another quality area supervisor (Robert Meyers), Respondent transferred him from another job and transferred at least some of the duties of that job to the quality area supervisors. However, the record otherwise fails to show the circumstances surrounding Meyers' transfer or Respondent's usual practice in determining whether to fill salaried vacancies by transfer, recall, or otherwise. Moreover, because the 14 April selection of only six quality area supervisors was part of a design to conceal Respondent's discriminatory motivation by concealing the seven discriminatees' replacement, it cannot be assumed at this point that Respondent decided in good faith that as of 14 April it needed only six persons instead of seven. Accordingly, if no vacancy for Watson is left following the other discriminatees' responses to Respondent's job offers and the dismissal (if necessary) of Sadler, Sisk, Murphy, and Richardson, Respondent will be required to put Watson on a preferential hiring list. Any other job and related rights she may have will be determined at the compliance stage.

Further, Respondent will be required to make all seven of the discriminatees whole for any loss of pay or other benefits they may have suffered by reason of their unlawful termination, less net interim earnings, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as called for in *Florida Steel Corp.*, 231 NLRB 651 (1977).[49] Because Respondent's unlawful scheme for concealing its discriminatory motivation was directly responsible for the 1-week interval between the discriminatees' last day on the active payroll as quality control technicians and the first day of work by the quality area supervisors, that week is to be included in the backpay period, and gross backpay is to include what the discriminatees would have been paid during that week but for their unlawful termination. In addition, Respondent will be required to expunge from its files any reference to the unlawful teminations, and to notify the seven discriminatees that this has been done and that evidence of such unlawful actions will not be used as a basis for future personnel actions against them. *Sterling Sugars*, 261 NLRB 472 (1982). The General Counsel's request for a "visitatorial clause" will be granted in view of the possible complexity of computing the "make-whole" remedy here. *Hilton Inn North*, 279 NLRB 45 (1986); but see *Westwood Industries*, 280 NLRB No. 12 (May 30, 1986) (not reported in Board volumes).[50] Also, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[51]

ORDER

The Respondent, The Armstrong Rubber Company, Madison, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 670, AFL–CIO–CLC, or any other labor organization, by terminating employees, converting one job into another job, or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(b) In any like or ralated manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necesary to effectuate the policies of the Act.

(a) Offer jobs as quality area supervisors, at salary grade 14, to Roy Dailey, Eugene Kincaid, James Mason, and James Hurley, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Afford Lee Roy Kemp and William Douglas the seniority, and any other rights or privileges, they would have enjoyed if they had not been terminated about 11 April 1986.

(c) If no position as quality area supervisor is available for Lizzie Mae Watson, place her on a preferential list, and offer her such a job as such employment becomes available and before other persons are hired for such work.

(d) Make Dailey, Kincaid, Mason, Hurley, Kemp, Douglas, and Watson whole for any loss of pay or benefits they may have suffered by reason of the discrimina-

[49] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[50] Such problems may include, without limitation, determining the wage rate at which the discriminatees' gross backpay is to be computed. As the General Counsel points out, when Respondent hired discriminatees Kemp and Douglas as quality area supervisors, Respondent paid them about 5 percent more than they had received as quality control technicians.

[51] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tion against them, in the manner set forth in the remedy section of this decision.

(e) Remove from its files any reference to the unlawful terminations and notify the employees in writing that this has been done and that the terminations will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful for analyzing the amount of backpay due under the terms of this Order.

(g) Post at its facility in Madison, Tennessee, copies of the attached notice marked "Appendix."[52] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors, or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States court of appeals enforcing this Order and may be had on any matter reasonably related to compliance with this Order, as enforced by the court.

[52] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to be heard and state their positions, the National Labor Relations Board has found that we violated the National Labor Relations Act and had ordered us to post and abide by this notice.

WE WILL NOT discourage membership in International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 670, AFL-CIO-CLC, or any other union, by terminating employees, converting one job into another job, or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 the Act.

WE WILL offer jobs as quality area supervisors to Roy Dailey, Eugene Kincaid, James Mason, and James Hurley, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL afford to Lee Roy Kemp and William Douglas, who are now working as quality area supervisors, the seniority, and any other rights and privileges, they would have enjoyed if they had not been terminated.

If no position as quality area supervisor is available for Lizzie Mae Watson, WE WILL put her on a preferential hiring list, and offer her such a job as such employment becomes available and before other persons are hired for such work.

WE WILL make all seven of these employees whole, with interest, for any loss of pay or benefits they may have suffered by reason of the discrimination against them.

WE WILL remove from our files any reference to the unlawful terminations of all seven of these employees, and notify them that these terminations will not be used against them in any way.

THE ARMSTRONG RUBBER COMPANY

C.S.E. Contract Cleaning *and* Service Employees International Union, Local 254, AFL–CIO. Case 1–CA–23800

14 April 1987

DECISION AND ORDER

BY MEMBERS BABSON, STEPHENS, AND CRACRAFT

Upon a charge filed by Service Employees International Union, Local 254, AFL–CIO (the Union) 30 April 1986 and an amended charge filed 12 June 1986, the General Counsel of the National Labor Relations Board issued a complaint 23 June 1986 against C.S.E. Contract Cleaning (the Company or the Respondent) alleging that it has violated Sections 8(a)(5) and (1) and 8(d) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Company has failed to file an answer.

On 9 February 1987 the General Counsel filed a Motion for Summary Judgment. On 12 February 1987 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 10 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 10 days of service, "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that by letter dated 25 August 1986 the Company was notified that unless an answer was received by 8 September 1986 a Motion for Summary Judgment would be filed. In addition, on 9 October 1986, copies of the charge, amended charge, complaint, and notice of hearing were hand-delivered to the Company.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation with an office and place of business in Brookline, Massachusetts, is engaged in the business of providing cleaning services to the New England Conservatory of Music. During the calendar year ending 15 June 1986, the Company provided services valued in excess of $50,000 directly to the New England Conservatory of Music. During the calendar year ending 15 June 1986, the New England Conservatory of Music derived gross revenues in excess of $1 million, which amount excludes contributions which, because of limitation by the grantor, are not available for operating expenses. During the calendar year ending 15 June 1986, the New England Conservatory of Music received goods and materials at its Boston, Massachusetts location valued in excess of $5000 from points directly outside the Commonwealth of Massachusetts. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit and the Union's Representative Status*

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by the Respondent engaged in the Contract Building Cleaning Industry, wherever employed in the covered territory performing janitorial services, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen and groundsmen, maintenance tradesmen if not previously covered by agreements with other unions, but excluding all executive employees, salaried supervisors, sales employees, clerical employees, hourly paid supervisors, foremen, and employees who do not regularly work in excess of fifteen hours per week.

Since 1981 the Union has been the designated exclusive collective-bargaining representative of the employees in the unit, and since 1981 the Union has been recognized as such representative by the Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the

most recent of which is effective by its terms for the period of 1 September 1984 to 31 August 1987.

At all times since 1981 the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the unit employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

B. *The Refusal to Bargain*

About January 1986 the Respondent failed to continue in full force and effect all the terms and conditions of the 1984–1987 contract by failing and refusing to remit contributions to the Service Employees Pension Fund as required by article XIII of the 1984–1987 contract, payments for employee health benefits to the Boston Building Service Employees Trust Fund as required by article XII of the 1984–1987 contract, and union dues to the Union as required by article XXXIII of the 1984–1987 contract.

The terms and conditions of the agreement which the Respondent failed to continue in full force and effect are terms and conditions of employment of unit employees and are mandatory subjects of bargaining. The Respondent engaged in such conduct without prior notice to and without having afforded the Union the opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees. We find that the Respondent has failed and refused to bargain collectively with the representative of its employees and has thereby violated Sections 8(a)(5) and (1) and 8(d) of the Act.

CONCLUSIONS OF LAW

By failing and refusing to remit contributions to the Service Employees Pension Fund, payments for employee health benefits to the Boston Building Service Employees Trust Fund, and union dues to the Union, as required by the 1984–1987 contract, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall, inter alia, order the Respondent to make all contributions to the Service Employees Pension Fund and payments for employee health benefits to the Boston Building Service Employees Trust Fund required by its collective-bargaining agreement with the Union.[1] We shall also order the Respondent to reimburse its employees for any expenses ensuing from its unlawful failure to make payments to the fringe benefit funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest as prescribed in *Florida Steel Corp*, 231 NLRB 651 (1977). We shall also order the Respondent to pay union dues to the Union,[2] with interest as prescribed in *Florida Steel Corp.*, supra.[3]

ORDER

The National Labor Relations Board orders that the Respondent, C.S.E. Contract Cleaning, Brookline, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to make contributions to the Service Employees Pension Fund as required by its 1984–1987 contract with the Union.

(b) Failing and refusing to make payments for employee health benefits to the Boston Building Service Employees Trust Fund as required by its 1984–1987 contract with the Union.

(c) Failing and refusing to pay union dues to the Union as required by its 1984–1987 contract with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

---

[1] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for the addition of a fixed rate of interest on unlawfully withheld fund payments at the adjudicatory stage of a proceeding. We leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. Depending upon the circumstances of each case, these additional amounts may be determined by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, by evidence of any losses directly attributable to the unlawful withholding, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[2] It is not clear from the complaint whether the Respondent's remission of union dues to the Union, as required by art. XXXIII of the contract, is pursuant to checkoff authorizations signed by the unit employees. We therefore shall require the Respondent to remit such dues to the Union only if the employees have executed the appropriate checkoff authorizations.

[3] The General Counsel has requested a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

(a) Make contributions to the Service Employees Pension Fund required by its 1984–1987 contract with the Union, as provided in the remedy section of this decision.

(b) Make payments for employee health benefits to the Boston Building Service Employees Trust Fund required by its 1984–1987 contract with the Union, as provided in the remedy section of this decision.

(c) Pay union dues to the Union as required by its 1984–1987 contract with the Union, as provided in the remedy section of this decision.

(d) Make unit employees whole for any loss of benefits suffered as a result of the Respondent's failure to make the fringe benefit fund payments required by its collective-bargaining agreement with the Union, as provided in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(f) Post at its facility in Brookline, Massachusetts, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to make contributions to the Service Employees Pension Fund as required by our 1984–1987 contract with the Union.

WE WILL NOT fail and refuse to make payments for employee health benefits to the Boston Building Service Employees Trust Fund as required by our 1984–1987 contract with the Union.

WE WILL NOT fail and refuse to pay union dues to the Union as required by our 1984–1987 contract with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make contributions to the Service Employees Pension Fund as required by our 1984–1987 contract with the Union.

WE WILL make payments for employee health benefits to the Boston Building Service Employees Trust Fund as required by our 1984–1987 contract with the Union.

WE WILL pay union dues to the Union as required by our 1984–1987 contract with the Union.

WE WILL make our unit employees whole for any loss of benefits suffered as a result of our failure to make the fringe benefit payments required by our collective-bargaining agreement with the Union. The appropriate unit is:

> All full-time and regular part-time employees employed by us engaged in the Contract Building Cleaning Industry, wherever employed in the covered territory performing janitorial services, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen and groundsmen, maintenance tradesmen if not previously covered by agreements with other unions, but excluding all executive employees, salaried supervisors, sales employees, clerical employees, hourly paid supervisors, foremen, and employees who do not regularly work in excess of fifteen hours per week.

C.S.E. CONTRACT CLEANING

National Association of Letter Carriers (United States Postal Service) *and* Marvin Hill. Case 10–CB–4823(P)

14 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 21 January 1987 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, National Association of Letter Carriers, Dunwoody, Georgia, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] Member Johansen notes that the same result is reached if we construe the authorization to continue but that, as the amount of dues owed is zero, zero is the amount to be deducted and remitted.

Mary L. Bulls, Esq., for the General Counsel.
Richard N. Gilberg and *Devon Lee Miller, Esqs.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Atlanta, Georgia, on 2 October 1986. The complaint, which was filed on 29 August 1986, was based on a charge filed 5 August 1986. It is admitted that the Employer in this case, United States Postal Service, provides postal services for the United States of America and operates various facilities throughout the United States, including the facility in Dunwoody, Georgia, involved in this proceeding. Additionally, Respondent, National Association of Letter Carriers, is admitted to be a labor organization within the meaning of Section 2(5) of the Act. I find that the Board has jurisdiction over Respondent by virtue of the provisions of the Postal Reorganization Act, 39 U.S.C. § 1209(a).

FINDINGS OF FACT

This case involves the unsuccessful efforts of union member Marvin Hill to resign from the Union and to revoke his checkoff authorization. Respondent and the Postal Service are parties to an existing collective-bargaining agreement which expires on 20 July 1987. Marvin Hill is employed in the unit encompassed by that collective-bargaining agreement. The collective-bargaining agreement does not require employees to become members of the Union or to pay dues to the Union.

Marvin Hill is employed by the United States Postal Service as a letter carrier. During his employment Hill has been a member of the Union. Hill signed a dues-checkoff authorization (form 1187) on 23 November 1984.

In early June 1986, Hill phoned Union Branch Vice President Charles Windham that he wanted "to withdraw from the Union." Windham testified that he was phoned by Hill and that, among other things, Hill told Windham that "he wanted to get out of the Union." According to Hill, Windham told him that he could not withdraw until his "anniversary date."

Hill wrote Windham on 13 June 1986:

> This letter is to inform you that I am withdrawing my membership to the Union immediately and would like for dues not to be taken out of my check. I will complete whatever forms are necessary to oomplete the transaction. I formally request a response concerning this matter within 10 (ten) days to the address provided below.

On 20 June 1986 Windham responded:

> We have received your request to withdraw your membership from the NALC. As we discussed in our phone conversation, ours is an open shop and you are not forced to belong to our labor organization.
>
> Our records indicate that your application was processed in December, 1984. As I told you at the time of our conversation, Form 1188 must be executed to withdraw your membership. This is a personnel controlled form used by the Postal Service. The union cannot process this form for you nor can we change the requirements under Section B of Form 1187. I have attached a copy of form 1187 for your inspection. Section B is self-explanatory and the reason why you will not be able to withdraw your membership until your anniversary date. I trust that this response is satisfactory.
>
> In closing, if you have some problems that we are not aware of, President Taylor and myself remain willing to discuss them with you. You could contact us by phone or set up an appointment to come in. I feel that you lose far more than you could ever gain by dropping your membership.

Hill again wrote Windham. The second letter, which was received by Windham on 2 July 1986, stated:

> This letter is to request a copy of the form I signed making me a union Member. Also it is to inform you that your Answer to my request to withdraw from the Union was unacceptable. There are legal questions concerning *voluntary* deductions from an Individuals paycheck. We will find an answer to legal question at a later date. The necessary Complaints and Motions are being filed with legal couns [sic] State & Federal labor boards, (Including a letter of complaint to the National headquarters about the problem and especially about your attitude in your conversation with me), and consumer complaint agencies. (Since I am paying for a service). I hope we can avoid litigation in this matter for the good of everyone involved. I wish you would be so kind to respond to the letter within seven (7) days.

Hill also contacted the United States Postal Service. By letter delivered 11 July 1986, Hill told the Postal Service that he was resigning from the Union effective immediately. Hill also submitted a signed form 1188, which is the form used by the Postal Service employees to cancel payroll deductions. Hill's form 1188, which was dated 30 June 1986, shows that he canceled his authorization for the deduction of dues of the National Association of Letter Carriers.

Neither the Union nor the Postal Service accepted Hill's resignation or his cancellation of dues-deduction authorization. Dues continued to be deducted from Hill's pay and accepted by the Union.

During the hearing and again in its brief, Respondent argued that Hill's only efforts to resign and withdraw dues-deduction authorization were directed to the branch and to the United States Postal Service and that the branch was not acting as agent for the Union in that regard. Hill did indeed admit that he did not contact the Union.

However, in response to my questions during the hearing, Respondent's attorney admitted that a member's resignation request may be presented locally.

The evidence illustrated that Hill's contacts were all with the branch as opposed to the Union. Local Vice President Windham testified the branch presents an "orientation package" to new employees, which includes a copy of form 1187. Form 1187 is the dues-deduction authorization form. Additionally, the branch's shop steward provides form 1187 to employees and, on request, form 1187 will be mailed to an employee by the branch union office.

CONCLUSIONS

In *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), the Supreme Court approved the National Labor Relations Board policy regarding unrestricted rights of union members to resign. The Court stated:

> The Board has found union restrictions on the right to resign to be inconsistent with the policy of voluntary unionism implicit in § 8(a)(3). [See *Machinists Local 1414 (Neufeld Porshe-Audi)*, 270 NLRB 1330 (1984); *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 992 (Chairman Van de Water and Member Hunter, concurring), enf. denied 725 F.2d 1212 (1984).] We believe that the inconsistency between union restrictions on the right to resign and the policy of voluntary unionism supports the Board's conclusion that League Law 13 is invalid. [Footnote omitted.]
>
> . . . .
>
> By allowing employees to resign from a union at any time, § 8(a)(3) protects the employees whose views come to diverge from those of his union.

The authorization for dues deduction signed by Hill on 23 November 1984 links payment of dues to union membership by specifying that the deduction is limited to "regular and periodic membership dues." In *Postal Service*, 279 NLRB 40 (1986), the Board found a violation where the employer refused to honor dues-checkoff revocation by an employee that had effectively resigned from union membership.

In *Postal Service*, 280 NLRB 1439 (1986), the Board held that resignations from the union are effective without regard to the union's efforts to place limitations on the time of resignation. In that case the Board also stated that the Postal Service dues-checkoff authorization provides "for the payment of dues as a quid pro quo for union membership and was therefore revocable when union membership ceased to exist by virtue of an effective resignation from membership."

Those cases control the instant controversy. Respondent argues, however, that the branch of the Union was not acting on behalf of the National and, for that reason, Hill's letters to the branch could not serve as resignation from the the National. The National is the only party charged by the complaint. However, Respondent's counsel admitted that it was a practice of the branch to accept resignations. Obviously, Respondent cannot hold Hill to a more onerous requirement that it customarily follows in resignations. Therefore, Respondent's point is without merit.

By its letter to Hill dated 20 June 1986 the branch specifically refused to accept Hill's resignation until his "anniversary date" and until Hill executed form 1188 with the Postal Service. By attempting to limit Hill's resignation, Respondent thereby violated Section 8(b)(1)(A). Additionally, Respondent violated Section 8(b)(1)(A) by continuing to accept membership dues from the Postal Service on behalf of Marvin Hill.

CONCLUSIONS OF LAW

1. United States Postal Service is subject to the jurisdiction of the National Labor Relations Board by virtue of 39 U.S.C. § 1209.

2. Respondent is a labor organization as defined in Section 2(5) of the Act.

3. By refusing to honor his resignation from the Union and the revocation of dues-checkoff assignments by employee Marvin Hill where those dues-checkoff assignments were in consideration of union membership, Respondent violated Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the purposes of the Act. I recommend that Respondent be ordered to make employee Marvin Hill whole for any monetary loss he may have suffered by reason of Respondent's unlawful refusal to honor his resignation and revocation of dues-checkoff assignment. Those amounts are to be computed in the manner consistent with the Board policies stated in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest in accordance with the formula prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

Additionally, Respondent is directed to cease maintaining or enforcing all provisions of governing documents which unlawfully restrict the rights of members to resign from the Union. To the extent Respondent may legally remove those written restrictions unilaterally, it is directed to do so and, if those provisions require actions by the Employer, Respondent is directed to advise the Employer of the effect of this decision and of its desire to remove all unlawful restrictions to a member's right to resign from all governing documents including the form used by the Employer to authorize checkoff of union dues. *Auto Workers Local 73 (McDonnell Douglas)*, 282 NLRB 466 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, National Association of Letter Carriers, Dunwood, Georgia, its officers, agents, and representatives, shall

1. Cease and desist from restraining and coercing employees by refusing to permit them to resign their union membership, by refusing to honor revocation of dues-checkoff assignments by employees having effectively resigned from union membership, by maintaining or enforcing provisions in governing documents which unlawfully restrict members' rights to resign from the Union, or by in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse and refund to Marvin Hill the dues unlawfully collected from him, with interest, from the time of his resignation from union membership and revocation of dues-checkoff assignments, as set forth in the remedy section of this decision.

(b) Delete provisions in its governing documents, and advise the Employer of its desire to delete provisions in governing documents maintained by the Employer, which unlawfully restrict members' rights to resign from the Union.

(c) Post at its facility in Dunwoody, Georgia, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to honor valid resignations by employees from union membership.

WE WILL NOT refuse to honor revocation of dues-checkoff assignments by employees having effectively resigned from union membership when the employees' dues-checkoff assignments are in consideration of union membership.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL delete all provisions in our governing documents, and request the United States Postal Service to delete provisions in documents which it maintains or enforces, which unlawfully restrict members' rights to resign from the Union.

WE WILL reimburse or refund to Marvin Hill dues unlawfully collected from him, with interest, for the time following his valid resignation from union membership and revocation of dues-checkoff assignments.

NATIONAL ASSOCIATION OF LETTER CARRIERS

Donald Browne d/b/a Bailey Distributors *and* Timothy Nevins. Case 2–CA–18022

14 April 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 21 January 1986 the Board issued a Decision and Order in this proceeding[1] dismissing the complaint.[2] The Board determined that dismissal was appropriate because a prior arbitration between the Respondent and the Union, which "met the *Spielberg* and *Raytheon* standards for deferral,"[3] has resolved the issues raised by the complaint. On 23 June 1986 the United States Court of Appeals for the Second Circuit remanded the case to the Board for further proceedings.[4]

The court determined that the Board's deferral to the arbitrator's decision had been appropriate regarding the allegation that the Respondent discriminated against Nevins by not affording him the same terms and conditions of employment as union members also employed as "helpers."[5] The arbitrator determined that from November 1977 to January 1981 Nevins had never worked as a helper, only as a relief driver and driver. The arbitrator determined that when Nevins worked as a relief driver and driver he had been afforded the same terms and conditions of employment as union members. In affirming the Board's decision to defer on this allegation, the court said:

> As to Nevins's first statutory claim, discriminatory treatment in his employment as a helper, we have little difficulty in concluding, as did the NLRB, that the arbitrator's determination of Nevins's employment status disposed of the issue.[6]

Accordingly, this allegation is not before the Board.

The allegation that is now before the Board pursuant to the court's remand is Nevin's second statutory claim—that on 5 January 1981 the Respondent conditioned its offer of employment (as a helper) on Nevins' accepting subscale wages, i.e., wages below those specified in the collective-bargaining agreement for an employee performing the job of helper. The court determined that deferral on this allegation was not appropriate as the *Olin* standard had not been satisfied. The court held that the issues before the arbitrator were not factually parallel to those of the second statutory claim.

The Board accepted the remand and the General Counsel filed a brief on 22 October 1986.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having accepted the remand, the Board must observe the court's opinion as the law of the case and, necessarily, its judgment that the Board improperly deferred to arbitration on Nevins' second statutory claim.

The Board has considered the entire record, the court's decision, and the General Counsel's brief and has decided to adopt the judge's rulings, findings,[7] and conclusions but only as to Nevins' second statutory claim.

The Respondent is engaged in the nonretail sale and distribution of beverages from its warehouse located in the Bronx, New York. The Board's prior decision contains an extensive discussion of the facts and positions of the parties regarding the nature of the employment relationship and the actual jobs that Nevins performed during the period from November 1977 to 5 January 1981.

The record shows that on 2 January 1981, a Friday, Nevins worked for the Respondent as a relief driver. On 5 January 1981 Nevins was

[1] 278 NLRB 103.

[2] The pertinent part of the complaint alleged that the Respondent discriminated against Timothy Nevins, a nonunion member of the bargaining unit, with regard to his "hire or tenure or terms or [sic] conditions of employment." The complaint alleged that the Respondent violated Sec. 8(a)(1) and (3) of the Act by paying Nevins "lower wages and rates of pay and lesser benefits than members of the Union" who also held the position of "helper." The complaint further alleged that on 5 January 1981 the Respondent violated Sec. 8(a)(1) and (3) of the Act by conditioning "its employment of Nevins [as a helper] upon Nevin's [sic] relinquishment of his rights to those wages, hours and other terms and conditions of employment set forth in the then current collective-bargaining agreement."

On 3 January 1983 Administrative Law Judge Robert T. Snyder issued a decision in which he determined that the Respondent had discriminated against Nevins. Judge Snyder found both 8(a)(3) and (1) violations. Subsequent to the judge's decision, *Olin Corp.*, 268 NLRB 573 (1984), was issued and the Board remanded the present case to the judge for further consideration. Judge Snyder issued a supplemental decision on 25 June 1984 in which he found that deferral was not appropriate; he reaffirmed his previous decision.

[3] Citing *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Raytheon Co.*, 140 NLRB 883 (1963), set aside on other grounds 326 F.2d 471 (1st Cir. 1964).

[4] *Nevins v. NLRB*, 796 F.2d 14 (2d Cir. 1986).

[5] Since 1974 the Respondent and the Soft Drink Workers Union Local 812 I.B.T. have been signatories to successive collective-bargaining agreements. One such agreement was in effect from 1 June 1978 to 31 May 1981. The collective-bargaining agreement covered three classifications of employees: route salesmen, route drivers, and utility drivers and helpers.

[6] 796 F.2d at 18.

[7] The Respondent has previously excepted to some of the credibility findings in the judge's decision and supplemental decision. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

present in the Respondent's warehouse at the start of the business day. The Respondent's owner, Browne, was preparing to drive one of the delivery trucks on its scheduled daily route. Browne turned to Nevins and offered to employ him as a helper for that day if Nevins would accept $40–$50 for the day's work and would provide his own transportation. The $40–$50 offer was below that called for by the collective-bargaining agreement. Nevins refused to work for less than he was entitled to as a bargaining unit member. Nevins declined the job of helper and left the Respondent's warehouse. After this incident, Nevins never again worked for the Respondent.

The judge found that the Respondent's conditioning of its job offer on Nevins' accepting subscale wages deprived Nevins of his Section 7 rights. The judge found that the Respondent thereby violated Section 8(a)(3) and (1) of the Act. We affirm the judge's finding of the violation. Accordingly, as alleged in the complaint, the Respondent unlawfully refused to hire Nevins for discriminatory reasons.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Donald Browne d/b/a Bailey Distributors, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily refusing to hire individuals for bargaining unit positions unless the individuals accept subscale wages.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to employ Timothy Nevins in the position for which he is qualified and in which he would have been employed but for the discrimination against him or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the administrative law judge's decision.

(b) Remove from all personnel records and files, and any other records, any reference to Timothy Nevins' refusal to be employed by the Respondent under the discriminatory terms the Respondent offered him on 5 January 1981, and notify Nevins that it has done so and that its unlawful conduct on that date will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its facility located in the Bronx, New York, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] The judge and the court referred to this 8(a)(3) and (1) violation as a constructive discharge. We do not do so because the arbitrator (in that portion of his decision to which the Board properly deferred) decided that prior to January 1981 the Respondent had not employed Nevins as a helper. Therefore, on 5 January 1981 Nevins could not have been constructively discharged from the position of helper as he had never held the position of helper.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminate against individuals by refusing to hire them for bargaining unit positions unless they accept subscale wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Timothy Nevins employment in the position for which he is qualified and in which he would have been hired but for the discrimina-

tion against him, without prejudice to his seniority or any other rights or privileges to which he would otherwise be entitled.

WE WILL make Timothy Nevins whole for any loss of earnings or any other benefits resulting from the discrimination against him, less any net interim earnings, plus interest.

WE WILL remove from all personnel records and files, and our other records, any reference to Timothy Nevins' refusal to be employed by us under the discriminatory terms offered him on 5 January 1981, and WE WILL notify him that we have done so and that our unlawful conduct on that date will not be used as a basis for future personnel action against him.

DONALD BROWNE D/B/A BAILEY DISTRIBUTORS

System Electric Co., Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 440. Case 21-CA-21572

16 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 12 September 1983 Administrative Law Judge Russell L. Stevens issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1. In the final paragraph of the discussion section of his decision, the judge concluded that the Respondent was not in the building and construction industry as that phrase is used in the Act. We reverse. Paragraph 2(a) of the amended complaint alleges, and the answer admits, "At all times material herein, Respondent, a California corporation, has been engaged in the business of electrical contracting in the construction industry . . . ." In addition, the complaint as amended at the hearing alleges, and the Respondent admits, that the appropriate unit comprises the Respondent's employees "engaged in electrical or electronic construction job work." Nothing in the record contradicts these admitted allegations. Accordingly, we find that the Respondent is "an employer engaged primarily in the building and construction industry" within the meaning of Section 8(f) of the Act.

2. In *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), the Board overruled *R.J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973), abandoned the conversion doctrine, and modified unit scope rules in 8(f) cases. As more fully set forth in *Deklewa*, supra at slip op. 8, the Board decided to apply the following principles in 8(f) cases.

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

Applying *Deklewa* to the instant case, we conclude that the complaint should be dismissed. In 1975 the Respondent signed a letter of assent-A with the National Electrical Contractors Association, Southern Sierra Chapter, pursuant to which it became bound to the then-current collective-bargaining agreement. By letters dated 17 December 1981 the Respondent timely and properly terminated the then-current bargaining agreement effective as of its 31 May 1982 expiration date and revoked NECA's authority to bargain on its behalf. No further agreement was reached by the Respondent with the Union. Although the Respondent admits it was bound to successive NECA agreements from 1975 through 31 May 1982, it contends and we find that any bargaining agreement between the Respondent and the Union expired as of 31 May 1982. Thus, under the fourth *Deklewa* principle quoted above, the Union enjoyed no presumption of majority status, and the Respondent was free to repudiate the 8(f) bargaining relationship. The judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by dealing directly with its employees and by failing to pay contractual wages and benefits and Section 8(a)(1) by telling job applicants that it would be a nonunion employer. As the judge's conclusions turn, however, on whether the Respondent owed bargaining or contractual obligations to the Union after 31 May 1982, which under *Deklewa* it did not, we shall reverse the judge and dismiss the complaint.

ORDER

The complaint is dismissed.

Gordan A. Letter, for the General Counsel.
Steven D. Atkinson, Esq. (Atkinson, Andelson, Loya, Rudd & Romo), of Long Beach, California, for the Respondent.
Jeffrey L. Cutler, Esq. (Davis, Frommer & Jesinger), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge. This case was tried in Indio, California, on June 16, 1983.[1] The complaint[2] is based on a charge filed September 10

[1] All dates hereinafter are within 1982, unless stated otherwise.
[2] As amended March 2, 1983, and as again amended at trial with leave of the administrative law judge.

by International Brotherhood of Electrical Workers, Local Union No. 440 (the Union). The complaint alleges that System Electric Co., Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material Respondent, a California corporation, has been engaged in the business of electrical contracting in the construction industry, and operates a facility in Cathedral City, California. During the 12-month period following June 4, 1982, at which time Respondent activated its operations, Respondent, in the course and conduct of its operations, purchased and received goods and materials valued in excess of $50,000 from suppliers located within the State of California, each of which purchased and received the same goods and products directly from suppliers located outside the State of California.

I find that Respondent is, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local Union No. 440 is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[4]

Industrial Electric Supply is a California business wholly owned by John Gomes, who also has served as chief negotiator for National Electrical Contractors Association, Southern Sierra Chapter (NECA). Approximately in 1975 John Gomes organized Respondent and became its president. His son, James (Jim) Gomes, was Respondent's vice president until March 1982. On March 10, 1975, John Gomes signed the Union's form Letter of Assent-A, pursuant to which Respondent became bound by a collective-bargaining Inside Wireman's Agreement between NECA and the Union, effective June 1, 1973, until May 31, 1975, and thereafter until terminated in accordance with the Letter of Assent-A. The agreement had, inter alia, an exclusive hiring hall provision that has remained the same in successive bargaining agreements between the parties, including the one involved herein, which was effective from June 1, 1981, through May 31, 1982. The bargaining agreements also had continuous provisions for health and welfare trust fund contributions by Respondent, with the requirement that Respondent submit monthly trust fund reports, whether or not any unit employees were on the payroll.

Respondent was an inactive corporation until early in 1982. In December 1981 Michael Gomes, who was another son of John Gomes and who had been a field supervisor of Industrial Electrical Supply for several years, decided with his family to activate Respondent. Soon after the first of the year Michael began organizing Respondent's affairs and preparing to go into operation, and he became president of Respondent in March.

By letter dated December 17, 1981, Jim Gomes notified the Union of Respondent's termination of its collective-bargaining agreement effective May 31, 1982, when the then-current agreement expired, and also notified the Union that Respondent had revoked NECA's authority to bargain for it. Finally, Respondent offered to meet and bargain with the Union for a new contract on its own behalf. By letter dated December 17, Jim Gomes also notified the Association that Respondent had revoked its authority to bargain with the Union on behalf of Respondent.

By letter dated March 2, Gilbert Dovey, the Union's business manager, advised Respondent (Jim Gomes) of the Union's intention to terminate the agreement expiring May 31 and offered to meet and bargain for a new contract.

On March 12, R. Reincke, a labor consultant for Mike Sullivan and Associates, Inc. (Sullivan), replied to Dovey's letter, stated that Sullivan was Respondent's exclusive collective-bargaining agent, reaffirmed Respondent's withdrawal from NECA, and offered to meet and bargain with the Union, on behalf of Respondent, at a mutually agreeable date. The letter shows a carbon copy to Respondent.

On March 17 Sullivan again wrote to the Union (Dovey), and also to Local 569, reiterated that Sullivan was Respondent's exclusive bargaining representative, and made a second request to meet and negotiate. The lettter shows a carbor copy to Respondent.

On May 26 Leland Brand, the Union's business agent who replaced Dovey, wrote a letter to Respondent (Jim Gomes), stated that the Union had received Sullivan's letter of March 12, questioned Sullivan's representative status, asked confirmation of that status, and offered to meet and bargain on June 1, 3, or 4.

On May 27 Sullivan replied to the Union's letter of May 26 to Respondent, reiterated its status as Respondent's exclusive collective-bargaining representative, questioned the Union's *fides* in continuing to refuse to recognize Sullivan's status, advised the Union that Michael, rather than James, was Respondent's principal officer, and asked for a reply to Sullivan's letter of March 17. The letter shows a carbon copy to Respondent.

On June 11 Reincke wrote a letter to the Union (Brand), enclosed a letter from Michael advising that Sullivan was Respondent's exclusive bargaining representative, and offered to meet and bargain with the Union immediately on reply from the Union. The letter shows a carbon copy to Respondent.

[4] This background summary is based on stipulations of counsel, and on credited testimony and evidence that is not in dispute.

On June 14 Jim Gomes replied to the Union's letter of May 26, and reiterated that he no longer worked for, or represented, Respondent.

Between March 10, 1975, and June 4, 1982, Respondent submitted monthly trust fund reports to the Union, as required by the various collective-bargaining agreements. As of approximately June 4 those reports were discontinued, and since that date Respondent has not made any trust fund payments or reports, and has paid wages to employees that are lower than the Union's contract wages.

Andrew Amento was initiated into the Union on November 30, 1979, approximately at the time he was employed by Industrial Electric Supply. When he became a union member he was assigned the rating of wireman p.e. (pending examination). He kept that same classification all the time he was a union member. In April or May Michael called Amento, whom he had known for some time, on the telephone and asked if he would be interested in working for a new company Michael was starting. Amento had been working for a nonunion company,[4] and asked Michael about the new company's relationship with the Union. Amento said he assumed the new company would be nonunion, and Michael stated that it would not be affiliated with the Union. They agreed to meet later, and approximately 2 weeks after the telephone call Amento went to Respondent's shop to talk with Michael. They walked around in the shop, and Michael reiterated that the shop would not be signatory to a union contract—that it would be "a merit or open shop." Amento expressed his dislike of the Union, and made it clear to Michael that he did not want to work under a union contract. Amento said he had not signed the Union's out-of-work book, and had not paid his dues for some time. Michael and Amento talked about the latter's pay, which was to be a little more than $18 per hour. Michael said some fringe benefits later may be arranged, but there would be no pension arrangement. Amento went to work for Respondent a few days later at $19 per hour, which was less than the Union's contract rate, and has worked for Respondent continuously to date. Amento has had an unsatisfactory relationship with the Union, although he paid his membership dues through January 1982,[5] when he was laid off by the contractor he then was working for. He did not go to the union hall or attempt to work through the Union thereafter. On one occasion in 1978 Amento argued with Brand about hiring hall procedures and on another occasion he was given a verbal reprimand because he worked on a job with nonunion employees. Brand credibly testified that members are suspended after failure to pay dues 3 months, and are dropped from membership after failure to pay dues 6 months. On May 12, 1982, Brand advised Amento by letter of his 3-month dues delinquency, and requested payment of $182.28 for dues and reinstatement from suspension. By letter dated July 14, 1982, Brand notified Amento that he would be tried by the Union on July 28, 1982, on the charge of working for Respondent without going through the union hiring hall. By letter dated August 5, 1982, Brand advised Amento that, in Amento's absence at trial, he had been fined $3000, with $2000 suspended. Amento never paid the fine. By letter dated August 17, 1982, Brand notified Amento that he had been dropped from the union membership. During his employment by Respondent, Amento kept Micheal Gomes well-advised concerning his problems with the Union, gave Michael the letters he received from the Union, and frequently expressed to Michael his dislike of the Union.

Robert Hudson formerly worked for Industrial Electric Supply. Sometime prior to June 1982 Hudson called Michael on the telephone and asked about the possibility of working for Respondent. An interview was arranged and held, and during either the telephone call or the interview Hudson asked if Respondent would be operating as a union shop and Michael said it would not. Hudson was working for a nonunion contractor at the time he talked with Michael. No job opening was available at the time, but Hudson was hired soon thereafter, as a wireman at $14 per hour. He still is employed by Respondent. Hudson became a union member February 25, 1980, and was a union member at the time he was hired by Respondent. Hudson also had a strained relationship with the Union, although he paid his union dues through February 1982. The dues paid for December, January, and February of 1981–1982 were in amounts that show a nonwork status, rather than a work status. Hudson talked with Michael Gomes about the Union on several occasions, and expressed his dislike for the Union. By letter dated September 8, 1982, Brand informed Hudson that he had been dropped from union membership because of failure to pay his union dues.

Michael Jones became a union member October 28, 1977, and worked for Respondent 15 hours during June 1982, at an hourly wage of $14.

Counsel stipulated that Respondent had no employees between its inception and June 4, 1982, who were covered by the Union-NECA agreement. During the balance of June 1982 Respondent had two full-time employees, Amento and Hudson, and Jones worked a short time. Amento and Hudson continued thereafter as full-time employees, occasionally assisted by helpers.

Sometime in June Brand learned that Respondent had employed two persons, but that such fact had not been reported to the Union. Brand notified the Union's trust office of the apparent problem, and sent a union agent, Tom Brady, to Respondent's shop to investigate. Brady later reported to Brand that the two employees, Amento and Hudson, told him the Union was not giving them work and that they had to work some place, so they went to work for Respondent. Brady credibly testified without contradiction that his visit to Respondent's jobsite to talk with the employees was on July 6.

On July 16 the Union filed an NLRB charge against Respondent, alleging that Respondent had violated Section 8(a)(5) and (1) of the Act. On July 22 Respondent filed an 8(b)(1)(B) charge against the Union. Both charges were withdrawn August 26. In July, Amento

[4] This work was not for Industrial Electric Supply, which is a union company.

[5] This date of January 1982 is from the testimony of Amento, corroborated by Brand.

called Brand on the telephone to complain about his name being on the Union's NLRB charge.

By letter dated August 26, 1982, Brand advised Sullivan that he was willing to meet with him concerning Respondent on September 1 or 2. Reincke called Brand on the telephone, and September 1 was agreed on as the date to meet.

On August 31 Respondent filed an RM petition with the Board, which later was dismissed on January 5 by the Regional Director of Region 21, on the basis of the Union's disclaimer on January 3 of interest in representing Respondent's employees.

The parties met as scheduled at the Union's office on September 1. Sullivan and Reincke attended for Respondent, and the Union was represented by Brand and Marvin Cook, the Union's International representative. The meeting lasted approximately 1 hour, and neither side presented contract proposals. A principal topic of discussion was the status of Amento and Hudson and the Union's representation of them. Sullivan asked for the Union's proof of representation because he doubted it, and the Union contended that it did, in fact, represent the two employees. The Union pointed out that Amento and Hudson were members of the Union at that time. A few other matters briefly were discussed, including a "favored nations" provision in some contracts, possible negotiation of an 8(f) contract, Brand's possibly meeting later with Amento and Hudson, ratification of the contract by Respondent's employees, and guidelines for future negotiations.

The parties have not met or negotiated since September 1.

B. *Discussion*

Several salient facts are not in dispute, or clearly are established by the report. (1) Respondent timely and properly notified NECA and the Union of Respondent's intention to withdraw NECA's bargaining authority for Respondent, and of Respondent's proposed termination of its contract with the Union effective May 31. (2) Amento and Hudson were hired in June, after the collective-bargaining agreement's termination date, without going through Respondent's hiring hall and at a wage rate lower than that provided by the terminated agreement. (3) Since approximately June 4, Respondent has submitted no reports to the Union's trust fund, and has not made any payments to union trust funds required by the terminated agreement. (4) Amento and Hudson were union members as of the date of their hire by Respondent. They were delinquent in payment of union dues as of that time, but they had not been dropped from union membership. (5) Amento and Hudson kept Michael abreast of their running feud with the Union, and freely discussed their dislike of the Union with Michael and fellow employees. (6) Prior to the date Amento was hired, Michael already had decided, in late April, that he was not going to be signatory to a contract with the Union. That fact was testified to by Michael.

On December 17, 1981, Respondent notified the Union of its willingness to bargain, on request, for a new contract. The Union took no affirmative action relative to Respondent's offer, but on March 2 told Respondent it was "ready to meet" at any mutually agreed time. On March 12, Reincke answered the Union's letter of March 2, but the Union refused to recognize Sullivan as Respondent's representative. Not until May 26 did Brand ask Respondent for confirmation of Sullivan's status, and that request was in Brand's letter to James Gomes. Brand offered conflicting statements at trial for his refusal to deal with Sullivan, none of which had the ring of truth. It would have been a simple matter for Brand to have questioned Sullivan's status, by telephone call or letter, either to Sullivan or Respondent or both, much earlier than May 26.[6] In any event, it is clear that the Union did not, or would not, until late May or early June, deal with Sullivan. However, that fact does not reach any of the basic issues.

The General Counsel avers that, by signing the Letter of Assent-A, Respondent became a member of a multiemployer bargaining group, but that matter is not in issue. Respondent acknowledges that fact, and Respondent timely withdrew from the multiemployer group. The withdrawal from the Letter of Assent-A was made December 17, 1981, with the existing contract to be terminated on its expiration date, May 31, 1982.

A basic question is whether the presumption of the Union's majority arising from Respondent's signing the Letter of Assent-A, i.e., its participation in the multiemployer bargaining group, survives Respondent's timely withdrawal on December 17, 1981, from the multiemployer group prior to expiration of the union-NECA contract on May 31, 1982.[7] Existence of the original presumption is not in dispute. So far as the post-10(b) period is concerned, it is fundamental that a contract, lawful on its face, raises a presumption that the union party to the contract was the majority representative of the employees at the time the contract was executed, as well as during the life of the contract, and thereafter.[8] The General Counsel argues that the presumption is irrebuttable, and cites *Cauthorne Trucking*[9] as authority for that proposition. *Cauthorne Trucking* did not involve a multiemployer unit, however—only a single employer was involved, and the principle relied on by the General Counsel was set forth in footnote 3:

> *Rish Equipment Co.*, 173 NLRB 943 (1968), enfd. 407 F.2d 1098 (4th Cir. 1969). A collective-bargaining agreement, lawful on its face, raises an irrebuttable presumption that the union's majority status continued through the end of the contract. This presumption continues beyond the expiration of the contract, but becomes rebuttable. Of course, the

[6] In his letter of March 17 addressed to the Union, Reincke referred to a letter of February 8, which, he said, advised the Union of Sullivan's representative status with Respondent, but that letter of February 8 is not in evidence.

[7] Respondent does not, and legally could not, now challenge the Union's multiemployer majority as of the time the Letter of Assent-A first was signed on March 10, 1975, in view of Sec. 10(b) of the Act. *Bryan Mfg. Co.*, 362 U.S. 411 (1960).

[8] See, e.g., *Nevada Lodge*, 227 NLRB 368 (a1976); *Shamrock Dairy*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (D.C. Cir. 1960), cert. denied 364 U.S. 892 (1960).

[9] *Cauthorne Trucking*, 256 NLRB 721 (1981), modified 691 F.2d 1023 (D.C. Cir. 1982).

burden of rebutting this presumption is upon the party that would do so. *Eastern Washington Distributing Co., Inc.*, 216 NLRB 1149 (1975).

Rish Equipment Co., relied on in *Cauthorne Trucking*, is not proper authority for the footnote reference, however, because *Rish* arose from an RC case and involved refusal by an employer to bargain with a Board-certified union. In *Rish*, the administrative law judge stated, page 944: "[T]he continued majority status of the certified union is presumed, but an employer may rebut the presumption by an affirmative showing that the union no longer commands a majority." It is clear from *Nevada Lodge*, supra, which followed *Tahoe Nugget*,[10] that the presumption relied on by the General Counsel is rebuttable. In both *Tahoe Nugget* and *Nevada Lodge*, the evidence relating to the Union's majority that allegedly continued after timely withdrawal from a multiemployer bargaining group and until the contract expired was carefully examined and found to be an actual majority. In this case, it is quite clear that, at no time prior to expiration of the multiemployer agreement on May 31, 1982, did Respondent have any employees. As noted supra, counsel stipulated that Respondent had no employees between Respondent's birth and June 4, 1982, who were covered by the union-NECA contract. Therefore, the Union did not enjoy majority status in any employee complement of Respondent prior to June 4, 1982. However, that fact is not the end of the controversy.

Assuming the Union's lack of majority status at Respondent's plant at all times prior to May 31, 1982, the union-NECA contract was effective until that date, and Amento and Hudson were union members until, and beyond, that date, albeit both of them were not conducting themselves as loyal union members and were engaged in running controversies with the Union. Even if, arguendo, Respondent was not required to negotiate with the Union as the representative of its employees for a new contract to succeed the one that would expire May 31, 1982, such a fact would not release Respondent from the union-NECA contract, and its requirements, prior to that date. So much apparently was recognized by Jim Gomes, who advised the Union on December 17, 1981, that the existing union-NECA contract would be terminated so far as Respondent was concerned, effective May 31, 1982. Further, Respondent continued until June 4, 1982, to submit monthly employee reports to the Union's trust fund, as required by the union-NECA contract. It is found that Respondent was bound to the union-NECA contract, and all its provisions, until May 31, 1982, regardless of any questions relating to Respondent's obligation to bargain with the Union thereafter, as the representative of Respondent's employees. By directly negotiating with Amento and Hudson concerning their work conditions, within the term of the union-NECA contract and without notice to, or bargaining with, the Union, Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.[11]

As noted in the background summary above, Michael Gomes made it clear to Amento and Hudson when he talked with them in May prior to their employment that he would be operating Respondent as a nonunion plant. As previously noted, Amento and Hudson were union members at that time, regardless of their poor relationship with the Union. They did not resign from their membership, as they could have, but rather, sometime after their employment by Respondent, they let their membership be terminated by the Union through failure to pay union dues. Also at the time of the statements to Amento and Hudson in May, Respondent still was a party to, and bound by, the union-NECA contract. Finally, about the same time as the statements by Michael, the latter freely discussed with Amento and Hudson their various problems with the Union. Admittedly, Michael did not want a union shop, so informed Amento and Hudson, and actively participated in widening the rift between the Union and its two members. Under such circumstances, Michael's statements to Amento and Hudson about his intention to have a nonunion shop were coercive and in violation of Section 8(a)(1) of the Act, as alleged in the complaint.[12]

A basic issue is whether Respondent had a good-faith boubt, based on reasonable and objective considerations, that the Union represented a majority of Respondent's employees after May 31, 1982. As discussed above, it is apparent that Amento and Hudson disliked the Union, stopped paying their union dues, and conveyed those facts to Michael Gomes. However, that does not determine any conclusion. In the first place, prior to May 31 Respondent already had committed two violations of the Act, found above. Michael made it plain to Amento and Hudson that he planned to operate without a union contract, and he negotiated direcly with those two potential employees, without regard to his contractual obligations to the Union. Those facts alone take Respondent outside the usual parameters of the good faith required in raising a doubt about the Union's majority.[13] But more is involved. Regardless of the fact that Amento and Hudson on several occasions made it clear to Michael that they disliked the Union, they did not resign their memberships. Rather, they just let them die a natural death, sometime after their employment by Respondent. Brady visited Amento and Hudson July 6, and sometime thereafter, according to Brand's testimony, credited on this matter, Brand decided that Amento and Hudson did not want to be represented by the Union. Later, on January 3, 1983, the Union formally filed a disclaimer of interest in representing the two employees. In view of Respondent's earlier violations of the Act, and in view of Michael's determination to go nonunion and his frequent talks with Amento and Hudson about their sentiments, there is no possibility of determining whether the two

[10] *Tahoe Nugget, Inc.*, 227 NLRB 357 (1976).
[11] *Creative Engineering*, 228 NLRB 582 (1977).
[12] *Continental Inn*, 186 NLRB 248 (1970), enf. in relevant part 453 F.2d 269 (6th Cir. 1971). Amento and Hudson were applicants for employment at the time the statements were made by Michael. They were, therefore, covered by the Act at that time. See, e.g., *Daily Transit Mix Corp.*, 238 NLRB 879 (1978).
[13] *Harvey's Resort Hotel*, 236 NLRB 1670 (1978); *Acme Markets*, 232 NLRB 219 (1977).

employees would have wanted union representatives in the absence of those facts. Respondent meddled in the relationship between the Union and the two employees, and cannot now claim any benefits that may flow from the meddling. When the two employees were hired they were union members, and that fact prima facie gave the union majority status. That showing is buttressed by the presumption flowing from the union-NECA contract that was terminated effective May 31. The Act requires that, on expiration of a contract, an employer must retain the same wages and working conditions that prevailed under the contract, and if changes detrimental to employees are made without giving the employees' representative prior notice and an opportunity to bargain about the changes, such action would constitute a violation of Section 8(a)(5) and (1) of the Act.[14] The Union was the representative of Respondent's employees at the time Respondent ceased paying hourly wage rates and fringe benefits prevailing under the terminated contract, and thereafter continued such reduced wages and benefits. Such changes constitute a violation of Section 8(a)(5) and (1) of the Act as alleged in the complaint.[15]

Respondent argues that it was in the building and construction industry and offered to bargain with the Union for an 8(f) contract. That argument is without merit because it was not shown that Respondent was in the building and construction industry as that phrase is used in the Act. Such a showing was Respondent's burden, and the burden was not met. Respondent also argues that the changes in wages and working conditions were permissible because the parties had reached a bargaining impasse, but that argument also is without merit. Respondent had submitted no proposals to the Union, on which an impasse could be reached. Respondent's effort to establish that the union was intractable in its insistence that all area employers sign the Union-NECA contract was not persuasive.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by Respondent engaged in electrical or electronic construction job work, consisting of the handling and moving of all electrical or electronic material, equipment, apparatus and appliances, the installation of all electrical or electronic construction and/or erection work including the installation and connecting of motors or generators, of all fixtures, or area light diffusing systems, appliances, and electrical maintenance thereon, and of all electronic equipment, electronic systems, communication systems with all related control wiring and devices, to and including the final running test, and any related instrumentation work or radiation monitoring, the welding, burning, brazing, bending, drilling and shaping of all copper, channel iron, angle iron, I beams, and brackets to be used in connection with the installation and erection of electrical wiring or equipment, the chasing and channeling necessary to any electrical or electronic work, the installation and maintenance of all temporary wiring and of all electrical lighting, heating and power equipment, the operating of power equipment used for the installation of electrical or electronic work, the cutting, threading and bending of all conduit by hand or machine, the sound backgrond work, regardless of voltage, electronic and high frequency equipment installation and maintenance, the installation assembly, trouble-shooting and final checkout including outside and inside construction of closed circuit television, intercommunication, audio background music for private, commercial or industrial use, for all electrical apparatus by means of which electricity is applied to amplification transmission, transference, production recording or reproduction of voice, music and sound, and work on Nurse Call, Fire Alarm, Synchronized Clock and other similar control signaling and indicating systems; excluding all office employees, guards, and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) of the Act by telling job applicants that Respondent would be a nonunion employer, at a time when Respondent's employees were represented by the Union.
5. Respondent violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with its employees concerning wages and other terms and conditions of employment; and by failing and refusing until January 3, 1983, to pay hourly wage rates and fringe benefit contributions for its employees as required by the union-NECA contract in effect between the parties.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that Respondent make whole employees for their losses in wages and fringe benefit contributions from June 4, 1982, until January 3, 1983, at which time the Union disclaimed further interest in representing Respondent's employees, as noted supra, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]

[14] *NLRB v. Katz*, 369 U.S. 736 (1962); *Cauthorne Trucking*, supra.
[15] *Stone Boat Yard*, 264 NLRB 981 (1982); *Dial Tuxedos, Inc.*, 250 NLRB 476 (1980); *Creative Engineering*, supra.

Synergy Gas Corporation a/k/a Glover Bottled Gas Corp. *and* Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 29–CA–12585

17 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

Upon a charge filed by the Union on 19 August 1986 and an amended charge filed on 26 September 1986, the General Counsel of the National Labor Relations Board issued a complaint on 3 October 1986 against the Company, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act.

The complaint alleges that on 6 February 1986, following a Board election in Case 29–RC–5495, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982). The complaint further alleges that since 9 April 1986 the Company has refused to bargain with the Union. Since 1 July 1986 the Union has requested the names and addresses of the employees in the unit, and the Respondent has refused to provide them. On 16 October 1986 the Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On 27 January 1987 the General Counsel filed a Motion for Summary Judgment. On 2 February 1987 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response on 16 March 1987.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Company's answer denies that the Union requested it to bargain with it; denies that the Union requested the names and addresses of the unit employees; and denies that the information is necessary for and relevant to the Union's performance of its function as collective-bargaining representative. The General Counsel argues that all material issues have been or could have been previously decided. We agree with the General Counsel.

The record, including the record in Case 29–RC–5495, reveals that an election was held 11 September 1981 pursuant to a Stipulated Election Agreement. The tally of ballots shows that of approximately 13 eligible voters, 5 cast votes for and 5 against the Union; there were 3 determinative challenged ballots.

On 17 September 1981 the Respondent and the Petitioner filed objections to the election. On 10 November 1981 the Regional Director issued a Report on Challenged Ballots and Objections, Order Consolidating Cases and Notice of Hearing.[2] On 20 November 1981 the Respondent filed exceptions to the report.

On 15 March 1982 the Board issued an unpublished Decision and Direction directing that other issues be considered as part of the hearing. On 5 August 1983 Judge D. Barry Morris issued a decision in which he concluded that two of the challenged employees, Libynski and Nannery, had been discharged in violation of Section 8(a)(3) of the Act.[3] Judge Morris stated that "it is likely the opening and counting of these [two] challenged ballots will produce a conclusive result." The judge recommended that Case 29–RC–5495 be severed and remanded to the Regional Director. The Respondent filed exceptions.

On 10 September 1984 the Board remanded these proceedings to Judge Morris, consolidating them with Cases 29–CA–9764 and 29–CA–9811. On 29 November 1984 Judge Morris issued a supplemental decision in which he reaffirmed his earlier rulings. The Respondent filed exceptions and a supporting brief.

[1] The Respondent's response is titled "Respondent's Opposition to Motion for Summary Judgment and Issuance of Decision and Order." The response raises two issues.

The Respondent contends that the identity of the Union has changed in that Local 282 IBT was the certified bargaining agent of the employees in the bargaining unit, but the Respondent received written requests for bargaining from Building Material Teamsters, Local 282. We have examined the letters requesting bargaining and find that the Respondent could not have reasonably doubted the identity of the Union. Each letter bears along its left margin the phrase "Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America"; and the Teamsters' "horsehead" logo.

The Respondent also contends that two affidavits, relied on by the General Counsel to show that the Respondent was requested to bargain and did not, are invalid because they were given "on information and belief." We note that certain portions of the affidavits were given "on information and belief," but the relevant portions were given on personal knowledge. Both affidavits were given by Franklin K. Moss, the Union's attorney. In his 27 August 1986 affidavit, par. 8, he stated that "[o]n August 8, 1986, I caused to be mailed to Synergy Gas Corporation by certified mail, return receipt requested, the letter annexed as Exhibit F. To date, I have received no response." This letter requested that the Respondent bargain with the Union and furnish it with information.

We find that both the Respondent's contentions lack merit.

[2] Cases 29–RC–5493 and 29–RC–5494 and Cases 29–CA–9116 and 29–CA–9117 were consolidated with the present case for the purpose of a hearing before an administrative law judge.

[3] The third determinative ballot was cast by employee Trypaulik.

On 11 June 1985 the Board affirmed Judge Morris' recommendation and ordered Case 29–RC–5495 severed and remanded to the Regional Director.[4] On 22 January 1986 the Regional Director opened the ballots of Libynski and Nannery; both ballots were for the Union. The revised tally of ballots shows seven votes for the Union, five against, with one nondeterminative challenged ballot.[5]

On 6 February 1986 the Acting Regional Director issued a certification of representative certifying the Union as the exclusive collective-bargaining representative of the employees in the unit found appropriate.

By letters dated 9 April, 28 July, and 8 August 1986 the Union requested that the Respondent bargain, and since 9 April 1986 the Respondent has refused to bargain with the Union. By letters dated 1 July 1986 and 8 August 1986 the Union requested the names and addresses of the employees in the bargaining unit, and since 1 July 1986 the Respondent has failed to provide the Union with the employees' names and addresses.[6]

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence. We do not find any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a New York corporation, is engaged in the sale of propane gas at its facility in Patchoque, New York, where during the past year it purchased and caused to be transported and delivered to its place of business in excess of $50,000 worth of goods and materials located outside of the State of New York.[7] We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held 11 September 1981, the Union was certified on 6 February 1986 as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time office clerical employees employed by the Employer at its Patchoque, New York location; excluding all temporary employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since 9 April 1986 the Union has requested the Company to bargain. Since 9 April 1986 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Since 1 July 1986, the Union has requested the Respondent to provide it with the names and addresses of the employees in the bargaining unit described above in section II, A; such information is necessary and relevant to the Union's performance of its function as collective-bargaining representative.

CONCLUSIONS OF LAW

By refusing on 9 April 1986 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, and by refusing since 1 July 1986 to provide the Union with the names and addresses of the unit employ-

---

[4] 275 NLRB 658 (1985).

[5] The Regional Director served on the parties a revised tally of ballots that showed that a majority of the employees in the stipulated unit selected the Union as their collective-bargaining representative.

[6] In its answer, the Respondent denied that it was asked to bargain with the Union and that the Union requested the employees' names and addresses. We note that the Union made its requests in writing, and the requests were forwarded to the Respondent by certified mail, return receipt requested.

[7] In its answer, the Respondent denied that its principal location was Patchoque, New York, and that it is engaged in the nonretail sale of propane gas. Counsel for the General Counel states that he does not contest these denials. We find that, as the Respondent admitted being engaged in interstate commerce, the denials do not raise issues requiring a hearing.

ees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement; and to provide the Union with the names and addresses of the unit employees.[8]

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Synergy Gas Corporation a/k/a Glover Bottled Gas Corp., Patchoque, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of the employees in the bargaining unit.

(b) Refusing to provide the Union with the names and addresses of the employees in the unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time office clerical employees employed by the Employer at its Patchoque, New York location; excluding all temporary employees, guards and supervisors as defined in the Act.

(b) Provide the Union with the names and addresses of the unit employees.

(c) Post at its facility in Patchoque, New York, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous piaces including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] The General Counsel's request for a visitatorial clause is denied, as such a clause is not necessary in the circumstances of this case.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT refuse to provide the Union with the names and addresses of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time office clerical employees employed by the Employer at its Patchoque, New York location; excluding all temporary employees, guards and supervisors as defined in the Act.

WE WILL provide the Union with the names and addresses of the unit employees.

SYNERGY GAS CORPORATION A/K/A
GLOVER BOTTLED GAS CORP.

Twistex, Inc. *and* National Association of Government Employees (SEIU/AFL-CIO). Case 1-CA-23472

17 April 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 30 October 1986 Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Twistex, Inc., South Grafton, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 1(d).

"(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

Ronald S. Cohen, Esq., for the General Counsel.
Richard G. Remmes, Esq., of South Boston, Massachusetts, for the Respondent.
Robert Weihrauch, Esq., of Worcester, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Boston, Massachusetts, on 16, 17, and 18 June 1986. The proceeding is based on a charge filed 10 January 1986,[1] by National Association of Government Employees (SEIU/AFL-CIO). The Regional Director's complaint dated 20 March 1986, alleges that Respondent Twistex, Inc., of South Grafton, Massachusetts, violated Section 8(a)(1) and (3) of the National Labor Relations Act by laying off and subsequently failing and refusing to recall two employees because of their union or other protected concerted activities and by attempting to cause another employer to discharge one of the same employees.

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the manufacture, distribution, and sale of yarn products. It annually ships goods valued in excess of $50,000 from its South Grafton location to points outside Massachusetts and it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Massachusetts. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Twistex is primarily owned by Bruce Kiviat (as well as brothers Reed and Douglas Kiviat), however, it is not shown that he is actively engaged in company operations. His father, Jerry (Jerome) Kiviat, owns the building in which Respondent conducts its operations. Several other tenants are located in the same building. Jerome is shown to serve as Respondent's "engineering" consultant and he plays an active role in directing Respondent's fundamental operations. He is recognized by the employees as being personally engaged in labor relations matters and the day-to-day plant operations. Jerome receives consultant fees that exceed the annual salary paid Plant Manager Sam Vouna.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Babson and Member Stephens find it unnecessary to pass on the judge's application of the "small plant doctrine" in view of the other grounds relied on by the judge that establish the Respondent's knowledge of the union activity of employees Potter and Poulin. Additionally, Member Babson and Member Stephens note that no exceptions have been filed to the judge's finding that the Respondent did not violate Sec. 8(a)(1) based on Plant Manager Vouna's 8 October 1985 conversation with Potter.

[2] The General Counsel excepts, inter alia, to the judge's recommended remedy and Order to the extent that they provide backpay for Potter and Poulin based on their part-time status, contending that these employees were entitled to recall to full-time positions. We note, however, that the complaint alleges that the Respondent unlawfully refused to recall Potter and Poulin from layoff and that as of the time of their layoffs they occupied part-time positions. Furthermore, we find that the evidence is insufficient to establish that Potter and Poulin requested and were entitled to recall to full-time positions. Accordingly, we find the General Counsel's exceptions without merit.

The judge recommended that a broad cease-and-desist order issue against the Respondent. We have considered this case in light of the standard set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded that the narrow cease-and-desist order is appropriate. We shall modify the judge's recommended Order accordingly. Despite his recommended Order, however, we note that the judge's recommended notice contains the narrow cease-and-desist language.

[1] All following dates will be in 1985 unless otherwise indicated.

Jerome is also the president and owner of Brentwood Yarn Mills. This company owns the machinery used by Respondent, as well as the raw materials it processes. In effect Respondent contract processes Brentwood's yarn for a set fee per pound. Brentwood has a manufacturing facility of its own located on Long Island, New York. It also uses the processing services of BRD Industries, of New Jersey, an operation similar to that of Respondent and owned by Bruce, Reed, and Douglas Kiviat. Both Respondent and BRD contract exclusively with Brentwood; Richard Cadrin serves as the controller of both Respondent and Brentwood but maintains his office in South Grafton. Jerome Kiviat has his office at Brentwood but visits South Grafton frequently and otherwise is in almost daily phone contact with plant manager Vouna or Cadrin. Vouna also holds a position on the payroll of both Respondent and Brentwood.

Among other activities, Jerome Kiviat regularly has discussed employee wage levels with Vouna and Cadrin and Jerome, along with Vouna represented Respondent in a meeting with an investigator for the occupational Safety and Health Administration (OSHA). Cadrin testified that the work capabilities of the three facilities are partially interchangeable and that Respondent has better machinery and can perform all the functions of the other plants plus handle heavier yarns that the other plants cannot process. The assignment of work to any particular plant is made by scheduling people who work under the direct supervision of Jerome Kiviat. Also, by letter dated 10 October Jerome notified Vouna of a decision to cut back production at Respondent's plant and directed Vouna to immediately layoff any "excessive part time help."

Although the Respondent disclaims any ownership status by Jerome Kiviat, I conclude that regardless of Bruce Kiviat's titular position as president, the record shows such close and intimate control over the operations by Jerome that it must be concluded that he served as a supervisor and agent acting for and on behalf of management and that his statements and actions pertinent to the charges herein must be found to be attributable to Respondent.

Respondent's manufacturing process involves three basic production operations; twisting, binding, and winding/reeling and for the most part the production operations are located on the fourth floor of the Kiviat's building. The main production room contains the twisting and binding operations together with two winders and the core winder. The tube winding operation is in a separate room on the same floor.

Because of a general drop in the overall business generated by Brentwood, Respondent started an experimental hand-knit operation in the spring of 1985. In conjunction with the hand-knit business, Respondent began planning for a retail store, which it opened on the fourth floor in the spring of 1986.

Tina Potter began working for Respondent in 1980 on a part-time basis. On graduation from high school in 1981, she became a full-time employee. Potter started on skeining and then at various times performed all other production tasks including reeling, binding, twisting, and cone and tube winding. She was laid off during the winters of both 1981 and 1982, but returned in April 1983. In late October 1984 she requested a raise from her base wage of $3.95 an hour and quit when Jerry Kiviat told her she would never make $5 an hour working for him. She returned to Respondent in April 1985 on a part-time basis and told Vouna she would consider going full time in September. During the latter half of September she performed twisting and binding on Respondent's new hand-knit project and returned to cone winding and pull skeining shortly before being laid off on October 11. Generally, she worked 4 morning hours, but often stayed latter at Vouna's request.

Sandra Poulin was first employed by Respondent from 1979 to September 1981 and again from August 1983 to July 1984, predominently part time. She returned with Potter on a part-time basis in April 1985. She worked in all production jobs except skeining and during the last period of employment performed binding cone winding, twisting, and, during the second week of October, tube winding.

During the greater part of 1985, Respondent generally employed approximately 22 production employees. And, until October, production ran on three shifts. Poulin held employee number 20, while Mary Richard, described by Respondent as the senior part-time employee (apparently because of her continuous service record) was number 22, and Potter was number 163. New employees hired in November received 400 series numbers.

In early September Potter and Poulin spoke with Vouna about their perceived unsatisfactory working conditions. They specifically referred to eye, ear, and lung protection and requesting a water fountain, eye goggles, and ear plugs. Vouna said he would see about a fountain and suggested that the Company would reimburse them if they purchased other items themselves.

Poulin testified that on two occasions in mid-September Vouna told them they could work all the overtime they wanted and when they mentioned the possibility of going full time he said to wait and see after the anticipated October raises went into effect. He also explained that they were going to hire some new people and start up a "skeining" operation involving the packaging of yarn in quantities suitable for retail sale.

Potter testified that Bouna said he had discussed their raises with Jerry and that they would get a 30-cent-an-hour increase but that they should not discuss it with others as the others would not be getting as much. She also confirmed Vouna's comments about available work, his offer of more hours, and the possibility of full-time work. When she indicated a reluctance to work more hours because of a dissatisfaction with her pay rate, Vouna said he was gong to hire others whether they went full time or not and repeated that they could work as much as they wanted as there was plenty of work. During the latter conversation with Vouna, he also indicated that they would receive 30-cent-an-hour raises. (The extra 10 cents apparently was designed to make up for a raise other employees had received the previous year when Potter and Poulin were not working.)

During mid-September, Vouna assigned Potter to the pull-skeining operation for several days of training on the

best copy available

new job. Also in mid-September Poulin told Vouna that she did not want to work with employee Gina Perras who worked on a binding machine. The explanation for her statement was that Gina sat down much of the time and got away with a lot of things because she was the girl friend of forman Bruce Boisvert.

On 19 September Poulin, in Potter's presence and after discussing their dissatisfaction with working conditions, called the Occupational Safety and Health Administration, and shortly thereafter received a complaint form.

On 30 September Poulin, together with Potter, filled out, signed, and mailed a complaint to OSHA regarding nine areas of concern including lack of hearing protection, cotton, and wool contamination in nose, eyes, and lungs, and lack of drinking fountains.

On 2 October, Potter and Poulin met at the latter's home with Dave Surpernant, a representative of the Union. They received union literature and authorization cards that they then took to work and distributed the next day. Potter gave them personally to 4 or 5 employees and placed literature in the ladies' room and on windshields of vehicles in the employees' parking area, including Foreman Boisvert's truck. Potter testified that Boisvert was 15 feet away and looking at her while she distributed some literature in the twisting and binding room. On 4 October, additional literature, which specifically listed Potter and Poulin as the persons to contact for more information, was distributed in the same manner as well as at the lunch table where they were observed by Foreman Boisvert. Potter testified that Bosivert then approached them and stated they were not going to form a union as Jerry Kiviat would not let them. Boisvert admitted that he saw the union pamphlets on the lunch table and that he then went to Vouna's office and asked if Vouna knew what was going on out there. Vouna replied affirmatively and Boisvert observed that a union leaflet was on Vouna's desk. Boisvert denied that he identified any particular employees as being involved in the Union, however, he admitted that while a group of employees, including Potter and Poulin, were talking about the Union he said that "Jerry Kiviat would not let the union in here and would close down first."

Boisvert also testified that the literature he found on his truck and first saw in the plant did not have any employee names on them. He admitted, however, that he heard rumors going around that Potter and Poulin were trying to get a union in there, but denied that he told that to Vouna.

On 7 October, without prior notice to the staff, Jerry Kiviat, Vouna, and Cadrin held a meeting with all the day-shift production employees (approximately 10 people were in attendance). Cadrin had a pad and pen and took notes of what went on. Kiviat opened by stating that it had been a year since their last meeting, it was time for a meeting, and he wanted to hear any complaints the employees had. Respondent asserts that it has been Kiviat's practice to have an annual meeting near 1 October and to give a review of the company's condition. Potter, however, recalled that the last company meeting had been in August 1984, and that they had several days advanced notice prior to the meeting. Potter asked for a water fountain, clean lunch table, and a sanitary napkin machine in the ladies' room and spoke about her eyes being bothered. Poulin asked for hearing protection and mentioned ventilation, breathing dust, and not knowing the makeup of the yarn. Other employees made comments, both pro and con, regarding the suggestions. During the 45-minute meeting Kiviat also told the employees that work was slow but that of his three plants, Respondent would be the last place to have a layoff because he would take work from the other plants and keep Respondent going. Cadrin testified that in response to the complaints, Respondent ordered a water bubbler and sanitary napkins and that after acting on these matters, he discarded his notes of the meeting.

On 8 October Potter and Poulin both received of 20-cent-an-hour pay raises, rather than the 30 cents they had expected. The next day they both spoke with Vouna about it and he told them that because employees in the plant were complaining about discrimination, he decided to give everyone the same raise. During the same conversation Potter questioned why all the woman except for Potter and Poulin were asked their preference for the type of sanitary napkins and he replied it has all been done by his secretary.

Also on 8 October Potter and Poulin observed an OSHA inspector tour the plant in the company of Manager Vouna. Both were given "boxes" for the taking of some measurements and the next day when Potter asked Vouna what had been going on, Vouna responded with a question about who had made the OSHA complaint and Potter said she had no idea who it was. Poulin also saw Jerome Kiviat in the office but he did not look at her and, when she left, the company mechanic commented that Kiviat was upset about OSHA being at the plant.

Potter also recalled that on 8 October they spoke with Boisvert at the lunch table and he was upset because as a result of the presence of its OSHA inspector he had been required to vacuum the "fuzz" from the various machines.

On 10 October Vouna told Poulin and Potter that he was cutting back on their hours. Poulin recalled that they had been working more than 4 hours a day for 2 months. (Record indicates that for the last 3 weeks of September, they averaged 20 hours a week or less, however, the first week of September and the next 2 weeks in October generally reflect more than 4 hours a day.)

On 11 October Potter and Poulin were both told by Vouna that they were laid off because work was slow and because they had the least seniority of the part-time workers.

On leaving Respondent's area of the plant both went to another company, located in the same building, and applied for jobs. Both testified that the supervisor said he would love to hire them and indicated he was aware of something going on about some union activity upstairs. Subsequently, on 4 November, Potter obtained a job with Hospital Data.

During 1985 Hospital Data Systems rented portions of the second floor in the building owned by Jerome Kiviat and utilized by Respondent. Its president, Richard Anderson, testified that while he was absent his foreman had hired some additional help from within the building.

On his return in the early part of November, he visited Vouna's office at the latter's request Vouna told Anderson that he had a personnel problem because a girl he had hired, Tina Potter, was vindictive and a troublemaker and Vouna suggested that it would be in everyone's best interest if Anderson discontinued her employment. Anderson also recalled that Vouna had referred to some relationship she had with a union. Vouna admitted that Anderson's recollection was substantially correct but stated he said nothing about "union cards" Vouna added that he had just received the OSHA citation reflecting Potter's and Poulin's names, knew they were working downstairs, and he just wanted to tip Anderson off that they were troublemakers. Potter testified that her foreman from Hospital Data told her she might be laid off because Respondent had spoken with Anderson, said she was a troublemaker, and was upset that she had been hired.[2]

During the first week of December Poulin saw newspaper ads by Respondent for full-time employees. She called Vouna who told her he had no more openings at the time. Vouna admits that he was hiring at that time but did not consider Poulin because he assumed she was seeking part-time work and he wanted full-time binding and twisting operators.

On 14 January 1986, Potter listened on an extension phone while Poulin called Vouna and asked if any full-time employment was available. He answered in the negative and when she asked if he knew when she might be called back to work he said he had no idea.

Potter also testified that in a conversation with Vouna in September, prior to her layoff, she had learned of Respondent's plans to open a retail outlet and had told him she had 6 months of retail experience and would like to work in the planned store. Vouna indicated it would be a good idea but to just wait as he did not know when it would all happen. Vouna recalled the conversation but testified that he subsequently did not place the ads or do the hiring for the positions that were filled.

Plant Manager Vouna testified that at the end of August, Respondent had run out of wool orders, which resulted in the end of reeling (skeining) operations, and that a major cotton order being produced for a manufacturer of sweaters was placed on hold early in October. Consequently, it was decided that the third shift should be eliminated, effective 9 October, in order to stretch out the work and reduce the number of employees. Vouna stated the change to a two-shift operation automatically reduced production by one-third and resulted in there not being enough day shift work in tube winding to keep Poulin, Potter, and two other employees who performed that function, occupied. Potter and Poulin were considered to be the least senior employees in tube winding because both had returned to work in April 1985 after quitting in the early fall of 1984, and it was considered to be company policy that part-time employees be laid off first.

Vouna also indicated that in addition to the economic reasons for their layoff, he also considered their intractable attitude as evidenced by their past work history, including Poulin's leaving without notice in April after returning for only 1 week as a full-time employee (she then went to part time) and because she threatened to quit rather than work as a "binder" in the main production area because she could not get along with the First-Shift Foreman Boisvert and employee Gina Perras.

[2] Although Respondent objected to the hearsay nature of this statement, its objection was not pursued on brief.

III. DISCUSSION

The issues in this case arose from the events surrounding a brief union organizational attempt by two employees and their contemporaneous filing of a complaint with OSHA about working conditions. A review of the record leads to the conclusion that the Company responded with the layoff of the involved employees and a subsequent refusal to recall them.

As noted above, I conclude that Jerome Kiviat exercises effective control over Respondent and two other companies engaged in the same business and that he is a supervisor and agent of Respondent whose statements and actions pertaining to the involved complaint properly are attributable to Respondent. I also find Foreman Bruce Boisvert is a statutory supervisor within the meaning of Section 2(11) of the Act.[3]

Boisvert admitted that when he first saw union literature being distributed he told a group of employees, including Potter and Poulin, that Jerry Kiviat would not let the union in and would close down first. On cross-examination Respondent attempted to minimize the nature of this threat by obtaining an answer from Boisvert that this was only his personal opinion and was not based on any comments by Kiviat, however, it is well established that a supervisor's statement to employees that threatens plant closure if a union is organized constitutes illegal interference. Accordingly, I find that Boisvert's statement of 8 October is attributable to Respondent and that the statement interfered with the union activity of employees in violation of Section 8(a)(1) of the Act, as alleged.

Also on 8 October the plant was visited by an OSHA investigator and it is alleged that subsequently Vouna interrogated Potter about who had made the complaint. The only evidence relative to this allegation indicates that Vouna made a comment that he was trying to find out who made a complaint in response to Potter's question to him about what was going on with the presence of the OSHA investigator. Under these circumstances, I do not find that his answer rises to a level that would tend to restrain, coerce, or interfere with employees' rights, see *Rossmore House*, 269 NLRB 1176 (1984), and I find that Respondent is not shown to have violated the Act in this respect, as alleged.

Turning to the layoff and refusal to recall aspects of this proceeding, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees' union or other protected, concerted activities were the motivating factor in the employer's decision to lay off

[3] The record shows that Boisvert was regarded as a supervisor by the employees, he admittedly could and did hire, fire, and discipline employees and he was a salaried worker who received essentially twice the rate other production employees were paid.

and not recall the employees. Here, the record shows that Potter and Poulin openly distributed union leaflets during the early part of October. This occurred in front of Foreman Boisvert and lead to his admitted comment that Kiviat would not let the Union in and would close the plant.

Secondly, after having first made certain personal complaints to Vouna about perceived unsatisfactory working conditions, Potter and Poulin filed a complaint with OSHA on 30 September. These complaints were also repeated by Potter and Poulin in the unannounced general meeting of all employees called by Kiviat on 7 October. On the morning of 8 October, when the OSHA inspector visited the plant and brought the complaint to the attention of Vouna and, apparently, Jerome Kiviat, the investigator's notes indicate that Vouna asked him to test the two employees he believed to be the "source of all this" with a "dosimeter" and that Respondent stated the "complaint arose from an ongoing effort to unionize the shop." Potter and Poulin were both tested. Later that same day Vouna met with Cadrin and assertedly made the decision to lay off both employees. The subject of the OSHA complaint involved working conditions and Potter's and Poulin's joint complaints to Vouna regarding the same matters (as well as pay rates), clearly constitute a protected, concerted activity, see *A. N. Electric Corp.*, 276 NLRB 887 (1985). On 11 October they were told of their layoff and, subsequently, no effort was made to recall them, despite the fact that ads were placed for new employees, some new employees were hired, and Potter and Poulin both made inquires about returning to work. Under these circumstances, I conclude that the General Counsel has met his initial burden by presenting a prima facie showing sufficient to support an inference that the employees' union activity and their protected, concerted OSHA complaint were the motivating factors in Respondent's layoff decision as well as its apparent subsequent decision to not recall them from layoff status. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Although Respondent denies that Plant Manager Vouna had any knowledge of Potter's and Poulin's union activity at the time of their layoff, the record does establish that by 4 October, when Vouna was told about union activity by Boisvert, he already had possession of a union leaflet brought to him by his secretary and he had acknowledged that he was aware of what was going on. Although it was not established that the leaflet seen by Vouna specifically identified Potter and Poulin, Boisvert admitted that rumors were going through the plant identifying them as the persons trying to get a union started.

As noted, Respondent's operation involved 22 or fewer production employees (9 or 10 in a shift), working in an open environment in which Supervisors Boisvert and Vouna were regularly present and in which Potter and Poulin openly distributed leaflets, some of which carried their names. While Boisvert and Vouna deny that Boisvert identified the union activitis to Vouna, Boisvert testified that he assumed Vouna already knew and I do not credit Vouna's bear disavowal of knowledge. Under these circumstances, it is appropriate to apply the "small plant rule" and infer the presumptive likelihood that Vouna had knowledge of the employees' open activities, inasmuch as there is sufficient other information, including the admitted rumors and presence of leaflets with Potter's and Poulin's name, and the conveyance to Vouna of a leaflet by his secretary, to independently infer Respondent's knowledge of their union activity. See *D & D Sewing Co. v. NLRB*, 801 F.2d 636 (3d Cir. 1986).

Respondent also denies that it knew Potter and Poulin were behind the OSHA complaint until after the layoff, when, on 19 October it received a document that specifically carried their names. As otherwise noted, Respondent told the OSHA investigator that it believed it knew the source of the complaint and then specifically directed testing of Potter and Poulin. Otherwise, the sequence of direct complaints to Vouna and Kiviat on the same specific subjects covered in the OSHA complaint independently support an inference that Respondent knew or believed at the time Potter and Poulin were laid off that they were responsible and I cannot find Vouna's denial in this respect to be credible. While I conclude that these circumstances are sufficient to establish Respondent's knowledge, I also conclude that this inference is further supported by the timing of the layoffs and, as discussed below, the pretextual quality of Respondent's asserted justifications for its action and for its subsequent failure to recall them from layoff. These factors also establish a basis for the inference that Respondent was aware of the employees' protected activity and that such knowledge is directly linked to their respective layoffs and Respondent's subsequent failure to recall them. See *Dr. Frederick Davidowitz, D.D.S. a Professional Corp.*, 277 NLRB 1046 (1985).

Respondent's principal defense rests on its claim that a reduction in its work force was required because of a decline in orders. Vouna testified that when there are layoffs Kiviat usually orders him to lay off "a certain amount of hours" and, when work decreased in 1984, Respondent cut hours back by 20 percent instead of laying off employees. However, in October Kiviat departed from the norm by ordering the layoff of "excessive" part-time employees.

Also, in 1982 Respondent asked for volunteers as an alternative to layoffs, however, no such request was made in 1985 even though it knew of two employees who were pregnant and had already indicated they would be leaving work in December. Vouna's attempted explanations for the variance were contradictory and unpersuasive. For example, he first said he did not cut hours in 1985 because when he did that in 1984 it caused some third-shift employees to quit. However, Vouna also testified at the hearing, and in his affidavit, that he had decided to eliminate the third shift with the hope that this would cause the same third-shift employees to quit. Vouna further testified he did not cut back hours because he did not want to unfairly penalize all the em-

ployees, yet he attempted to force third-shift employees to quit. Subsequent to the alleged unfair labor practice in 1985, Respondent again utilized cuts in hours for reduced work loads in 1986, and there were no apparent layoffs.

Respondent presented an exhibit and testimony regarding the numbers of production employees at its several related plants. This shows that between weeks 42 (the week Potter and Poulin were laid off) and 43, Respondent's Twistex plant had a reduction of three production employees while the BRD plant showed an *increase* of one production employee and the Brentwood plant showed no change. It appears that the only involuntary cutback imposed on employees at any of the three plants was the layoffs of Potter and Poulin. This is to be contrasted to 1984 when during the months of October through December the number of production employees of Respondent *increased* while the number of production employees at BRD decreased from 52 to 14 and the number of production employees at Brentwood decreased by one in the same period. The 1984 practice was consistent with the assurance given in October 1985 by Jerome Kiviat that production would be shifted to Respondent from other plants (it was considered that the work force at both of its other facilities was considered to be more elastic and could be more readily replaced after a layoff than at Twistex, yet, only a week later, this practice was not followed.

During that period of time the union organizational drive activated by Poulin and Potter occurred and, as urged by the General counsel, the evidence establishes that Respondent departed from its normal practice in deciding to have a layoff at the plant and in implementing that layoff, thus supporting an inference that Respondent's actions were unlawfully motivated. See *Heartland Food Warehouse*, supra. Under these circumstances, I find that Respondent's principal stated economic reason for the layoff of Potter and Poulin is pretextual. Although some decrease in production occurred, it appears that this was manipulated by Jerome Kiviat to adversely affect Respondent's plant despite his assurances to the contrary.

Significantly, Respondent stated it selected Potter and Poulin as they were the least senior part-time workers (but based on then current time rather than total or original starting date) but also has asserted various other reasons, including the assertion that they were doing winding, a function no longer needed, and were reluctant to work in twisting and binding. These reasons must be contrasted with the showing that both Potter and Poulin were qualified and experienced in all job functions and that any reluctance to work was directed at working conditions in a particular location where management failed to correct a situation where foreman Boisvert gave preferential treatment to his girlfriend. Also, in a letter dated February 25, 1986, from Respondent to OSHA, Respondent listed seven reasons for selecting them for layoff including the assertation that their attendance was poor, that Potter had quit 1 year earlier after demanding a 25-percent pay increase and had been laid off twice before, and that Poulin had previously quit twice and had been fired once.

Under these circumstances, I conclude that the apparent shifting and subsequent buildup of additional reasons for their layoff only serves to further underscore its unlawful motive and the pretextual nature of their layoff. See *J & G Wall Baking Co.*, 272 NLRB 1008 (1984).

Respondent's reasons and testimony also are rendered suspect by the timing of the layoff almost immediately after the visit of the OSHA investigator, by the apparent repudiation of Kiviat's assurances that Respondent's facility would be the last to have a layoff, and by the contradictory statements of its various principals. For example, Vouna testified that he made the decision to lay off the two employees on 8 October, yet a letter of instructions from Kiviat clearly implies that the decision was made by Kiviat on 10 October. However, Cadrin informed OSHA that the decision to lay them off was made on 11 October. Also, Vouna's affidavit stated that a decision was made on 1 or 2 October to lay off a full-time employee or two part-time employees. Vouna also testified that Kiviat told him to lay off one full-time employee and he then decided to lay off two part-timers, however, Kiviat's letter clearly states that Kiviat ordered the elimination of "all excessive part-time employees." Vouna attempted to portray the elimination of the third shift and the layoffs as part of the same decision-making process and testified that the decision to lay off the two employees was made at the same time it was decided to eliminate the third shift but in his affidavit he stated he made the decision to eliminate the third shift weeks before 8 October, and Cadrin's letter to OSHA clearly separated the two events.

I conclude that the totality of Respondent's motivational defense is pretextual and I find that Respondent has failed to show that it would have laid off either Potter or Poulin absent the start of the Union's organizational drive and the visit of the OSHA investigator and Respondent's suspicions that each of them was engaged in union activity and in the making of a complaint to OSHA.

Respondent has failed to meet its burden under *Wright Line*, supra, and, as the General Counsel otherwise has shown by a preponderance of the evidence that both Potter and Poulin were laid off because of their protected activities and I further conclude that Respondent thereby violated Section 8(a)(1) and (3) of the Act as alleged.

The conclusion reached regarding Respondent's motivation for the layoff are reinforced by a review of Respondent's actions subsequent to the layoff.

After Potter was hired by another employer, in the same building as Twistex, a building owned by Kiviat (and after Respondent had received an OSHA document specifically identifying Poter and Poulin as the complaining parties), Vouna admitted asking her new employer to get rid of her because she was vindictive and a troublemaker. I also credit that the Company's president, who independently testified that Vouna made a reference to Potter's involvement with a union. This action by Vouna constitutes a separate violation of Section 8(a)(1) of the Act, as alleged.

Production continued during the fall of 1985, and Respondent experienced some turnover of employees. Respondent placed newspaper ads for and hired several new production employees. Potter and Poulin both spoke to Vouna about coming back to work. Poulin specifically telephoned Vouna in December asking for work right after Vouna began advertising for full-time help. Vouna explained that he did not hire Poulin because he *assumed* she was calling for part-time work, yet the record shows that one former employee on disability and one new employee were put on in November as part-time employees.

Respondent's work records also show that numerous employees, including newly hired workers, consistently had weekly wages in the range between $98 and $62 (Mary Richards a retired, part-timer also consistently worked 20 hours), from November 1985 through January 1986, whereas a comparable 40 hour production wage apparently would be at least in the $135 range. Also, regular production workers regularly worked between 2 and 15 hours overtime each week and received significantly greater wages.

A comparison for the last half of 1985 of the numbers of production employees at Respondent and at the two other companies controlled by Kiviat also indicate that Twistex went from a consistent level of 20 employees in the third quarter to a fluctuation between 18 and 14 in the fourth, while BRD went from a third quarter 12–15 range to a higher 16–20 range in the fourth quarter, and Brentwood went from a third quarter 24–30 range to a consistent 27 in the fourth quarter. Under these circumstances, it appears that little effort was made to assign more production to Respondent's plant despite the fact that it had better machinery, Kiviat had promised the employees that he would do so, and that had been the practice in the past.

Under these circumstances, I find that Respondent had ample opportunity to recall Potter and Poulin from layoff but never sought to do so. Moreover, it specifically denied their request for recall. I further find its attempt to find a distinction between their asserted status as part-time employees, qualified in only one area of operation, to be contrary to its operational practices and clearly pretextual. Respondent clearly knew of Potter's and Poulin's OSHA complaint by this time and it also is shown that it mentioned Potter's union activity when it attempted to get an independent employer to terminate her. I therefore conclude that the motivating factor behind Respondent's failure to recall them from layoff was their union and protected concerted activity and I conclude that Respondent is therefore shown to have violated Section 8(a)(1) and (3) of the Act in this respect, as alleged.

Under all these circumstances, I conclude that Respondent has not met its burden of showing that Potter and Poulin would have been laid off and not recalled absent their union activity and protected concerted activity in filing their OSHA complaint, compare *Dorothy Shamrock Coal Co.*, 279 NLRB 1298 (1986). The General Counsel otherwise has met her overall burden of proof and I further conclude that Respondent thereby violated Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening that the plant would be shut down before a union would be let in, Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By attempting to cause another employer to discharge Tina Potter, in retaliation for her union and protected concerted activity, Respondent has violated Section 8(a)(1) of the Act.

5. By laying off employees Tina Potter and Sandra J. Poulin on 11 October 1985 and by subsequently failing and refusing to recall them from lay off because of their union activity and protected concerted activity, Respondent has violated Section 8(a)(3) and (1) of the Act.

6. The Respondent has not otherwise engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off and failed to recall employees Potter and Poulin, I find it necessary to order it to offer them reinstatement to their former positions with compensation for loss of pay and other benefits, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). It also shall remove from its files any reference to the separation and notify them that it has been done and that evidence of such unlawful action will not be used as a basis for further action against them. See *Sterling Sugars*, 261 NLRB 472 (1982). Otherwise, because of the serious nature of the violations and an overall display of a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order, requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

As a part of the relief sought, the General Counsel also seeks imposition of a so-called "visitatorial clause" whereby the Board would be authorized to engage in certain discovery activities in order to monitor compliance. Although the imposition of such a provision recently has become a common practice, there is no showing that it is of particular applicability or usefulness in dealing with the type of unfair labor practice involved in this proceeding. Accordingly, the request is denied and no visitatorial clause will be imposed as part of the order herein.

On these findings of fact and conclusions of law and n the entire record, I issue the following recommend-d[4]

ORDER

The Respondent, Twistex, Inc., its officers, agents, uccessors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the closure of its busi-ess before it would allow a union.

(b) Attempting to cause another employer to discharge ormer employees in retaliation for their union or other rotected concerted activity.

(c) Laying off or failing and refusing to offer recall to ny employees or otherwise discriminating against them or engaging in union organization activity or other pro-cted concerted activity.

(d) In any other manner interfering with, restraining, coercing employees in the exercise of their rights uaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to ffectuate the policies of the Act.

(a) Offer Tina Potter and Sandra A. Poulin immediate d full reinstatement to their former or equivalent posi-ons and make them whole for the losses they incurred a result of the discrimination against them in the anner specified in the section above entitled Remedy," and remove from its files any references to ese separations on 11 October 1985, and notify them in riting that this has been done and that evidence of this lawful separation will not be used as a basis for future rsonnel actions against them.

(b) Preserve and, on request, make available to the oard or its agents for examination and copying, all pay-ll records, social security payment records, timecards, rsonnel records and reports, and all other records nec-sary to analyze the amount of backpay due under the rms of this Order.

(c) Post at its South Grafton, Massachusetts, facility pies of the attached notice marked "Appendix."[5] pies of the notice, on forms provided by the Regional rector for Region 1, after being signed by the Re-ondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained 60 consecutive days in conspicuous places including places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED, that the complaint be dismissed insofar as it alleges violations of the Act other than those found above.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with the closure of our business before we would allow a union.

WE WILL NOT attempt to cause any other employer to discharge any of our former employees because they engaged in union organization activity or other protected concerted activity.

WE WILL NOT layoff or refuse to recall employees laid off or otherwise discriminated against for engaging in union organization activity or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain our employees in the exercise of the rights set forth above.

WE WILL offer Tina Potter and Sandra A. Poulin immediate and full reinstatement to their former or equivalent position and make them whole for any losses they incurred as a result of the discrimination against them in the manner specified in the section entitled "Remedy."

WE WILL remove from our files any references to their separations, and notify them in writing that this has been done and that evidence of this unlawful separation will not be used as a basis for future personnel action against them.

TWISTEX, INC.

If no exceptions are filed as provided by Sec. 102.46 of the Board's es and Regulations, the findings, conclusions, and recommended er shall, as provided in Sec. 102.48 of the Rules, be adopted by the rd and all objections to them shall be deemed waived for all pur-es.

If this Order is enforced by a judgment of a United States court of eals, the words in the notice reading "Posted by Order of the Nation-abor Relations Board" shall read "Posted Pursuant to a Judgment of United States Court of Appeals Enforcing an Order of the National or Relations Board."

Adair Standish Corporation *and* Flint Local 282-C, Graphic Communications International Union, AFL-CIO. Case 7-CA-25973

17 April 1987

DECISION AND ORDER

BY MEMBERS BABSON, STEPHENS, AND CRACRAFT

On 10 November 1986 Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Adair Standish Corporation, Standish, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dwight R. Kirksey, Esq., for the General Counsel.
Francis T. Coleman, Esq., and Scott R. Merrill, Esq. (Boothe, Prichard & Dudley), of Washington D.C., for the Respondent.
Donald B. Greenspon, Esq. (Greenspon, Sheff & Washington, P.C.), of Detroit, Michigan, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This case was originally consolidated for hearing with Case 7-CA-25059 by the Regional Director for Region 7, by his order consolidating cases, amended complaint and notice of hearing issued on 16 July 1986. As explained in my order granting motion to sever, dated 5 November 1986, and attached hereto as Appendix A, I granted the Charging Party's motion to sever the two cases for the reason set out in that order.

As shown in that order, following an election won by the Union on 11 September 1986, a hearing was held on objections filed by Respondent in which the hearing officer concluded that the objections were without merit, and a Certification of Representative issued by the Board on 27 May 1986.[1] The Regional Director issued a complaint in this case, based on a charge filed by the Union on 26 June 1986 and, on 16 July, consolidated it for hearing with the outstanding complaint in Case 7-CA-25059. The complaint in the present case alleges that, since about 6 June 1986, Respondent has refused the 30 May request of the Union to commence bargaining collectively with it and to provide certain information to it.

As the order granting motion to sever makes clear, the Respondent does not contest that it has refused to bargain and to supply information, and the only apparent basis for these refusals is its belief that its objections in the representation proceeding should have been sustained.

The Respondent has adduced no evidence or issues that it did not have the opportunity to litigate at the representation proceeding. There are no factual issues aside from the underlying objections themselves, because the record shows Respondent's refusal to engage in collective-bargaining negotiations and to furnish the requested information.[2]

Accordingly, I concude that by its refusal to meet with the Union and to furnish relevant information to the Union, in and after June 1986, Respondent has violated and is violating Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By virtue of the representation election of 11 September 1985, the Union is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its facility at 4334 Airpark Drive, Standish, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

4. By refusing, on and after 6 June 1986, to recognize and bargain with the Union and to provide relevant information requested by it, Respondent has violated, and is violating, Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom, to bargain on

[1] Not included in bound volumes. On 6 June, Respondent filed a motion for reconsideration of the Board's ruling; on 24 September, the Board denied the motion.

[2] The Respondent does not challenge, and there can be no doubt, that the information requested in the Union's 30 May letter—a list of current employees with their dates of hire, current pay rates, current classifications, holidays, vacation periods and qualifications therefor, fringe benefit plans, hours of work, and "all other conditions of employment"—constitutes the kind of core data to which a union is presumptively entitled. E.g., *Union Oil Mill*, 280 NLRB No. 143, slip op. at 3, 4 (July 31, 1986) (not published in Board volumes).

request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement and to provide the Union, on request, the information it requested on 30 May 1986.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, the initial period of the certification shall commence as the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Adair Standish Corporation, Standish, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Flint Local 282-C, Graphic Communications International Union, AFL-CIO (the Union), as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its facility at 4334 Airpark Drive, Standish, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

(b) Refusing to supply the Union with requestd information necessary for, and relevant to, the Union's function as the exclusive bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

(b) Furnish the Union with information requested by it 30 May 1986 in current form.

(c) Post at its facility in Standish, Michigan, copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

ORDER GRANTING MOTION TO SEVER

On 4 October 1985, the Charging Party filed a charge (Case 7-CA-25059) with Region 7, alleging that Respondent had violated Sections 8(a)(1), (3), and (5) of the Act by, about "13 Setpember 1983 [sic]," unilaterally changing conditions of employment and retaliating against employees by promulgating a new discipline policy, and about 15 and 17 September discriminating against four named employees. On 16 October 1985, an amended charge alleging two more violations of Section 8(a)(1) and "(2)(3)" was filed, referring to unlawful solicitation of employees to revoke membership cards since 3 October and unlawful surveillance, threats, and promises of benefits since June.[1]

On 15 November, the Region issued a complaint based on these charges. The complaint included allegations that the Charging Party had been selected as the exclusive bargaining representative of employees in an identified bargaining unit on 11 September and, by virtue of a unilateral change in certain policies and by laying off employees, Respondent had violated Section 8(a)(5). The complaint also contained several allegations of Section 8(a)(3) and (1), including alleged discrimination against four employees.

The record shows that a representation election was held among the employees in the appropriate unit on 11 September 1985; that the tally of ballots disclosed that the Charing Party had won the election; that the Respondent filed objections to the election that were overruled by a hearing officer and thereafter by the Board, which, on 27 May 1986, issued a Certification of Representative; and that the Respondent then filed with the Board a motion for reconsideration about 6 June 1986. The motion for reconsideraton was denied by the Board on 24 September.

On 26 June 1986, the Charging Party filed a new charge (Case 7-CA-25973), in which it alleged that since about 28 May 1986, the Respondent had violated Section 8(a)(5) in that it had "refused to bargain in good faith with the Union." On 16 July 1986, the Region consolidated the two cases and amended the existing complaint to allege that about 30 May 1986, the Union had requested the Respndent to "commence bargaining collectively"

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

If this Order is enforced by a judgment of a United States court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] A second amended charge, making minor changes in the amended charge, was filed on 14 November.

with it and to furnish it with information concerning the number of employees, their hire dates, classifications, benefits, and other conditions of employment, all of which, since 6 June 1986, the Respondent, by letter, has refused to do.

At the instant hearing, on 8 August 1986, Charging Party moved that the two cases be severed and that separate decisions be issued for purposes of each complaint. Respondent opposed the motion; the General Counsel stated that I should exercise my discretion in the matter. I took the motion under advisement and authorized the parties to file briefs on the issue by 12 September.[2]

Briefs were thereafter filed by the Respondent and the Charging Party. After consideration, however, I concluded that the circumstances of the case were such that a ruling on the motion for severance was not ripe; at the time that we resumed (and completed) the case on 22 September, Respondent had not finished presenting its evidence, and I thought it possible that Respondent might raise an issue or issues in doing so that would make severance inappropriate. Consequently, I deferred ruling on the motion until completion of the hearing. I have further deferred ruling on the motion prior to the filing of briefs in these cases, on the theories (1) that Respondent is entitled to file a brief in a completed case; and (2) that Respondent's brief might contribute some contention or insight that would affect the decision regarding severance. Briefs were received from the parties about 3 November.

Sections 102.33 (d) and 102.35 (h) of the Board's Rules and Regulatins, Series 8, as amended, authorize administrative law judges to order the severance of proceedings prior to issuance of their decisions. This seems a proper situation in which to exercise that authority. Compare *Quaker Tool & Die, Inc.*, 169 NLRB 1148 (1968), in which the Board did not deny the authority of an administrative law judge to sever and decide after hearing, but, rather, only disagreed with his decision to do so, given the facts before him.

In refusing to recognize and bargain with the Union and to furnish information to it, Respondent appears to be engaging in what is usually referred to as a "technical" refusal to bargain, based on the claim, already twice rejected by the Board, that the Union should not have been certified as the collective-bargaining representative in the first place. Respondent thus apparently intends to "test" the certification in a circuit court of appeals by refusing to acknowledge the validity of the Board's certification. E.g., *NLRB v. San Jose Care & Guidance Center*, 652 F.2d 856, 858 (9th Cir. 1981).[3]

Routinely, in a technical 8(a)(5) case free of other controverted issues, the General Counsel will file motion for summary judgment with the Board; the Board will issue a decision and order finding the employer quilty of a refusal to bargain (or of various refusals); the employer will not comply with the Board's cease-and-desist order; and the General Counsel will petition a court of appeals for enforcement of the Board's order. In what may be anticipated to be a reasonably brief period, the court of appeals will decide whether the Board's certification was faulty or valid. In the first event, there may be required a new hearing, further consideration by the Board, or a nullification of the whole proceeding. In the second case, the employer must (short of a petition for certiorari to the Supreme Court) bargain with the union. In the great majority of cases, the issue is joined and conclusively settled relatively quickly, and the union will either capitulate and decamp, mount another organizing effort, or exercise the court-affirmed right to represent the employees. This same likelihood of a quick disposition is, of course, even greater if it should eventuate that Respondent chooses not to seek judicial review, but merely to exhaust its avenues of relief solely before the Board.

The possibility of a fairly prompt resolution of the representation issue becomes much more problematical if it is, as here, joined together with disputed allegations of violations of other sections of the Act. It is a fair wager that a determination of the separable and fundamental refusal-to-bargain question will be delayed by its inclusion in the overall complaint. My own schedule suggests that I might not issue a decision on the entire matter until well into the first part of 1987;[4] it seems probable that exceptions and briefs will then be filed with the Board; the Board's busy docket, and unforeseeable internal disputes about the disposition of any one of the several issues presented by the case, may delay the Board's own

[2] The hearing was scheduled to adjourn until 22 September.

[3] Respondent has not, in so many words, stated that it was generally refusing to extend recognition and supply information solely for the reason that it was testing the validity of the certification, but that conclusion is inescapable. In its answer to paragraph 10 of the original complaint, which alleged that the Union has been the exclusive collective-bargaining agent of the employees since the 11 September 1985 election, Respondent "denie[d] that the Charging Union was selected by an uncoerced majority of its employees" in the election, that the Union had not been certified, and "hence has not since September 11, 1985, been the exclusive representative" of the employees. In answer to paragraph 16 of the complaint, which alleges that since 13 September 1985, Respondent has refused to bargain by unilaterally changing personnel practices and laying off employees, Respondent replied that it "is under no legal duty to bargain with the Charging Union and therefore denies that it has refused to bargain. . . ." These responses were substantially repeated in the answer filed to the consolidated complaint, and Respondent simply filed denials to the new paragraphs regarding the refusal of the May 1986 requests for bargaining and for information (other than to admit that the requests were made). However, in G.C. Exh. 20, Respndent's letter of 6 June 1986 replying to the Union's earlier requests to negotiate a contract and to receive information, counsel for Respondent, noting its pending motion for reconsideration before the Board in the representation case, stated, "Accordingly, we see no need to engage in negotiations with your organization or provide the information requested until this matter has been finally adjudicated and resolved."

Furthermore, in its interim brief on this point, Respondent, treating with the Charing Party's statement at the hearing that "there are no factual disputes and it [the validity of the certification] is clearly a legal conclusion," did not take issue with these assertions, but simply replied that it "remains unclear how such action [severance] will conserve the resources of the Board. It is also unclear exactly how such 'legal conclusion' is different from any of the other portions of the consolidated complaint *from* [*sic*] *which these are no factual disputes*. . . ." (emphasis added).

Finally, at no point in the hearing did Respondent make any claim or present any evidence (such as testimony that might tend to show that the Union already had the information requested) that would signify that it was raising any issues other than its contention that the election was subject to meritorious objections, and its most recent brief simply fails to refer to the May 1986 requests altogether.

[4] As noted above, briefs were not received until 3 November.

decision for an unpredictable length of time; and the same may be true of any judicial review to follow.

The Respondent argues—indeed, it is basically Respondent's only argument—that severance of the cases would be at the expense of judicial economy. That is true, although the economics involved do not seem very large. But it appears to me that a more important value is implicated here. If one of the purposes of creating this administrative agency was to provide for a prompt resolution of questions of employees desire for representation, then it would stand to reason that severance of the two cases clearly seems to be the more certain way of achieving that goal, without prejudicing any other significant interest that comes to mind. The issue of the right to representation would quite likely be put to rest more quickly; the due process rights of the employer would be fully safeguarded; and the disposition of the remaining allegations would not be affected. See *Jessie Beck's Riverside Hotel*, 231 NLRB 907 (1977), 909 ("[A]s the alleged 8(a)(1) and (3) violations involved conduct occurring after the election and certification herein, which are the underpinnings of the 8(a)(5) and (1) violations alleged herein, we find that there was not abuse of discretion in the refusal to consolidate and that the *Peyton Packing*, [129 NLRB 1358 (1961)] and *Jefferson Chemical* [200 NLRB 992 (1972) precedents cited by the Respondent are distinguishable and inapposite.")

Despite the foregoing, however, this case may seem, at first glance, to present special problems. As noted earlier, the original complaint issued in Case 7–CA–25059 alleged that Respondent had refused to bargain collectively, in violation of Section 8(a)(5), "by unilaterally and without giving the Charging Party notice and affording it a meaningful opportunity to bargain" with respect to changes in enforcement of its personnel policies and laying off employees since 13 September. The Charging Party has not moved to sever this allegation as well. One of the issues underlying it is the basic duty of the Respondent to bargain, which, of course, implicates the validity of the election. If these allegations remain in the original complaint, and the other Case 7–CA–25973 8(a)(5) allegations are severed and treated as a separate proceeding, then, it may be argued, the validity of the election might be subject to testing in two different forums.

I do not see this as a real problem, however. If the motion for severance is granted and the Board and the Court of Appeals for the Sixth Circuit[5] should agree that Respondent has violated Section 8(a)(5) by generally refusing to bargain and by specifically refusing to provide information, it is difficult to conceive that Respondent might later petition for review of any other 8(a)(5) allegations found against it by the Board by searching out another circuit in which to file its petition and there attempt to raise again the propriety of the certification—not only would few courts tolerate such naked forum-shopping, but they would probably also hold that, on the underlying question of the validity of the representation election, the matter was res judicata.

[5] The court in which the Board would seek to enforce its decision, see Section 10(e).

It is, in short, my view that the motion for severance makes good sense and is a rational and healthy exercise of the flexibility intended to be a major characteristic of the administrative process. Accordingly, the motion is granted.

The record in this case shall consist of the official record in Case 7–RC–17730;[6] the charge in Case 7–CA–25059 dated 4 October 1985, and the amended and second amended charges in that case (received in evidence in the consolidated unfair labor practice hearing as the General Counsel Exhibits 1(a), 1(c), and 1(e)); the complaint and notice of hearing and Respondent's Answer thereto in Case 7–CA–25059 (received in evidence in the consolidated unfair labor practice hearing as the General Counsel Exhibits 1(g) and 1(i)); the charge in Case 7–CA–25973 dated 26 June 1986 and the "Order Consolidating Cases, Amended Complaint and Notice of Hearing" in Cases 7–CA–25059 and 7–CA–25973, and Respondent's answer thereto (received as G.C. Exhs. 1(u), 1(aa), and 1(cc)); General Counsel Exhibit 19, a letter from the Union to the Respondent dated 30 May 1986; and General Counsel Exhibit 20, a letter from the Respondent to the Union dated 6 June 1986.[7]

It is hereby ordered that the motion to sever Case 7–CA–25973 from Case 7–CA–25059 is granted; that the two cases shall henceforth be regarded as separate proceedings; and that separate recommended Decisions shall be rendered by the administrative law judge in each such proceeding.

[6] Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations and Statements of Procedure.

[7] Although this letter might be read as simply a refusal to recognize and bargain until the Board had decided Respondent's motion for reconsideration filed that day, it also states that Respondent would not negotiate or provide information "until this matter has been finally adjudicated and resolved." If, by this, Respondent were only to mean that it did not intend to pursue its remedies beyond the level of the Board, that would be all the more reason to grant the Charging Party's motion.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Flint Local 282–C, Graphic Communications International Union, AFL–CIO (Union), as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its facility at 4334 Airpark Drive, Standish, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to provide the Union with requested information necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached regarding terms and conditions of employment for our employees in the aforesaid bargaining unit.

WE WILL furnish the Union, as requested in its 30 May 1986 letter, the information necessary for, and relevant to, the performance of its duties as the exclusive bargaining representative of the employees in the bargaining unit.

ADAIR STANDISH CORPORATION

Goodie Brand Packing Corp. ***and*** **Roberto Sanchez** ***and*** **Elva Rodriguez.** Cases 2–CA–18205, 2–CA–18299, 2–CA–18361, and 2–CA–18370

20 April 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 30 April 1984 the National Labor Relations Board issued a Decision and Order in this proceeding[1] in which the Board adopted the finding of the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by certain of its statements to and conduct toward Union Steward Roberto Sanchez. The Board further found, in disagreement with the judge, that the Respondent did not violate Section 8(a)(3) of the Act by discharging Sanchez, that the strike in protest of Sanchez' discharge was not a protected unfair labor practice strike, and that the discharges of the strikers and refusal to reinstate them were not in violation of Section 8(a)(3). Subsequently, the Charging Parties petitioned the United States Court of Appeals for the Second Circuit to review and set aside the Board's Order. On 11 March 1986 the court of appeals issued its decision granting the petition for review, modifying the Board's Order to find that the Respondent violated Section 8(a)(3) by discharging Sanchez, and providing for the reinstatement of Sanchez. The court remanded the case to the Board for further proceedings with respect to the 8(a)(3) claims of the striking employees.[2]

The Board accepted the court's remand and notified the parties that they could file statements of position concerning the issues the remand raised. The General Counsel, the Respondent, and the Charging Parties filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board accepts the court's opinion as the law of the case. The Board has considered the record as a whole in light of the court's decision and the statements of position on remand and now makes the following findings.

Both the Respondent's drivers and floorworkers have been represented by Teamsters Local 202 since 1959 under separate collective-bargaining agreements that provide for union stewards and arbitration, and contain valid no-strike and union-security clauses. Many provisions of the agreements, including the union-security clause, were not being enforced when Roberto Sanchez became shop steward in July 1980. The Respondent had a telling history of hostility to union activities and of harassment of stewards. After Sanchez became steward, he was threatened and assigned more onerous working conditions. Part-owner Abe Solomon asked Sanchez why he was organizing the workers and said that Solomon would fight Sanchez every day. Sanchez was told to advance his own money for tolls, contrary to prior company practice, and he was assigned to the night shift contrary to seniority rules. The Respondent also sent letters to the Union complaining about Sanchez' work performance. The Board found that the Respondent violated Section 8(a)(1) of the Act by threatening, warning, and interrogating Sanchez and assigning him more onerous working conditions because of his protected concerted activity.[3] Despite this harassment, Sanchez filed over 45 grievances.

On 25 September 1981[4] Sanchez had an accident in one of the Respondent's trucks, which was damaged to the extent of $2300. After the incident Abe Solomon told Sanchez he was being suspended and sent him a copy of a letter to the Union indicating Sanchez was being suspended indefinitely. Later, on 2 October, Solomon told Union Agent Mogilnicki that the indefinite suspension would be for 2 weeks. Neither Solomon nor Mogilnicki told Sanchez or any of the employees that the indefinite suspension had been converted to a 2-week suspension.

Believing he had been discharged, on 5 October Sanchez and about 40 employees set up a picket line outside the Respondent's plant to protest the action taken against Sanchez. On 6 October the Respondent sent a letter to all these employees except Sanchez informing them that they were engaged in a wildcat strike and that they would be discharged unless they returned to work on 9 October. Eventually, all striking employees were offered unconditional reinstatement except Sanchez and former steward Elva Rodriguez and her sister.

As stated above, the court granted the petition for review with respect to Sanchez' claim that the Respondent discharged him in violation of Section 8(a)(3).[5] Pursuant to the court's remand, the single

[1] 270 NLRB 451 (1984).

[2] *Roberto Sanchez & Elva Rodriguez v. NLRB*, 785 F.2d 409 (2d Cir. 1986).

[3] 270 NLRB 451 (1984).

[4] All dates hereinafter are in 1981 unless otherwise specified.

[5] The court found that the unlawful actions taken against Sanchez culminated in his removal from the payroll on 25 September. The judge and the Board agreed there was a prima facie case that the Respondent's action was unlawfully motivated. The Board found, however, contrary to the judge, that the Respondent had satisfied its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of establishing that it would have taken the action against Sanchez even in the absence of protected activity because of his

Continued

issue before us is whether the striking employees were discharged in violation of Section 8(a)(3). We must first decide if the strike was prompted by the unlawful action taken against Sanchez on 25 September. We find that it was.

All the employee witnesses testified that they decided to strike in order to seek the reinstatement of Sanchez, an active shop steward. The employees' picket signs indicated they were striking because they wanted their shop steward put back to work. Since the court has found that Sanchez' discharge violated Section 8(a)(3), we find that the strike in protest thereof rendered the strikers unfair labor practice strikers.

The remaining issue is whether the strikers were engaged in protected concerted activity in spite of the no-strike clause in the collective-bargaining agreement.

In *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), the Supreme Court held that a no-strike clause in a collective-bargaining agreement does not waive the right to strike against an employer for unfair labor practices. In *Arlan's Department Store*, 133 NLRB 802 (1961), the Board limited this rule to apply only in cases of serious unfair labor practices. The Union herein made little or no effort to enforce the collective-bargaining agreement. With Sanchez gone the employees had "virtually no representation," as the judge found. 270 NLRB at 457. We find, in agreement with the judge, that the Respondent's attempt to deprive its employees of proper representation was a serious unfair labor practice within the meaning of *Arlan's*. See also *Lustrelon, Inc.*, 242 NLRB 561, 570–571 (1979). Therefore, we find that the no-strike clause does not apply, that the strike was protected, that the Respondent's 6 October letter discharged the strikers in violation of Section 8(a)(3) and (1), and that they are entitled to reinstatement and backpay in accord with *Abilities & Goodwill*, 241 NLRB 27 (1979).[6]

Inasmuch as the court has already reinstated the portions of the judge's recommended Order providing for the reinstatement of Sanchez, it is unnecessary to repeat them here. Rather, we shall adopt those parts of the judge's recommended Order dealing with the reinstatement and backpay of the discharged strikers.

ORDER

The National Labor Relations Board adopts the pertinent portions of the recommended Order of the administrative law judge set forth below and orders that the Respondent, Goodie Brand Packing Corp., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees because of their participation in protected strike activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent it has not already done so, offer Jose Rodriguez, Ana La Roche, Santia Rodriguez, Elva Rodriguez, Maria Luisa Rentas, Isabel Bank, Nancy Santana, Mariliez Torrez, Rafael Larracuente, Jose Suarez, Andres Tejada, Juanita Sedano, Natalio Santiago, Victor Negron, and Raul Robles immediate and full reinstatement to their former job or, if those jobs no longer exist, to substantially equivalent positions, and make them whole for their lost earnings in the manner set forth in the remedy section of the administrative law judge's decision.

(b) Remove from its files any reference to the discharges of the employees named above in (a), and notify each of the discriminatees in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its New York, New York place of business, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms pro-

driving mishap. The court rejected the Board's finding and concluded that while the evidence suggests that Sanchez was merely suspended for a week or two because of the driving mishap, it does not support a finding that Sanchez was discharged for the incident. Under the court's analysis, the Respondent failed to sustain its *Wright Line* burden, leaving intact the prima facie case of unlawful discipline of Sanchez for union activity. While the court made no specific finding regarding the date of Sanchez' discharge, the discharge must have commenced at the time of Sanchez' 25 September removal from the payroll, as found by the judge. Our conclusion as to the date of discharge is supported by the court's analysis recited above and its order that those portions of the judge's decision concerning the rehiring of Sanchez be reinstated. 785 F.2d 409, 415. This would necessarily include the judge's conclusions on the discharge date for the purpose of calculating Sanchez' backpay.

[6] Chairman Dotson would overrule *Abilities & Goodwill*, 241 NLRB 27 (1979), and would date the Respondent's backpay obligation to the discharged strikers from the time they made an unconditional offer to return to work.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Nation-

Continued

vided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

al Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you who participate in protected strike activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, to the extent we have not already done so, offer Jose Rodriguez, Ana La Roche, Santia Rodriguez, Elva Rodriguez, Maria Luisa Rentas, Isabel Bank, Nancy Santana, Mariliez Torrez, Rafael Larracuente, Jose Suarez, Andres Tejada, Juanita Sedano, Natalio Santiago, Victor Negron, and Raul Robles, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharges of the employees named above, and notify each of them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

GOODIE BRAND PACKING CORP.

MacDonald Miller Company *and* United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 32. Case 19–CA–16489(E)

21 April 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 19 May 1986 Administrative Law Judge James M. Kennedy issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Applicant filed an answering brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

The complaint in the underlying proceeding alleged that the Applicant violated Section 8(a)(3) and (1) of the Act by discharging Raymond Atkinson and Kenneth Dulaney because they were the subject of a grievance filed by the Union on their behalf and because of their union and other protected activities.

On 25 November 1985 the Board[1] adopted the judge's findings that Atkinson was a supervisor and that the General Counsel did not prove that the Respondent violated Section 8(a)(3) and (1) by discharging Atkinson and Dulaney. The judge based his finding that Atkinson was a supervisor on the fact that he was a foreman, received a premium wage, attended supervisory meetings, and independently assigned work to other employees. Even assuming Atkinson was not a supervisor, the judge also found that the General Counsel was unsuccessful in proving either that the Respondent unlawfully discharged Atkinson and Dulaney because of their participation in union and other protected activities or that their discharges were inherently destructive of their Section 7 rights. The Board adopted the judge's recommended Order and dismissed the complaint.

In his supplemental decision the judge correctly noted that under Section 504(a)(1) of the Equal Access to Justice Act (EAJA)[2] a prevailing party may receive an award for fees incurred in connection with an adversary adjudication involving an administrative agency unless the agency was "substantially justified." He further noted that Congress clarified that phrase as meaning "more than merely reasonable,"[3] observing, however, that EAJA is not designed to deter the Government from advancing in good faith close questions of law or fact.[4] The judge concluded that in the face of objective factors, i.e., title, wage, and duties, the General Counsel at all times should have known that Atkinson was a supervisor. The judge also found that the General Counsel should have realized that established Board law rejects the application of the "inherently destructive" theory to nonanimus job loss and that as to the application of the traditional theories for an unlawful discharge allegation she was missing vital elements in proving a violation. The judge therefore concluded that the General Counsel was not substantially justified in proceeding with the case and awarded the Applicant $16,489.34 plus any additions and expenses it may incur in pursuing this EAJA claim if the General Counsel filed exceptions to the judge's supplemental decision.

In her exceptions the General Counsel contends that she was substantially justified in bringing this case to the Board because the case turned on credibility issues[5] and inferences to be drawn from the facts.[6] The General Counsel argues that the judge erred in equating what he believed to be easily resolved credibility issues with the absence of such issues[7] and failing to draw reasonable inference from the General Counsel's evidence. We agree.

The facts in the underlying case are as follows. The Applicant does construction and maintenance work in the Seattle, Washington area. The Applicant's construction department employees (pipefitters) install heating and air-conditioning equipment in buildings under construction while the refrigeration department employees (refrigeration mechanics) do service and maintenance. Some new construction employees' work had been assigned, however, to the refrigeration department employees. Approximately 90 percent of this work was assigned to Atkinson and Dulaney.

[1] 277 NLRB 701 (1985).

[2] S. Rep. No. 96-253, 96th Cong., 1st Sess. 6 and 14 (1979); H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10 (1980).

[3] H.R. Rep. No. 99-120, 99th Cong., 1st Sess. 9 (1985). See also *Penco, Inc.*, 278 NLRB 1095 (1986).

[4] *Shellmaker, Inc.*, 267 NLRB 20, 21 (1983).

[5] See, e.g., *Natchez Coca-Cola Bottling Co.*, 269 NLRB 877, 878 (1984).

[6] See *Bosk Paint & Sandblast Co.*, 270 NLRB 514 (1984); *Iowa Parcel Service*, 266 NLRB 392 (1983), enfd. sub nom. *Iowa Express Distribution v. NLRB*, 739 F.2d 1305 (8th Cir. 1984), cert. denied 105 S.Ct. 595, and 105 S.Ct. 1385 (1984).

[7] See *University of New Haven*, 279 NLRB 294, 295 fn. 10 (1986).

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 32 (the Union), separately represents the refrigeration mechanics and the pipefitters and had a collective-bargaining contract for each department. The Union's refrigeration department contract expired in 1982 and was not renegotiated. The Applicant also had a collective-bargaining contract (the National Agreement) with the Union's parent International Organization. In the absence of a contract with the refrigeration mechanics, the Applicant invoked what it assumed were its rights under the National Agreement to assign new construction work to refrigeration department employees at the refrigeration mechanics' pay scale.[8] The Union believed that new construction work was subject to its contract with the Applicant covering the pipefitters and that refrigeration mechanics doing new construction work should be paid the pipefitters' wage scale (an additional $1.57 per hour) for this work.

On 18 July 1983[9] the Union mailed a memorandum to its members in the refrigeration department asking them to keep track of the time spent doing construction work so that the Union could be sure that they were being paid the correct amount. Atkinson was then shop steward, but did not keep records or report problems to the Union. Sometime in August, Dulaney complained to Union Business Representative John Fitzgerald that he was not getting the higher pay for the construction work he was doing. When the situation continued into mid-November, Union Business Manager Floyd Sexton asked the Applicant for a step 2 grievance meeting in accord with the pipefitters' contract. He asserted that the Applicant had violated the contract by not paying the proper wages and fringe benefits on new construction work. The grievance did not name the affected employees. It also skipped step 1 that required direct discussion between the aggrieved employee and his immediate supervisor. Virgil Timmerman, the Applicant's vice president, was confused by the grievance since he did not consider the new construction work assigned to the refrigeration mechanics to be pipefitters' work.[10] Timmerman also insisted that, to be valid, the grievance must start at step 1. He and Sexton could not agree on this point. They had many conversations in 1983 and January 1984 about the new construction work, with Sexton insisting that the pipefitters' wage rate applied and Timmerman remaining adamant that the refrigeration mechanics' wage rate was applicable.

In early January Foreman Lyle Schramm, suspecting that the new construction work might be transferred to the pipefitters, made some notes about the desirability of retaining Atkinson if this occurred. His notes included a list of Atkinson's shortcomings and the observation that Atkinson "makes comments to his fellow employees that [the Applicant] is anti-union implying mistrust by using negative comments to induce mistrust." During this time the Applicant hired four refrigeration mechanics. In late January Timmerman decided to assign the new construction work to the pipefitters.[11] On January he issued a memorandum announcing the change, citing his inability to resolve the new work construction grievance as the reason. That afternoon the Applicant decided to discharge Atkinson and Dulaney.[12]

Schramm met with them individually and gave each of them a copy of the Timmerman memorandum and a termination slip along with their final checks. During his interview Schramm told Atkinson that there was nothing wrong with his work but answered "no" in response to Atkinson's question whether he could do service work. The "for cause" box was checked on Atkinson's termination slip. Dulaney had a similar interview with Schramm. Dulaney asked Schramm if the discharge was permanent or until the grievance was resolved. Schramm replied it was permanent. Schramm also refused to discuss the quality of Dulaney's work but agreed that Dulaney was a "good mechanic." Dulaney's termination slip, like Atkinson's, had the "for cause" box checked. Dulaney asked Schramm for an explanation. In response, Schramm wrote in the explanation section of the slip: "per grievance from Local 32."[13]

I. ATKINSON'S SUPERVISORY STATUS

In his supplemental decision the judge found that the only credibility question to be decided "was when, not if, Atkinson became the new construction foreman." The judge further found that the General Counsel was not reasonable in taking the position that Atkinson was not a supervisor, citing Atkinson's title, premium wage, duties, and Fitzgerald's admonition to Atkinson that under the contract he could not simultaneously hold the posi-

[8] The refrigeration department contract permitted the Applicant to assign new construction work to the refrigeration mechanics.

[9] Unless otherwise stated all dates are in 1983 or January 1984.

[10] The grievance did not describe the work involved.

[11] In a memorandum written at the time, he observed that if the new construction work was assigned to the pipefitters then the refrigeration mechanics doing this work would have to be let go.

[12] Schramm testified that it was he who had "suggested" that Atkinson and Dulaney be fired.

[13] The explanation portion of the slip is preceded by the printed statement, "If not eligible for rehire state reason."

tions of foreman and steward. The judge noted that Atkinson denied having had supervisory status but concluded that "in the face of the foregoing objective factors his denial should not have been given controlling weight."

Atkinson was hired by the Applicant in May 1978. He was hired as a service mechanic in the refrigeration department but was paid the foreman rate. The Applicant paid the higher rate to selected service mechanics in order to keep them from leaving. Atkinson began performing new construction work in 1982. In March 1983 Atkinson learned that he had been made foreman. About this time the Applicant discontinued the premium rate to service mechanics who were not foremen.

As foreman, Atkinson attended meetings of the construction department where he reported on the status of refrigeration work on construction projects and was advised of new projects that would involve new construction work. Atkinson did not assign work. Rather, assignments were made by the dispatcher. However, in February 1983, he did recommend that Dulaney be given the Bellevue Square job. In late November 1983 Atkinson was told by Union Business Representative Fitzgerald that he could not be both foreman and union steward and that the Union must elect a new steward. An election was held shortly thereafter with Dulaney selected as steward.

The General Counsel concedes that Atkinson held the title of foreman at the time he was discharged but contends that his supervisory status and not his job classification was the issue to be resolved by the judge's credibility findings. She further contends that the judge erred in finding that the General Counsel acted unreasonably in failing to recognize that "objective factors" nullified Atkinson's denial that he was a supervisor, the applicability of the factors being dependent on the judge's discrediting Atkinson's testimony and his adverse interpretation of the General Counsel's evidence. We agree.

In an EAJA case the judge does not resolve conflicting testimony in determining whether the General Counsel had substantial justification in issuing a complaint. This determination is made on the basis of the General Counsel's evidence alone.[14] Contrary to the judge, we find that the "objective factors" covering Atkinson's status on which he relied do not negate a finding that the General Counsel was reasonable in relying on Atkinson's denial that he was a supervisor to overcome Atkinson's testimony that he was not a supervisor.

Atkinson testified that except for attending construction department meetings, there was no change in his duties and authority after the Company made him a foreman in March 1983. The judge asserted that Atkinson's testimony was patently unbelievable in light of his title, premium wage, duties, and Union Representative Fitzgerald's statement that the Union's contract with the Company precluded Atkinson from holding both the positions of foreman and steward. There is no question but that the fact that Atkinson held the title of "foreman" does not, standing alone, establish that he was a supervisor.[15] Nor did his "premium wage," especially because this was not an increase over what he had received before becoming foreman and the Applicant had a history of paying a higher wage rate to keep skilled employees. Similarly misplaced was the judge's reliance on Atkinson's supervision of Dulaney on the Bellevue Square project. Atkinson's testified that, at the Applicant's behest, he recommended Dulaney for the Bellevue Square job. He further asserted that he did not supervise Dulaney on the job but only periodically checked to see how the work was progressing. Moreover, Dulaney began work at the Bellevue Square project in February 1983 before Atkinson was made a foreman. Finally, Fitzgerald's conclusion that Atkinson could not be a "foreman" and a steward does no more than suggest the possibility that the Union's business representative thought Atkinson might be a supervisor. Thus, we do not agree that the objective evidence was such that the General Counsel should have rejected Atkinson's assertion that the change in his title in March 1983 did not result in any change in his responsibilities such that he became a supervisor. Accordingly, we find that the General Counsel was substantially justified in accepting Atkinson's denial of supervisory status.

II. THE TRADITIONAL THEORIES

In issuing the complaint the General Counsel employed traditional theories for litigating an 8(a)(3) discharge, namely, that the Employer discharged the employee because of his union activities. In the underlying decision the judge found that the General Counsel failed to prove employer knowledge and animus, two essential components for an 8(a)(3) discharge allegation under the traditional theories. He found that there was no evidence that the Company knew that Atkinson and Dulaney had engaged in union activity or that it had animus against them for engaging in such activity.

[14] See, e.g., *Carmel Furniture Corp.*, 277 NLRB 1105 (1985); *Western Publishing Co.*, 276 NLRB 1566 (1985); *Derickson Co.*, 270 NLRB 516 (1984).

[15] See, e.g., *Magnolia Nursing Home*, 260 NLRB 377, 385 (1982).

In his supplemental decision the judge found that the General Counsel knew at the time the hearing in this case began that the Applicant was unaware that Atkinson and Dulaney had voiced complaints to the Union about being underpaid. He observed that although the Applicant knew that Atkinson and Dulaney would be the individuals discharged when the new construction work was transferred to the pipefitters, this was not the same as its knowing that they were engaged in union activity. As to the General Counsel's failure to prove animus, the judge noted that the collective-bargaining relationship between the Union and the Applicant had existed over a long period of time and that it continues to exist.

The judge further noted that the General Counsel does not contend that Applicant unlawfully breached the terms of its collective-bargaining contracts with the Union and concedes that the Applicant's decision to transfer the new construction work from the refrigeration mechanics to the pipefitters was lawful. He concludes that it was patently illogical for the General Counsel to find the transfer of work to be lawful and then to find unlawful the discharges of Atkinson and Dulaney that resulted from the transfer of that work. This inconsistent position, he maintained, was tantamount to an admission by the General Counsel that the discharges were not discriminatory and that she could not prove animus. The judge further found no merit in the General Counsel's contention that proof of animus could be sustained on the grounds that Atkinson and Dulaney had been union stewards; the Applicant had hired four refrigerator mechanics shortly before discharging Atkinson and Dulaney; and Schramm's testimony that Atkinson's accusation that the Applicant was antiunion had been considered by Schramm when he suggested that Atkinson be discharged. As to Schramm's note concerning Atkinson's accusation, the judge surmised that Schramm probably considered Atkinson to be a supervisor whose accusations could have had a disruptive effect on employees who believed him, but the judge concluded that in any event Schramm's belief was obviously a non sequitur and could not be a basis for concluding that the Applicant harbored animus. For reasons set forth below, we find that the General Counsel was substantially justified in alleging that the Applicant knew that Atkinson and Dulaney were engaged in union activities and had animus towards them for engaging these activities.

The judge erred in not considering the reasonable inferences that could have been drawn from the General Counsel's evidence. With respect to knowledge, the Applicant knew that Atkinson was the steward at the time the grievance originated and that Dulaney became the steward close to when the grievance was filed.[16] The Applicant's knowledge, combined with its awareness that Atkinson and Dulaney would be the employees most affected by a resolution of the grievance favorable to the Union, could have led the General Counsel to reasonably infer that the Applicant had concluded that Atkinson and Dulaney had complained to the Union about their wage rates and that they were instrumental in having the Union bring the grievance.

As to animus, we find that the judge also erred by failing to consider reasonable inferences from the General Counsel's evidence. Having concluded that the Applicant suspected that Atkinson and Dulaney had prompted the Union to file the grievance, it was reasonable for the General Counsel to infer that the Applicant blamed them for the hostility between it and the Union which the grievance generated. Moreover, Schramm admitted that Atkinson's accusation that the Applicant was antiunion was a consideration in having him discharged. Given this admission, it was reasonable for the General Counsel to infer that Schramm believe that Atkinson was a troublemaker, and that the Applicant's labor relations would be smoother without Atkinson and Dulaney, another bothersome steward. Finally, the Applicant had hired four refrigerator mechanics shortly before it discharged Atkinson and Dulaney, suggesting that refrigeration work was available. Its discharge of Atkinson and Dulaney rather than assigning them refrigeration work reasonably suggests that the Respondent was retaliating against them as a result of the Union's pursuit of the grievance.

III. THE INHERENTLY DESTRUCTIVE THEORY

Normally, to sustain a finding that an employer has committed an unfair labor practice in discharging an employee, the General Counsel has the burden of proving that the employer's decision was motivated by either a desire to discourage union membership or to interfere with the exercise of protected rights. In *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Supreme Court recognized an exception to the requirement of proving unlawful motivation where the employer's conduct is "inherently destructive" of the employees' right to strike or engage in collective bargaining. Such conduct carries with it "'unavoidable consequences which the employer not only foresaw but which he

[16] Schramm testified that he was present at the meeting in late November or early December when Atkinson stepped down and Dulaney became the steward.

must have intended' and thus bears 'its own indicia of intent.'"[17]

The General Counsel alleged that discharging Atkinson and Dulaney because they were involved with and were the subject of the grievance brought by the Union was inherently destructive and violated Section 8(a)(3). The judge in his underlying decision found no merit in this assertion. Citing *Monarch Machine Tool Co.*, 227 NLRB 1880 (1977), and *P. W. Supermarkets*, 269 NLRB 839 (1984), he found that the Board has rejected this theory in the context of a nonanimus job loss related to a grievance. The judge further found that even assuming for purpose of argument that the inherently destructive theory was applicable to the discharges of Atkinson and Dulaney, the Respondent effectively rebutted the presumption of illegality by showing under the test set forth in *Fleetwood*[18] that the discharges had a substantial and legitimate business purpose.

In his EAJA decision the judge found that the General Counsel was not substantially justified in advancing this theory to sustain the allegation in the complaint, and that she should have recognized the similarity between *Monarch Machine Tool Co.* and *P. W. Supermarkets* and the instant case and withdrawn the "inherently destructive" portions of the complaint. The judge found that the General Counsel failed to consider whether the Applicant's compliance with the grievance constituted a substantial business justification within the meaning of *Fleetwood Trailer Co.* and, as such, rebutted the General Counsel's allegation that its act of discharging Atkinson and Dulaney was "inherently destructive."

Monarch Machine Tool Co. and *P. W. Supermarkets* are factually distinguishable from the case at bar.[19] In those cases the grievance resulted in economic losses to the employers who thus had a substantial business justification for laying off or discharging the employees in question. Such was not the situation here. The Union did not grieve that the new construction work be performed solely by pipefitters, but rather insisted that the employees who were assigned this work be paid the pipefitters' and not the refrigerators mechanics' wage scale. Hence, arguably the Company had no substantial business justification for discharging Atkinson and Dulaney because the cost to the Company was the same if the work was done by them or by the pipefitters. Accordingly, we find that the General Counsel was substantially justified in contending that the Applicant's discharge of Atkinson and Dulaney was "inherently destructive."

We find, therefore, that the General Counsel's case had a substantial basis in fact and law. Based on evidence that she had at the time and inferences that could be drawn from the evidence, it was "more than merely reasonable" for her to proceed with the case. Further, the fact that the General Counsel's evidence was ultimately found insufficient to prove the allegations against the Applicant does not lead automatically to a conclusion that the General Counsel was not substantially justified in proceeding against the Applicant. Accordingly, we shall deny the application for fees and expenses.

ORDER

It is ordered that the application of the Applicant, MacDonald Miller Company, Seattle, Washington, for an award under the Equal Access to Justice Act is denied.

SUPPLEMENTAL DECISION

Equal Access to Justice Act

JAMES M. KENNEDY, Administrative Law Judge. On November 25, 1985, the Board issued its Decision and Order in the above case[1] adopting the conclusions and recommendation for dismissal set forth in my decision of August 16, 1985. Thereafter, pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, MacDonald Miller Company (the Applicant), Respondent therein, filed on December 19, 1985, an application for an award of fees and other expenses of litigation. The Board transferred the application to me for ruling on December 26, 1985. On January 8, 1986, the General Counsel moved to dismiss with respect to certain perceived shortcomings in the Applicant's net worth statement and other eligibility matters. On January 15, 1986, I conducted a conference call with the parties and subsequently the Applicant filed a motion to amend its application. The proposed amendment corrected the apparent deficiencies seen by the General Counsel, dropped certain precomplaint reimbursement claims, and added a claim for fees incurred in opposing the General Counsel's exceptions to my decision, and a claim for work in seeking reimbursement, both of which it had previously omitted. As a result of these corrections, I granted the Applicant's motion to amend its claim and denied the General Counsel's motion to dismiss on February 3, 1986. On March 3, 1986, the General Counsel filed its answer to the application supporting it by a memorandum. On March 14, 1986, the

[17] *NLRB v. Great Dane Trailers*, supra at 33.

[18] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

[19] While it would have been desirable for the General Counsel in the underlying case to have included in its brief a comparison of *Monarch Machine Tool Co.* and *P. W. Supermarkets* and the instant proceeding, as well as a consideration of the Applicant's alleged substantial business justification defense to the "inherently destructive" allegation, we find that her failure to do so does not affect our conclusion that the General Counsel was substantially justified in relying on the "inherently destructive" doctrine in issuing the complaint.

[1] 277 NLRB 701.

Applicant filed a reply. The matter is not ripe for decision.

I. FACTS ESTABLISHED BY THE PLEADINGS

The pleadings first establish that at the time the complaint was issued the Applicant was a mechanical contractor having a net worth of slightly more than $3 million operating from two locations (Seattle and Anchorage) and having 137 employees in various stated job classifications. It had no affiliated businesses. The General Counsel, therefore, admits that the Applicant meets the EAJA eligibility standards, and I so find.

Second, the General Counsel admits that the Applicant is a prevailing party within the meaning of EAJA insofar as the complaint alleged that the Applicant had discharged two employees in violation of Section 8(a)(1) and (3) of the Act. Specifically, the General Counsel admits that it failed to prove that Raymond Atkinson was a statutory employee and also failed to prove that Atkinson and Kenneth Dulaney were unlawfully discharged.

II. SUBSTANTIAL JUSTIFICATION

Under Section 504(a)(1) of EAJA a party prevailing in litigation before a Government agency is entitled to an award of attorney's fees and expenses incurred in connection with that litigation unless the Government can show that its position was "substantially justified." In 1985, the Congress amended EAJA to clarify, but not change, the definition of the phrase, "substantially justified." That phrase means "more than merely reasonable." See H.R. Rep. 99–120 at 9 (1985). See also *Penco, Inc.*, 278 NLRB 1095 (1986). At the same time, however, EAJA is not designed to deter the Government from advancing in good faith close questions of law or fact. *Shellmaker, Inc.*, 267 NLRB 20, 21 (1983).

The Applicant contends that the General Counsel was not substantially justified in issuing the complaint; contrariwise, the General Counsel contends that it was. After carefully analyzing the factual pattern presented here, I conclude that the Applicant's position should be sustained. The General Counsel approached this case with three different theories. The first was a reliance on the "inherently destructive" doctrine. The second and third theories can be combined for our purposes as the traditional unlawful discharge theory requiring the General Counsel to establish each of four elements to prove her case: the employee engaged in protected conduct, the employer's knowledge that the employee had engaged in such conduct, animus against the employee for doing so, all followed by a discharge. With respect to Atkinson, however, an additional issue was raised, whether he was an employee subject to the Act's protections or a supervisor unprotected by the Act.

The facts of this case were not in significant dispute. The only credibility question that was decided was when, not if, Atkinson became the new construction foreman. Even that matter was not particularly significant to the decision as his discharge occurred at least 2 months after he had been made foreman under his version. Contrary to his testimony, I found, however, that he had become foreman some 9 months before.

In any event, Atkinson and Dulaney were simultaneously discharged on January 25, 1984, when the Applicant transferred certain refrigeration construction work from its refrigeration department to its construction department. The Union represented employees in both departments, but in separate collective-bargaining units. Atkinson and Dulaney were in the refrigeration department. The Applicant had traditionally assigned new construction refrigeration work to employees in that department, particularly to those two individuals. Refrigeration department employees had previously enjoyed benefits paid under the so-called refrigeration contract. That contract specifically permitted refrigeration department employees to perform the new construction refrigeration work. When it was not renewed, for reasons not fully explained in the record, the Union asserted that individuals who were assigned that work should be paid under the construction contract. That would require a pay increase of $1.57 per hour as the construction contract did not incorporate the lower refrigeration rate. In furtherance of that aim, the Union filed on November 23, 1983, a step 2 grievance under the construction contract alleging that the Applicant was not paying the construction rate to individuals performing new construction refrigeration work. Neither Atkinson nor Dulaney was specifically named in the grievance. Unable to persuade the Union that it was privileged to assign the work as it always had, the Applicant, on January 25, 1984, transferred the work from the refrigeration department to the construction department, simultaneously discharging those two individuals. Each was given a copy of a company memo that referred to the company president's inability to resolve the grievance in the Applicant's favor and directed the work be transferred. When Dulaney asked for further explanation, his supervisor wrote on his termination slip that the discharge was "per grievance from Local 32."

The evidence also showed that Atkinson had been the Union's steward in the refrigeration department until late November or early December 1983 when the Union ordered him replaced. Atkinson, however, had never been an active steward and had never advised any of the Applicant's officials regarding his view of the grievance. After Dulaney's accession to stewardship, he did nothing about it either, preferring to rely on the previously filed institutional grievance. Both had, however, given the union officials some information with respect to their being assigned refrigeration construction work. Their cooperation, however, was unknown to the Applicant.

The Inherently Destructive Theory: The General Counsel's first theory was that because the Applicant admitted that Atkinson and Dulaney were discharged because of the Union's grievance, such an admission constituted a "per se" violation of the Act. Her representatives pointed to a line of Supreme Court cases following the "inherently destructive" doctrine including *NLRB v. Erie Resistor Corp*, 373 U.S. 221 (1963); *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); and *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967)

The General Counsel performed no analysis of the doctrine or why it applied to the facts of this case. The doctrine principally applies to an employer's treatment of strikers. Moreover, the doctrine has respectably been described as requiring evidence both bearing its own indicia of intent and having far-reaching effects, such as hindering future bargaining or discriminating solely on the basis of participation in strikes or union activity. *Portland-Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976). Here there was no strike and the union activity was minimal. Moreover, the discharge on its face was not based *solely* on that supposed activity; it had another visible motive, compliance with a grievance. Finally, the inherently destructive theory is not without limits. In *American Ship Building Co. v. NLRB*, 380 U.S. 300, 309, 313 (1965), the Supreme Court had said that employees who exercise Section 7 rights do not immunize themselves from economic disadvantage—"where the intention . . . is merely to bring about a settlement of a labor dispute on favorable terms, no violation of Section 8(a)(3) is shown." Indeed, the Board has applied traditional analysis, not "inherently destructive" analysis, in a nonanimus job loss arising in a similar grievance context. *Monarch Machine Tool Co.*, 227 NLRB 1880 (1977). The General Counsel seems to have been unaware of *Monarch* at the time it issued this complaint. Yet, less than a week after issuance, the Board decided *P. W. Supermarkets*, 269 NLRB 839 (1984), reaffirming *Monarch* and refusing to apply the "inherently destructive" doctrine to yet another nonanimus job loss arising from a grievance. Had the General Counsel been acting reasonably, he would have recognized the similarity between *Monarch*, *P. W. Supermarkets*, and the instant case. At the time *P. W. Supermarkets* was decided, 9 months still remained before this hearing was to open. Her representatives should have used that time to reflect on the similarities of the cases and should have withdrawn the "inherently destructive" portions of the complaint.

The Board, of course, agreed that the inherently destructive theory had no application to this fact pattern. But assuming it did, *Fleetwood* holds that if the employer can show a "substantial business justification" for its conduct, even that theory can be rebutted. Here there is no evidence that the General Counsel ever considered whether the Applicant's compliance with the Union's grievance would constitute a "substantial business justification" within the meaning of *Fleetwood*. Two of the Board's panel members agreed with me that it would. Member Babson said it was unnecessary to decide the question for the matter did not fall into the inherently destructive category in the first place. Yet, the point here is that the General Counsel thought it did, but failed to consider the Applicant's obvious defense as having any merit whatsoever.

Thus, on two fronts the General Counsel's representatives failed to act reasonably in advancing this theory: (1) they failed to recognize established law as rejecting the theory in the context of a nonanimus job loss related to a grievance, and (2) they failed even to consider a self-evident defense.

The Traditional Theories: Yet, the General Counsel must have recognized that the inherently destructive theory might not succeed for her representatives included two alternate, but traditional theories. They alleged that Atkinson and Dulaney had been discharged because of their union activities or because of their protected concerted activities. As noted above, however, four elements of proof are required. The most significant element is animus. Animus, of course, is established by evidence suggesting that an employer has an unlawful reason for the discharge—usually to discourage union or other protected concerted activities. Here, the record is remarkably devoid of any such evidence. First, the collective-bargaining relationship between the Applicant and the Union is a mature one, having existed for many years and through many contracts in at least two bargaining units. Although the refrigeration contract seems now to have come to an end, the General Counsel has not accused the Applicant of engaging in any unlawful activity with respect to its demise. Simultaneously, of course, the Applicant continues to have an ordinary relationship with the Union with respect to its construction bargaining unit. Second, there is no evidence of any independent 8(a)(1) conduct. Third, the Applicant has not been accused of unlawfully breaching any term of a collective-bargaining agreement. Fourth, and most significant, the General Counsel has always conceded that the Applicant's decision to transfer the work from the refrigeration department to the construction department to be lawful. Frankly, I have never understood the General Counsel's logic here. If the discharge of the two individuals was unlawful, as she contends, and if the discharge was the direct result of the transfer of work, why would she not also have alleged that the work transfer itself was unlawful? It seems to me that the concession that the transfer of work was lawful is tantamount to an admission that persons who lost employment as a result of that transfer were not victims of discrimination. To me the General Counsel's inconsistent position here is a direct concession that no animus could be proven.

The General Counsel, nonetheless, has argued vigorously that animus should be inferred from other facts. Her representative notes that Atkinson and Dulaney either were or had been union stewards; she notes that four individuals had been hired shortly before their discharge; and she makes a final observation with respect to the amount of nonconstruction work that these two individuals had performed, stating that similar amounts of work remained to be performed.

Yet, it is well settled that, standing alone, the discharge of a steward is not evidence of union animus;[2] neither is the fact that Respondent had recently hired others. Likewise, the availability of other work does not necessarily carry with it the suggestion of illegal motive. Finally, the General Counsel points to a rather obscure personal note made by Supervisor Schramm regarding Atkinson. Schramm said that he believed Atkinson was accusing the company of being antiunion and weighed that against Atkinson in deciding to let him go. Schramm

[2] *Mead Corp.*, 275 NLRB 323 (1985); *Manville Forest Products*, 269 NLRB 390, 391 (1984); *Kaiser Aluminum Corp.*, 265 NLRB 541, 543 (1982); *G & H Products*, 261 NLRB 298, (1982); *Freuhauf Corp.*, 255 NLRB 906, 910 (1981); *Riviera Mfg. Co.*, 167 NLRB 772 (1967).

no doubt considered Atkinson to be a supervisor. That being the case, he could see that Atkinson's accusations were inconsistent with his supervisory responsibilities and might well have a disruptive effect on employees who believed him. In any event, Schramm's belief was obviously a non sequitur and cannot be a basis for concluding that Respondent harbors animus.

Thus, it is clear that at all times the General Counsel either knew or should have known that she did not have in her possession any proof of the critical element of animus to support a traditional violation of Section 8(a)(3).

In addition, however, the General Counsel also knew that the Applicant was unaware that Atkinson and Dulaney had ever voiced any complaints to the Union regarding the wage rates they were being paid. On the first day of the hearing the General Counsel's representative conceded that she could not prove the Applicant's knowledge. Subsequently, her concession was borne out for the General Counsel never did. That is not the same as proving that the Applicant knew that Atkinson and Dulaney would be the individuals who would be discharged. Obviously, the Applicant knew that. But to know who the dischargees were going to be is not the same as saying that the Applicant also knew that they had engaged in protected activity.

Thus, the General Counsel did not have evidence of two of the four critical elements to support a traditional violation of Section 8(a)(3) and (1). Even evidence of the first element, union or protected activity, is scant.

Finally, had there been evidence of all four elements with respect to Dulaney, the General Counsel was unable to prove that Atkinson was a statutory employee. The General Counsel knew that Atkinson had become a foreman at least as late as November 1984. It also knew that the Applicant was contending that Atkinson had been made foreman much earlier. Indeed, the General Counsel knew that the Union considered Atkinson to be a statutory supervisor for it had directed him in November 1984 to relinquish his stewardship duties in favor of another. Moreover, Atkinson was paid the foreman wage and could readily be seen as supervising Dulaney in his work at the Bellevue Square project. Thus, it appears that the General Counsel at all times had reason to think that Atkinson was a statutory supervisor rather than an employee, by virtue of his title, his wage, and his duties. It is true that Atkinson denied his supervisory status but in the face of the foregoing objective factors his denial should not have been given controlling weight.

In conclusion, I find that the General Counsel acted unreasonably in pursuing this complaint. Recently the Board affirmed Administrative Law Judge Jerrold H. Shapiro who found a lack of substantial justification in a successorship case where the General Counsel proceeded knowing that he was without proof of one of the elements constituting a violation, i.e., whether the union enjoyed majority status of the successor's employees even though some of those employees had not been on the payroll of the predecessor at the time of the transfer. *Evergreen Lumber Co.*, 278 NLRB 656, 661 (1986). In *Evergreen* the General Counsel, as here, failed properly to assess the existing law as it applied to the theory of the case. In some ways this case more strongly favors the Applicant because here the law was against the General Counsel on one theory, not just pregnantly silent as in *Evergreen*. Accordingly, following the teaching of *Evergreen*, I conclude that the General Counsel was not substantially justified in proceeding with this case. The law was against her on one theory and she was missing the elements of a violation in proceeding on the other.[3]

The General Counsel has not argued that there are special circumstances justifying the issuance of this complaint and I am unable to perceive any. Neither does the General Counsel argue that it was attempting to advance the development of the law as suggested in *Shellmaker*, supra.

III. THE AWARD

In its application, as amended, the Applicant seeks reimbursement for attorneys' fees and expenses incurred after June 4, 1984, including fees and expenses for time spent pursuing the EAJA application itself. In support of its claim it has submitted itemized billings demonstrating that its law firm expended 209.2 hours in both matters. At the statutory rate of $75 per hour, the attorneys' fees total $15,690. In addition, it claims expenses of $799.34 for a combined total of $16,489.34. The General Counsel has not opposed these figures as unreasonable and I find them to be proper.[4]

CONCLUSIONS OF LAW

1. The Applicant is a prevailing party within the meaning of EAJA and meets the eligibility requirements of EAJA.

2. The position of the General Counsel in issuing and in prosecuting the complaint in this case was not substantially justified nor were there special circumstances that would make an award of attorneys' fees and expenses unjust.

3. The Applicant is entitled to attorneys' fees and expenses totaling $16,489.34, plus any additional fees and expenses that it may incur in pursuing this EAJA claim in the event the General Counsel files exceptions to this supplemental decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

It is recommended that the application of the Applicant, MacDonald Miller Company, Seattle, Washington, for an award under the Equal Access to Justice Act be granted.

---

[3] See also the analysis of reasonableness set forth in *De Bolt Transfer*, 271 NLRB 299, 302–303 (1984).

[4] Legal fees incurred in pursuing claims under EAJA are clearly recoverable. *Evergreen Lumber Co.*, supra.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

IT IS FURTHER RECOMMENDED that the Applicant be awarded the sum of $16,489.34, plus any fees and expenses that it may occur in pursuing its application in response to any exceptions that the General Counsel may choose to file.

Salisbury Hotel, Incorporated *and* Cheryl Resnick.
Case 2–CA–17955

21 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 14 September 1982 Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

The judge found the Respondent violated both Section 8(a)(1) and Section 8(a)(3) by discharging employee Cheryl Resnick for the following reasons: (1) because she complained to other employees, and to the Respondent, about a change the Respondent made in its lunch hour policy; (2) because she contacted the United States Department of Labor regarding the change; and (3) because the Respondent mistakenly believed Resnick had engaged in union activities. In finding that Resnick engaged in "concerted activities" within the meaning of Section 7 of the Act, the judge relied in part on the Board's decision in *Alleluia Cushion Co.*, 221 NLRB 999 (1975). Since the judge's decision in this case issued, however, the Board overruled *Alleluia* in *Meyers Industries (Meyers I)*[2] and set forth a definition of "concerted activities" under which individual activity generally must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[3] The Board recently reaffirmed its definition in *Meyers II*.[4] Pursuant to the *Meyers* decisions, we adopt the judge's conclusions, but only for the following reasons.

I.

The Respondent operates a New York City hotel and hired Cheryl Resnick in May 1980. All the Respondent's employees are represented by one of five different unions except those employees who work in the Respondent's executive office, accounting department, and front desk and reservation department. Resnick applied for a position as combination switchboard operator (a union-represented classification) and reservations clerk (an unrepresented classification). When interviewed, Resnick adamantly objected to becoming affiliated with, or a member of, any union. Consequently, the Respondent's president and chief operating officer, Willis Dadukian, who interviewed Resnick, had Resnick assigned to more hours as reservations clerk than as switchboard operator.[5]

In December 1980 the Respondent changed its lunch hour policy. Previously, the Respondent permitted its reservation desk employees to forgo their lunch hour and leave an hour early or report to work an hour later. In December it decided that it would require all employees to take a lunch hour break and work their entire shift. Although the policy change was to apply to all employees, Front Office Manager Chris LaPenta, who announced the change, indicated that only women were required to take the break. LaPenta testified that he at first told the employees "everybody ha[s] to take it." When employees asked LaPenta why, LaPenta responded, "Because it's the law. And women have to take a lunch hour."

According to LaPenta, "everybody balked" at the change and was "all up in arms." Employees, including Resnick, complained among themselves about the change, and Resnick and most of the others complained directly to LaPenta. Resnick proved to be the most vocal complainer.

Later, Resnick called the United States Department of Labor and asked whether the Respondent's new policy was lawful. The department told Resnick it was unlawful to apply the policy only to women and Resnick told this to LaPenta. LaPenta said he "stood corrected," and that "from then on everybody was taking lunch hours." Resnick also told Resident Manager Kurt Thomas what she learned.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. II, par. 15, of his decision, the judge erroneously stated employee Cheryl Resnick was assigned to fill in for employee Margaret Dean on 25 December 1980. The correct date is 27 December.

The last citation in fn. 33 of the judge's decision should read "*Waterbeds 'N' Stuff*, 238 NLRB 873, 876 (1978), enfd. 652 F.2d 601 (6th Cir. 1980)."

[2] 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948, 971 (1985).

[3] 268 NLRB at 497.

[4] *Meyers Industries*, 281 NLRB 882 (1986). Member Johansen did not participate in *Meyers II*.

[5] The General Counsel has not alleged that Resnick's assignment violated the Act.

There is no evidence that any employees knew in advance that Resnick would call the department or that they authorized her to call on their behalf.

The Respondent decided to discharge Resnick in mid-December. Both LaPenta and Dadukian testified that at least one of the reasons for the Respondent's decision was Resnick's resentment towards, and complaints about, the Respondent's lunch hour policy. They decided to defer discharging her, however, because the holiday season was approaching, making it difficult to find a replacement.

On 28 January 1981 Dadukian called Thomas to his office and asked him if he had "heard of Cheryl's union activities." Thomas said he had not and asked Dadukian, "[W]ho told you[?]" Dadukian replied that it was Vito Marasio, who was present in the room. Dadukian told Thomas to "[g]et rid of" Resnick. Thomas asked, "On what grounds?" Dadukian replied, "Tell her she's incompetent."

Later that day LaPenta convinced Dadukian to delay Resnick's discharge to give LaPenta an opportunity to see if her replacement would "work out."

The Respondent, however, erroneously issued Resnick a severance paycheck along with her regular paycheck shortly after Dadukian's agreement. When Resnick asked LaPenta and Thomas about the checks, Thomas told her she was being discharged because she was incompetent. Resnick said she "didn't buy that," and LaPenta then told her, "Well, I'm the one with the big mouth. I'm going to tell you that you were let go because of union activity."

Resnick remained employed for several more weeks. During this period LaPenta told employees Thomas Castner and Maurice Azzopardi several times that Resnick was being discharged for "trying to form a union."

Resnick was discharged 22 February 1981. A separation report prepared for her discharge indicated she was discharged for insubordination.

In March employee Castner filed a wage and hour complaint with the Department of Labor. When Dadukian learned of the claim, he told Castner he was displeased with Castner's work performance and had heard that Castner had been complaining about his job and job conditions. Dadukian also said he "cannot tolerate" the Department of Labor being at the hotel to investigate Castner's complaint. Dadukian stated he would "deal" with Castner having called the department "severely." Dadukian also said, "I got rid of Cheryl because of her activity with the union, and . . . [I am] more than looking forward to" fighting "the unions." Dadukian said he would "get rid" of Castner as well. There is no evidence that any union or union activity played any part in Castner's call.[6]

The judge found, and we agree, that the Respondent discharged Resnick because she complained to other employees, and to the Respondent, about the change the Respondent made in its lunch hour policy; because she contacted the Department of Labor; and because the Respondent mistakenly believed she had engaged in union activity. An employer clearly violates the Act by discharging an employee whom the employer mistakenly believes has engaged in union activity.[7] In this case, however, that was not the Respondent's only reason for discharging Resnick. For the reasons set forth below, we find further unlawful motivation for Resnick's discharge.

II.

The Respondent contends that Resnick's complaints to other employees, her complaints to the Respondent, and her call to the Department of Labor are not "concerted activities" within the meaning of Section 7. Accordingly, the Respondent argues, Resnick's discharge did not violate the Act. We do not agree.

In *Meyers I* the Board held that individual activity will generally be concerted only when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[8] In *Meyers II* the Board made clear that its definition encompassed "activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization."[9] The Board further noted, however, that the communication of speaker to listener must appear calculated to induce, prepare for, or otherwise relate to some kind of group action.[10] Resnick's complaints to other employees fit precisely into this category of concerted activity.

Moreover, under the facts of this case, Resnick's complaints cannot be considered in isolation.[11] Al-

[6] The General Counsel alleged no violations with regard to Castner.

[7] *Metropolitan Orthopedic Associates*, 237 NLRB 427, 429 (1978).

[8] 268 NLRB at 497.

[9] 281 NLRB 882, 887 (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951)).

[10] Id. (citing *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986), and *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

Member Johansen would find that a discussion between two or more employees regarding terms and conditions of employment is necessarily concerted activity because it is an "indispensable preliminary step to employee self-organization." Member Johansen would not further require that the discussion otherwise appear calculated to induce or prepare for group action, or that it otherwise be relate . to group action.

[11] *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1354 (3d Cir. 1969), cert. denied 397 U.S. 935 (1970).

though there is no evidence that the Respondent's employees explicitly agreed to act together to change the Respondent's new lunch hour policy, they did at least tacitly agree that they had a grievance and that they should take it up with management.[12] Thus, Office Manager LaPenta testified that "everybody balked" at the new policy and was "all up in arms." The employees complained among themselves and most, including Resnick, brought the complaint directly to LaPenta. Accordingly, we find the employees were engaged in a concerted effort to convince the Respondent to change its lunch hour policy.[13] Resnick's complaints to other employees, as well as her individual complaints to the Respondent, were part of that concerted effort.[14]

We also find Resnick's call to the Department of Labor concerted under the facts of this case. Her call logically grew out of the employees' concerted efforts and is therefore a "continuation" of that concerted activity.[15]

Because we find that Resnick's activity was concerted and that she acted for the employees' mutual aid or protection, we conclude that Section 7 protected her activities[16] and that the Respondent's retaliatory discharge of her violated Section 8(a)(1).[17]

[12] See *NLRB v. Guernsey-Muskingum Electric Co-op.*, 285 F.2d 8, 12 (6th Cir. 1960).

[13] Id.

[14] See *Hugh H. Wilson Corp. v. NLRB*, supra, 414 F.2d at 1354.

[15] *Dayton Typographical Service*, 273 NLRB 1205 (1984), enfd. in relevant part 778 F.2d 1188 (6th Cir. 1985).

We find Resnick's discharge for calling the Department of Labor unlawful for the additional reason that, as the judge found, Dadukian confused or associated the Department of Labor with union activity. In support of his conclusion, the judge cited Dadukian's hearing testimony in which Dadukian seemed confused about the distinction. We agree, and draw further support for that conclusion from Dadukian's threats to employee Castner after Dadukian learned that Castner had called the department on another matter. As discussed above, when Dadukian learned of Castner's call, he told Castner, "I got rid of Cheryl [Resnick] because of her activity with the union, and . . . [I am] more than looking forward to" fighting "the unions." There was no indication that any union or union activity played any part in Castner's call. Thus, like the Respondent discharging Resnick in part because it mistakenly believed she was involved in union activity, its discharging her for calling the Department of Labor, which the Respondent associated with union activity, is similarly unlawful.

[16] *NLRB v. City Disposal Systems*, 465 U.S. 822, 830 (1984).

[17] The Chairman contends we have "resurrect[ed] the *Alleluia* presumption that individual actions regarding 'group concerns' are concerted." The Chairman made a similar contention in *Every Woman's Place*, 282 NLRB 413 (1986). As we stated in *Every Woman's Place*, the Board in *Alleluia* required no demonstration of common complaints; it assumed that any complaint to a government agency that could benefit others automatically qualified as a common concern. Here, however, as in *Every Woman's Place*, we need not rely on an assumption. The employees spoke for themselves and Resnick advanced their common interest with her call.

The Chairman also contends there is no evidence "that the Respondent knew of the alleged concerted nature of the call." To the extent we require such a showing, we find that the evidence overwhelmingly establishes it here. The Respondent knew that "everybody balked" at its new lunch hour policy and was "all up in arms." Employees complained among themselves and most brought the complaint to Front Office Manager LaPenta. Resnick told her managers, including LaPenta, that she had made the call and LaPenta clearly understood Resnick's purpose. Resnick told LaPenta that the department told her it would be unlawful to apply the new policy only to women, as LaPenta indicated when he announced the new policy, and LaPenta told Resnick that he "stood corrected." Accordingly, the Respondent knew both that its employees concertedly sought to change its policy and that Resnick's call was part of that effort.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 2.

"2. By discharging and refusing to reinstate Cheryl Resnick for concertedly complaining to other employees and to the Respondent about a change the Respondent made in its lunch hour policy, and by discharging and refusing to reinstate Resnick for contacting the United States Department of Labor as a continuation of her and her fellow employees' concerted complaints, the Respondent violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Salisbury Hotel, Incorporated, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discharging and refusing to reinstate any employee for concertedly complaining to other employees, and to the Respondent, and discharging and refusing to reinstate any employee for contacting the United States Department of Labor as a continuation of the employee's and other employees' concerted complaints."

2. Substitute the following for paragraph 2(d).

"(d) Post at its place of business in New York, New York, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material."

3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN DOTSON, concurring.

While I do not agree with my colleagues' finding that Cheryl Resnick's call to the Labor Depart-

ment constituted concerted activity, I agree, as explained below, that the Respondent's discharge of Resnick violated Section 8(a)(1) and (3) of the Act.

The judge found, and I agree, that the Respondent discharged Resnick for three reasons: (1) because of her complaints to employees and management about the change in the Respondent's lunch hour policy; (2) because of her call to the Labor Department regarding the legality of the change; and (3) because of the Respondent's mistaken belief that she had engaged in union activities. I also agree with my colleagues that Resnick's complaints to employees and management about the change in lunch hour policy constituted concerted activity within the *Meyers*[1] definition and that therefore the Respondent could not lawfully discharge Resnick for this activity. Further, I agree with my colleagues that the Respondent was not privileged to discharge Resnick because of its mistaken belief that Resnick was engaging in union activities.

I disagree, however, with my colleagues' finding that Resnick's call to the Labor Department constituted concerted activity and thus evidenced further unlawful motivation for the discharge. Rather, I find that the record fails to establish that Resnick's call was "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[2]

My colleagues admit that there is no evidence that any employees knew in advance that Resnick would call the Labor Department or that they authorized her to call on their behalf. Nor is there evidence that Resnick made the call in an attempt to initiate, induce, or prepare for group action or that the Respondent knew of the alleged concerted nature of the call—a necessary element to establish a violation.

Yet, despite this lack of evidence, my colleagues make the finding of concerted activity, stating simply that "[h]er call logically grew out of the employees' concerted efforts and is therefore a 'continuation' of that concerted activity." This finding, made totally without regard to the record evidence, effectively resurrects the *Alleluia*[3] presumption that individual actions regarding "group concerns" are concerted, despite the Board's laying it to rest in its *Meyers* decision. As I have recently cautioned, the Board's continual creation of legal fictions as functional substitutes for record evidence runs contrary to the statutory scheme. See the dissenting opinion in *Every Woman's Place*, 282 NLRB 413 (1986).

In my opinion, the evidence establishes merely that Resnick, of her own accord, sought information from the Labor Department and, of her own accord, reported her findings to management. Accordingly, I find that the General Counsel has failed to establish that Resnick's action was concerted.

In sum, of the three reasons that motivated Resnick's discharge, I have found two of them to be unlawful and one to be lawful. However, applying the dual-motive analysis required by *Wright Line*,[4] I find that the Respondent did not establish that it would have discharged Resnick in the absence of the unlawful reasons.

The Respondent could escape being held in violation of the Act only by proving by a preponderance of the evidence that even absent the improper motives, it would have discharged Resnick in any event for her call to the Labor Department. The Respondent's defense, however, consisted of an enumeration of reasons for discharging Resnick, all of which were discredited by the judge.

The Respondent never attempted to establish that Resnick's discharge was justified by her call to the Labor Department. In fact, the Respondent contended that the call was not the motivation for the discharge. Under these circumstances, although the discharge was in fact motivated in part by the call to the Labor Department, the Respondent has failed to establish that it would have discharged Resnick for this activity absent the unlawful reasons found for her discharge, namely her concerted complaints about the lunch hour policy and her supposed union activities. Accordingly, I find that her discharge was violative of Section 8(a)(1) and (3).

[1] 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948, 971 (1985), reaffirmed 281 NLRB 882 (1986).

[2] *Meyers Industries*, 268 NLRB at 497.

[3] *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any of you for concertedly complaining to other employees and to us and WE WILL NOT discharge any of you for con-

tacting the United States Department of Labor as a continuation of your and other employees' concerted complaints.

WE WILL NOT discharge or otherwise discriminate against any of you because we believe that you have engaged in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Cheryl Resnick immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

SALISBURY HOTEL, INCORPORATED

Pearl Zuchlewski, Esq., for the General Counsel.
Michael Sloane, Esq. and *Robert B. Taylor, Esq., (Rovegno & Taylor, P.C.)*, of Forest Hills, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN B. FIST, Administrative Law Judge. Pursuant to charges filed by Cheryl Resnick (Resnick or the Charging Party) the Acting Regional Director of the National Labor Relations Board for Region 2, issued a complaint and notice of hearing on May 5, 1981.[1] The complaint alleges in substance that Salisbury Hotel, Incorporated (Respondent) discharged its employee, Cheryl Resnick about February 22, because she made complaints to the Department of Labor about Respondent's lunch hour policy and to discourage employees from engaging in such activities and other concerted activities and because of its belief that Resnick joined, supported, or assisted a Union, and in order to discourage employees from engaging in such activities, in violation of Section 8(a)(1) and (3) of the Act.

The hearing with respect to the violations encompassed by the complaint, was heard before me in New York, New York on April 26 and 27, 1982. Briefs have been received from the General Counsel and Respondent and have been duly considered.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

[1] All dates hereafter refer to 1981 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, is engaged in the operation of a hotel providing food and lodgings for guests. During the past year, Respondent derived gross revenues from its operations in excess of $500,000, and purchased and received at its facility, goods and materials valued in excess of $50,000 directly from points outside the State of New York. Respondent admits and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. FACTS

Respondent employs approximately 75 to 80 employees. Of these employees about 65 are represented by five different unions, covering various job categories such as maids, housemen, switchboard operators, engineers, and painters. The only employees not represented by unions are those employed in Respondent's executive office, accounting department, and the front desk and reservations department.

Resnick was hired by Respondent in May 1980. She was interviewed by Willis Dadukian, Respondent's chief operating officer and president. She applied for a position as a combined switchboard operator and reservations clerk. Dadukian informed her that the switchboard operators were represented by a union (Local 153), and Resnick expressed adamant opposition to becoming affiliated with or a member of a union. It was therefore decided that Resnick would spend the majority of her time as a reservations clerk, and would fill in if needed on the switchboard.

The record establishes that all times material, there was no organizational activity going on at Respondent's hotel with respect to the reservations clerks, or any of Respondent's employees, by either the unions representing certain classifications of its employees or any outside labor organization.

Prior to December 1980, Respondent's reservations employees worked 8-hour shifts, which included a 1-hour lunch break. Respondent, however, permitted employees if they so desired, to forgo a break in the middle of the day, and to either leave an hour early or come in an hour later. Resnick worked a shift from 12 noon to 8 p.m., and was one of those employees who would choose not to take a break, and in effect work a 7-hour day.

In early December 1980, Dadukian decided that the present system was causing confusion because some employees would be working and others not, and Respondent could not plan on people being present during overlap periods. In addition Dadukian felt that as a personnel practitioner, it was a good policy for people to break their work shift, refresh themselves, and come back and assume their responsibilities. Accordingly, Dadukian instituted sometime in early or mid-December, a new policy, which required all employees to take a 1-hour lunch break, thereby requiring them to be present at Respondent's premises for a full 8-hour day.

The new policy was announced to the employees by Chris LaPenta, Respondent's front office manager, and an admitted supervisor. Although the policy was to be instituted for all employees, LaPenta mistakenly indicated to the employees that only women were required to take the 1-hour lunch break. Respondent's new policy produced much consternation among the employees affected, who preferred the old system, and resulted in discussions among the employees complaining about the change, of which LaPenta was aware. Complaints were also made directly to LaPenta about the change in policy by most of the employees.[2] Resnick was according to LaPenta, the most vocal complainer about the new policy, and was involved in discussions with other employees concerning this new policy.[3]

Resnick also called the United States Department of Labor, Wage and Hour Division to inquire about the legality of Respondent's action. She reported to LaPenta that she had called the Department of Labor and was told that it was illegal to apply the policy only to women. LaPenta as he testified, "stood corrected, and from then on everybody was taking lunch hours."

Resnick also reported to Kurt Thomas, Respondent's resident manager and an admitted supervisor, that the Labor Department had informed her that she could only be required to take a half hour for a lunch break. However, Resnick was still scheduled for and took a 1-hour break, as did the other employees.

Dadukian was informed by his supervisors (LaPenta and Thomas) that Resnick had made a call to the Department of Labor. In fact at "staff" meetings[4] held in December, it was mentioned to Dadukian that there was discontent about the lunch hour policy, that Resnick was the most vocal complainer and resented the new policy, and that she had called the Department of Labor about the change. Dadukian testified that it was reported to him, "that the biggest complainer was Ms. Resnick, that she took exception with this, which to me was just taking exception with one more situation in our hotel, or exception to her leadership, her instructions."

Dadukian also testified that Resnick's calling the Department of Labor did not bother him, but admitted that, "the fact of a call to the Department of Labor was, I felt, a manifestation, or I could not help but assume it was a manifestation of her discontent with the policy."

At a staff meeting in mid-December, shortly after the lunch hour problem, it was decided that Resnick should be terminated. Respondent's witnesses (Dadukian and LaPenta) admit that one of the reasons for the decision being made to discharge her was her resentment towards and complaints about its new lunch hour policy.[5] In addition, LaPenta and Dadukian cite a number of other reasons that allegedly contributed to the decision to discharge her, and that allegedly occurred since October or November 1980. These alleged reasons were Resnick's unwillingness to receive toll free "800" calls and her reference to patrons who use these calls as cheapies; her failure to properly operate the Western Union equipment to confirm reservations, her habitual tardiness, her arguments with LaPenta, and her habit of doing her hair and makeup while at her desk; her practice of asking the switchboard for wake-up calls; and her habit making personal phone calls while at work.

The record reveals that at no time did any supervisor of Respondent ever warn Resnick that her conduct in any of these areas was considered unsatisfactory to Respondent, nor that Respondent was considering or contemplating discharging or disciplining her for these or any other reasons.[6]

It was decided at the staff meeting that the approaching holiday season would not be an appropriate time to discharge her and/or to find a suitable replacement. It was therefore decided that she would be fired when LaPenta was satisfied that a capable replacement was available. Resnick was not informed of Respondent's decision in this regard.

On December 24, 1980, Dadukian gave Resnick a letter to type concerning a mortgage request.[7] Dadukian informed her that this was a highly confidential document, and instructed her that all copies of the letter be returned to him. Resnick typed the letter as requested. However, the next day, Dadukian was informed that a copy of the letter had been found at the switchboard by the switchboard operator. According to Dadukian, this incident was "the straw that broke the camel's back," and that now there was no chance that he would reverse the decision to terminate her. Dadukian testified that he was particularly concerned with the fact that Resnick was a tenant in a building located on the same block as Respondent and owned by a landlord named Shapiro. Since the letter contained a request for a large mortgage, Dadukian did not wish this information disclosed to anyone, particularly to a landlord on the same block. Thus, when he found out that a copy of the letter was left at the switchboard, Dadukian claims that he believed that Resnick was either going to give this letter or the information contained therein to Shapiro. Dadukian did not discuss the letter with Resnick at the time, nor ask her for an explanation as to why she had left a copy of the letter at the switchboard.[8]

---

[2] LaPenta testified "it was a new policy, everybody balked."

[3] LaPenta testified that Resnick spent a lot of time talking to other coworkers about her discontent, and a lot of discussion at this time was regarding the lunch hours. He further testified "everybody was all up in arms," but Resnick was more concerned than anybody else.

[4] These "staff" meetings were actually supervisory staff meetings, attended by Thomas, LaPenta, Dadukian, and one or two other supervisors.

[5] In fact, Respondent's attorney on the record referred to Resnick as "as pain in the neck regarding the lunch policy."

[6] Dadukian while admitting that he himself gave no such warnings, testified that he thought that his supervisors, LaPenta and Thomas, had done so. However, both LaPenta and Thomas deny or do not recall giving Resnick any warnings. Thomas in fact denies being aware of any dissatisfaction with Resnick's work.

[7] Resnick was not regularly assigned to type for Dadukian. However, it was essential that this letter be sent out quickly, and Dadukian's secretary had left, so he asked Resnick to type the letter for him.

[8] The record reveals that Resnick had previously had some problem with Shapiro with respect to her lease and that Dadukian had interceded on her behalf with Shapiro to help straighten out the situation.

As noted above, part of Resnick's job was to fill in on occasion as a switchboard operator. Resnick had been assigned to fill in for an hour between shifts of the switchboard operators. One of the switchboard operators, Margaret Dean had been hassling Resnick about performing the job of a switchboard operator since she was not in the union, and the job is a "union position."[9] On December 25, 1980, Resnick was assigned to fill in prior to Dean arriving for the next shift. At some point prior to Dean arriving, LaPenta noticed that the switchboard was unattended. LaPenta confronted Resnick and asked her why she was not there. Resnick replied that Margaret Dean did not want her to work there since it was a union job, and she did not want any hassles with Dean. LaPenta responded that it was not Dean's decison to determine who works at the switchboard. Resnick said she would not go to the switchboard giving the same reason. Finally Dean arrived and took over the board.

LaPenta reported this incident to Dadukian and then wrote up a memo to Resnick's file dated December 29, 1980. The memo reads that Resnick on December 27, 1980 left her position without authorization, and refused to return to her position when requested. The memo states further that "her stated reason for not returning was that some Union employees did not wish her at the switchboard." The memo concludes by stating that her reasons for not returning are groundless, and "I consider this to be an act of insubordination."

Although the record reveals that Dadukian had instructed his supervisory staff to write up and place in employees' files any incidents of unsatifactory performance by employees, the above memo detailing the switchboard incident, is the only such memo appearing in Resnick's file. Dadukin with regard to this incident testified, "a major issue was not made of it."

LaPenta recalls that he discussed the incident with Resnick sometime in January, but does not recall what was said, nor whether the possibility of discharge was mentioned. In fact, LaPenta does not recall whether Resnick ever received or saw a copy of the memo placed in her file.

On the morning of January 28, 1981, Thomas was called into Dadukian's office. Present in addition to Dadukian was Vito Marasia, Respondent's accounting manager. Dadukian asked Thomas whether he had heard of Resnick's union activities. Thomas replied that he had not. Thomas asked whom Dadukian heard this from. Dadukian replied that it was Marasia. Thomas asked Marasia where he had heard about this. Marasia responded that he would not divulge this information. Dadukian then told Thomas to get rid of Resnick. Thomas asked on what grounds. Dadukian answered, "tell her she's incompetent."[10]

Later that same morning Thomas informed LaPenta that Dadukian had decided to terminate Resnick. LaPenta then went to see Dadukian and requested more time before discharging her. He told Dadukian that he had just hired a new employee, Juan Guererro, and wanted to see how he would work out. Dadukian was adamant that LaPenta make a decision on when to fire her. He told LaPenta that he was upset about the mortgage letter that Resnick had left in a public place, Dadukian also talked about the lunch hour incident. He told LaPenta that he was concerned and upset that people were questioning management's institution of policies, specifically referring to the lunch hour problem, and he did not like the fact that people, particularly Resnick, were balking or fighting against this new policy. LaPenta also testified that Dadukian mentioned something about her having called the Labor Department about the matter, but he could not remember what Dadukian said about it. LaPenta could not remember whether anything about any labor union activity engaged in by Resnick was brought up by Dadukian. The meeting ended with Dadukian agreeing to give LaPenta a couple of more weeks to break in Guererro before discharging Resnick.

Apparently Thomas was not informed of LaPenta's discussion with Dadukian and the decision to give Resnick a little more time. Thus he instructed the payroll clerk to prepare two checks for Resnick, her regular check and a severance check. When Resnick received the two checks, she went to see Thomas and LaPenta and asked why she had received two checks. Thomas replied that she was being terminated. Resnick asked why, and Thomas replied that she was incompetent. Resnick replied that she did not buy it, there must be other reasons. LaPenta then stated, "well, I'm the one with the big mouth. I'm going to tell you that you were let go because of union activity."[11]

LaPenta then spoke to Dadukian and reaffirmed the understanding that Resnick would be permitted to remain employed for a couple of weeks, until a replacement was adequately trained.

---

[9] The record does not reflect what the Local 153 contract contains regarding the recognition clause, or the amount of unit work necessary to be performed by an employee to come within the contract's terms. Indeed the record contains no evidence of any terms of the Local 153 contract. Thus, the record does not reveal whether the contract contains a grievance or arbitration clause and/or a no-strike clause.

[10] The above findings with respect to this conversation are based on the credited testimony of Thomas over the denials of Dadukian. Marasia did not testify. Respondent contends that an adverse inference should be drawn against the General Counsel for failure to call Marasia as a rebuttal witness. I do not agree. The record discloses that Marasia was equally available to be called as a witness by either Respondent or the General Counsel. Therefore, no adverse inference can be drawn against either party for failure to call him to either corroborate or refute the testimony of other witnesses. *Wayne Construction*, 259 NLRB 571 (1981); *Plumbers & Steamfitters Local 40 (Mechanical Contractors Assn. of Washington)*, 242 NLRB 1157 (1979); *Local 259, U.A.W. (Atherton Cadillac)*, 225 NLRB 421 (1976). Although Thomas' testimony may be considered somewhat suspect in view of his having been terminated by Respondent, I am persuaded that he testified accurately and truthfully with respect to this conversation. I note that his testimony is consistent with and in effect corroborated by the testimony of employees Castner and Azzopardi, set forth infra, i.e. which they were told by LaPenta that Resnick was terminated because of alleged union activities. I note also that Thomas confirmed this to Azzopardi shortly after Resnick's discharge at a time when he (Thomas) was still employed by Respondent, and would have no reason to fabricate or furnish testimony adverse to Respondent's interests.

[11] The above based on Thomas' credited testimony. LaPenta did not deny making the above comments, stating he could not remember the events of the meeting or what was said, although he admitted that he well might have said that he had a big mouth. LaPenta explained that he was very upset and agitated at this meeting, since he had been under the impression after his discussion with Dadukian that Resnick would not be terminated at that time, and would not be informed of any decision to terminate her.

After Resnick's meeting with Thomas and LaPenta, she spoke to employee Thomas Castner and told him that she had been fired because Marasia had told Dadukian that she was trying to form a union. At that time Castner observed LaPenta who was upset and in tears because he had to fire Resnick. A week later Castner asked LaPenta why Resnick was terminated. LaPenta replied that he was told by Dadukian to fire her because she was trying to form a union. LaPenta reported that he said that he needed to give Resnick a reason, adding that he (LaPenta) had no reason to fire her. Dadukian informed LaPenta that he does not "need a reason. The only reason that you need is that I'm telling you to fire her."

During the next several weeks, Castner and LaPenta had a number of discussions about Resnick's discharge. Whenever the subject was mentioned, LaPenta informed Castner that Resnick was trying to form a union and this was the reason for the discharge.

On a couple of these occasions Castner replied to LaPenta that he knew that was not true.[12] LaPenta answered "What can I do? I was told to fire her, and that's what I did."

Similarly, employee Maurice Azzopardi, sometime in January, met LaPenta in the reservations office and asked what happened to Resnick. LaPenta replied that she was fired and "they say it, that she was trying to form a union. And there were rumors going around there, as far as the union."

About 2 days later, Azzopardi approached Thomas and asked him if it was true that Resnick was fired because she tried to form a union. Thomas replied "yes, it's true."[13]

On February 2, Dadukian met with her to explain why she was being terminated. He told her that she was overqualified for the job. He explained that Resnick had previously worked in places like the Stork Club and other hotels, where she dealt with important people, and her pleasant personality and ability to mix with people would be more useful than at Respondent, which is a relatively small hotel, with little public exposure. Thus, according to Dadukian, overqualified people like Resnick tend to be disruptive influences among fellow workers, and take issue with leadership because these people think they know more than their bosses. Dadukian goes on to testify that at first Resnick was happy to perform "humble" duties, but then "later it became a situation where she was uncomfortable, compounded with the introduction of the lunch hour." During the course of his meeting with Resnick the lunch hour incident as well as the Department of Labor came up. Resnick asked if she was fired because she called the Department of Labor. Dadukian replied that it had nothing to do with the decision, and Respondent was a law-abiding company.

The subject of the mortgage letter was also discussed. He told her that he was very disappointed in her, that it was a betrayal of trust and a question of her integrity and loyalty. Resnick responded that it was an inadvertent mistake.

Dadukian in his testimony on several occasions appeared to either confuse and/or associate the Department of Labor with union activity. When asked about the subject of the Department of Labor coming up at the February 2 meeting, Dadukian testified, "I believe the subject of going to the Department of Labor was brought up. Whether it was a matter of union, I think these people were a little confused too. . . . I'm referring to Resnick and others who refer to Department of Labor and/or union activity." At another point in his testimony when asked about the subject of union activities coming up during this conversation, he testified that Resnick brought the subject up. Dadukian was asked what she said about it and what his response was. His testimony is as follows: "That I guess, if I remember correctly, if it was a concern of mine that she was trying to organize the hotel, that I shouldn't worry about it. I recall, vaguely, the subject but again the Department of Labor."

Subsequent to this meeting, Resnick wrote two letters to Dadukian. The first letter dated February 9, dealt mainly with the mortgage letter incident. Resnick explained that she has had no dealings with Shapiro since their problems with the lease and in fact they were enemies since that incident. She added that she would never consider giving him any confidential information regarding the hotel. She also criticized Dadukian for not getting her side of the story.

No mention of her being terminated for union activities was set forth in the letter. However, she does seem to suggest that reasons other than the mortgage letter incident were responsible for the decision to discharge her. Thus, she wrote, "the conviction under which you're acting has to stem from something other than this which seems so utterly inconceivable." At another point in the letter she states, "I did sense your having become disenchanted with me at one point along the way for some unknown reason, but I never dreamed it was of this magnitude, or what was brewing within you."

Resnick sent a second letter to Dadukian dated February 22. She again talked about the mortgage letter incident, explaining that she took the letter to the switchboard in order to type the envelope. She reiterated more clearly in this letter her belief that the mortgage letter was not the real reason for the discharge, and that Dadukian was using it as a "convenient camouflage." Resnick referred to the Union, by stating that Dadukian was barking up the wrong tree and that she was totally against unions. She suggested that he check out other employees who had been clerks at other union hotels in order to find the troublemakers. She added that she had not participated in any union discussions, and she would like to confront the person responsible for accusing her of same, commenting that "he or she is a damned liar and probably covering up for their *own* provocations which were probably overheard."

Resnick was terminated on February 22. LaPenta prepared a separation report, dated February 18, 1981. The

[12] Castner did not believe that Resnick was fired because of any union activities, since there were no union activities engaged in by Resnick nor going on at Respondent's premises.

[13] The above findings with respect to the conversations of Azzopardi and Castner with LaPenta and Thomas are based on the credited and undenied testimony of Castner and Azzopardi.

form lists boxes covering various areas of reasons for discharge. The only box checked by LaPenta was marked insubordination. Under explanation LaPenta wrote, "Insubordination to Superior. Cheryl Resnick was dismissed February 22, 1981. Her work deteriorated over several months; less productivity, tardiness became more frequent. She also, refused to follow orders given by her superiors. At the same time her attitude deteriorated as well." Thomas was given the form to sign by LaPenta and Dadukian. Thomas told Dadukian and LaPenta that this form was not accurate, but Dadukian ordered him to sign it and he complied. LaPenta also told Thomas that he hated to do this, but he had no other choice.

Subsequently, Resnick filed for unemployment insurance. Dadukian in a telephone conversation with the claims examiner said the following: Resnick was terminated for "incompatibility with work, (sic) environment, supervision which affected the quality of her work. Poor attitude reflected on numerous occasions which left serious doubt on the effectiveness of her work performance. Insubordination cited by her immediate supervisor. We are not contesting her claim for unemployment compensation benefits."

Sometime in March, Castner filed a wage-and-hour complaint concerning overtime with the Department of Labor. Sometime later in March, investigators from the Department of Labor appeared at the hotel. Dadukian told Castner that he was not pleased with Castner's performance, and that he heard from a number of people that Castner had been complaining about the job and conditions. Dadukian added, "don't think that Vito [Marasia] told me this." Dadukian continued that Castner was constantly complaining and accused him of going to the Department of Labor, commenting that they were across the hall. Dadukian also said that he could not tolerate the Department of Labor being there, and that because Castner had called the Department of Labor, Dadukian would "deal with that severely." Finally, Dadukian advised Castner, "I got rid of Cheryl [Resnick] because of her activity with the Union," and he was more than looking forward to, if he had to, to fight the unions. Dadukian concluded that he got rid of Resnick and if he had to he would get rid of Castner.

Castner replied that he did not go to the Department of Labor, and denied complaining to other employees. Castner continued that if Dadukian had definite facts that Castner had been complaining, he wanted to know who told him this. Dadukian replied that it did not matter, and he would not reveal that information, except to say that Vito had not been the source. The conversation concluded by Castner repeating that he was not complaining about anything.[14]

III. ANALYSIS

Resnick, although present in the hearing room throughout the trial, was not called as a witness to testify in this proceeding. The General Counsel offered no explanation as to why she failed to call Resnick as a witness. Respondent placed great reliance on and attached great significance to this failure to call Resnick, both in his brief and at the hearing. Respondent, although not actually articulating its objections to Resnick not having testified, appears to be arguing that her testimony was an essential element of the General Counsel's case, or at the very least calls for an adverse inference to be drawn against the General Counsel's case. Respondent specifically points to the fact that the charge filed by Resnick states that she was discharged, "because she engaged in concerted protected activities with respect to the formation of the Union and because she called the Labor Board." Respondent argues that the discrepancy between the charge, which alleges the discharge to be because she "engaged" in union activities, and the complaint, which alleges a mistaken belief in union activity as the reason, required Resnick to be called as a witness to explain such "inconsistency."[15]

It is well settled that where the record sustains the allegations of a discriminatory discharge, the testimony of the discriminatee is not a sine qua non for relief under the Act.[16] In the instant case, I find no basis for drawing of any adverse inference against the General Counsel for her failure to call Resnick as a witness. I note that the credibility of Resnick is not the significant issue herein. The motivation for Respondent in terminating her is determinitive, and I do not believe that Resnick's testimony was or is essential to such a determination. As outlined above, and as will be discussed more fully infra, Respondent's own supervisors and agents have given testimony and made statements to other employees, which are dispositive of the issues before me. Although it is possible that had Resnick been called as a witness, she might have cast some doubt on some portions of the testimony of these witnesses, she was present throughout the hearing in the courtroom, and Respondent was free to call her as an adverse witness. See *Wayne Construction*, supra.

Similarly, if Respondent felt that cross-examination of Resnick with respect to the alleged "discrepancy" between the charge and complaint[17] or any other matters,

[14] The above based on the credited testimony of Castner, which was largely undenied by Dadukian. Dadukian did not deny having such a conversation with Castner nor making any of the comments attributed to him by Castner, except to say that he never "chastised Castner concerning his call to the Labor Department."

[15] Insofar as this argument appears to be contending that this alleged "difference" between the charge and the complaint constitutes a substantial variation from same, sufficient to mandate dismissal, it is without merit. A charge merely initiates the investigatory process, and since the allegations set forth in the complaint are related to the charge, and based on the same events set forth therein, the charge is adequate to support the complaint. *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959); *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979); *Kern Bakeries*, 227 NLRB 1329 (1977).

[16] *Cutting, Inc.*, 255 NLRB 534 (1981); *Riley Stoker Corp.*, 223 NLRB 1146 (1976), and cases cited therein.

[17] I note that although the record is clear that Resnick did not actually engage in any union activities, the record does establish that she and other witnesses were told by Respondent's supervisors that she was terminated because Respondent believed her to have engaged in such activities. I find that the alleged discrepancy between the charge and complaint to be minimal and a matter of semantics, and attach no significance to it.

would in any way undermine the General Counsel's case, it could have called her to the stand and made such inquiries.

I shall therefore proceed to evaluate the merits of the complaint, based on the testimony and evidence adduced on this record, notwithstanding the failure of Resnick to testify herein.

The first issue to be determined, is whether the General Counsel has shown that protected conduct was a "motivating factor" in Respondent's decision to terminate Resnick.[18] Respondent's own witnesses admit, and the record establishes that one motivating factor for the discharge was Resnick's activity in complaining about Respondent's lunch hour change. Thus, both Dadukian and LaPenta admit that Resnick was the most vocal employee complainer about the change, that Dadukian was upset about people questioning this policy, and that Respondent's initial decision to terminate her was made in mid-December, shortly after such complaints were made. Indeed, as noted above, Respondent's attorney urges a finding that Resnick was fired because "she was a pain in the neck regarding the lunch policy."

Respondent contends, however, that Resnick's activity in complaining about the lunch policy should be construed as individual griping and complaining, and more for her own satisfaction, and not for the purpose of encouraging or inducing any group action. Thus, Respondent argues that she was not engaged in protected concerted activity.[19]

However, I do not believe that Resnick's actions in the instant case can be characterized as "individual griping or complaining." The evidence is clear that most of the employees affected by the change discussed and complained about the new policy among themselves, and that Respondent was aware of such discussions. Moreover, many of the employees voiced such dissatisfaction directly to supervisors of Respondent, with Resnick being the most vocal complainer. The lack of formal organization of a group or the fact that Resnick was not appointed as a spokesman for a group does not establish that her activity is not protected or concerted.[20]

Here, Resnick was protesting a change in Respondent's past practice regarding lunch hour policy, clearly a term and condition of employment. Action in protest of the discontinuance of such past practice, particularly when other employees shared her concerns, involves matters of mutual concern and benefit to employees, and constitutes protected concerted activity.[21]

Such is not negated because this matter of mutual concern coincided with Resnick's personal preferences or reasons peculiar to herself for opposing the lunch hour changes.[22]

Thus, her actions in complaining about the lunch hour policy in and of itself constitutes protected concerted activity.

Moreover, the evidence reveals that Resnick made a call to the Department of Labor, inquiring about the legality of Respondent's actions. Contrary to Dadukian's testimony and Respondent's assertions, I am persuaded that her call to the Department of Labor also constituted a "motivating" factor in Respondent's decision to discharge Resnick. Thus, Dadukian admitted that he considered Resnick's call to the Department of Labor, to be a "manifestation of her discontent" with Respondent's changes in the lunch policy. Therefore I do not believe that her call to the Department of Labor can be so easily divorced from, as Respondent urges, her actions in complaining along with other employees about the change in conditions of employment. Moreover, specific animus by Respondent towards calls to the Department of Labor is established by Dadukian's threat to terminate employee Castner because of his call to the same Federal agency about a different problem. Respondent also argues that the call to the Department of Labor was not protected concerted activity, again arguing that her call was merely to enforce a personal gripe or complaint.[23] As noted, I have already found that Resnick's activity, being in conjunction with similar complaints made by and discussions with other employees, should be characterized as concerted, and that her call to the Department of Labor was merely an extension of that activity and was so considered by Respondent. Therefore a discharge motivated by such activity is violative of the Act.[24]

However, even in the absence of any evidence of any other employee support for Resnick's actions in calling the Department of Labor, and in fact even if I were to find that she was acting alone in making such a call, Board law provides that such activity is still concerted.[25]

The record also supports the conclusion that another "motivating" factor in Respondent's decision to discharge Resnick, was its mistaken belief that she was engaged in union activities. The testimony of Thomas, Respondent's former supervisor, that Dadukian told him to get rid of Resnick immediately after asking if Thomas had heard about her union activities, and instructing him to "tell her she's incompetent," is particularly significant in reaching my conclusion. Moreover, this testimony is confirmed and corroborated by the testimony of employees Castner and Azzopardi who were both told by two of Respondent's officials that Resnick was fired because of union activities.[26]

---

[18] *Wright Line*, 251 NLRB 1083 (1980).

[19] *NLRB v. Office Towel Supply*, 201 F.2d 838 (2d Cir. 1953); *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345 (3d Cir. 1969); *Indiana Gear Works v. NLRB*, 371 F.2d 273 (7th Cir. 1967).

[20] *Carbet Corp.*, 191 NLRB 892 (1971).

[21] *W.C. Electrical Co.*, 262 NLRB 557 (1982); *Dimo Ambulette Service*, 255 NLRB 5 (1981); *Datapoint Corp.*, 246 NLRB 234 (1979); *First National Bank & Trust Co.*, 209 NLRB 95 (1974).

[22] *W.C. Electrical*, supra.

[23] *Hunt Tool Co.*, 192 NLRB 145 (1971).

[24] *Santa's Bakery*, 249 NLRB 1058 (1980).

[25] *Cimpi Transportation Co.*, 256 NLRB 1064 (1981); *Stafford Construction Co.*, 250 NLRB 1469 (1980); *J. N. Moser Trucking*, 249 NLRB 720 (1980); *Alleluia Cushion Co.*, 221 NLRB 999 (1975). I note that the Board has expressly overruled *Hunt Tool*, supra, cited by Respondent, in *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (4th Cir. 1980).

[26] Thus, Azzopardi was informed that this was so by LaPenta and Thomas. Castner was given this information by LaPenta and most importantly by Dadukian himself. The fact that Castner testified that he himself did not believe that Resnick's union activities were the reason for her dis-

Continued

Respondent argues that since it is admitted that Resnick engaged in no union activities, and that in fact the record reveals no evidence that any union activities were going on at Respondent's premises at the time, that no inference can be drawn that Respondent believed reasonably or otherwise that she engaged in such activities. I do not agree. The above-described credited testimony of Thomas, Azzopardi, and Castner is extremely compelling evidence,[27] and I need not and do not believe it is necessary for me to find the existence of any union activity, nor to ascertain what activities engaged in by Resnick, or others, formed the basis for Respondent's belief that she engaged in union activities. It is sufficient for me to find, which I do, that Respondent believed that she engaged in union activity and that its belief that she engaged in such activity was a motivating factor in the decison to discharge her.

However, I would note that the record does suggest some possible reasons for Respondent's belief. It is clear from Dadukian's own testimony that he confused and associated the call to the Department of Labor with engaging in union activities. Thus, it is not unreasonable for Respondent to have believed that the employee who was the most vocal complainer about its change in lunch policy and who called the Department of Labor to complain about it might tend to be involved in forming or supporting a union, perhaps in response to the employees' dissatisfaction with management's policies. Additionally, the record reveals that Resnick's refusal to fill in for the switchboard operator on December 29, was motivated by her at least indirect support of the position taken by the union representing the operators, that only bargaining unit personnel should perform such work. In fact, LaPenta's write-up of the incident, specifically mentioned her refusal in connection with union employees not wanting her to perform this work. Thus, this sudden "sympathy" for the union's position may have served to indicate to Respondent that she was becoming involved in some sort of union activity.

It is well settled that a discharge motivated by a mistaken belief that an employee engaged in union and/or protected concerted activity is violative of Section 8(a)(1) and/or (3) of the Act.[28]

Accordingly, I find that Respondent's mistaken belief that Resnick engaged in union activities, another instance of protected concerted activity, was also a motivating factor in Respondent's decision to terminate her. The next question becomes whether Respondent has shown that it would have taken the action against Resnick even in the absence of the protected conduct. See *Wright Line*, supra.

In my judgment, Respondent has fallen far short of making the necessary showing. Respondent's own witnesses testified that it made its initial decision to terminate Resnick in mid-December 1980. In addition to the lunch hour incidents, Respondent's witnesses contend that her discharge was also motivated by a long list of alleged problems with Resnick's performance. These include tardiness, doing her hair and makeup at her desk, asking for wake-up calls, failure to confirm reservations on Western Union, making personal calls at work, referring to patrons who use 800 reservation numbers as "cheapies" and refusing to answer their calls, and arguments with LaPenta. However, although Dadukian had instructed his supervisors to write up all incidents of unsatisfactory performance of employees and place them in their personnel files, no such write ups were made with respect to any of these incidents.[29] Moreover, Respondent never warned or cautioned her that recurrence of any of these "transgressions," might result in any kind of disciplinary action, much less discharge. The failure to caution or admonish her that her conduct might lead to dismissal is a highly significant indication of discriminatory motivation.[30]

In *E. Anthony & Sons v. NLRB*, 163 F.2d 22 (D.C. Cir. 1947), cert. denied 332 U.S. 773 (1947), a case often cited in this area,[31] Judge Prettyman speaking for the Court, set forth a respondent's failure to warn its employees of its dissatisfaction with their performance, and found that; "Such action on the part of an employer is not natural. If the employer had really been disturbed by the circumstances it assigned as reasons for these discharges, and had no other circumstances in mind, some word of admonition, some caution that the offending lapse be not repeated, or some opportunity for correction of the objectionable practice would be almost inevitable."

I find these comments particularly applicable to the facts at hand. Thus, if Respondent had really considered these incidents serious enough to warrant discipline or discharge, it is reasonable that it would have so informed Resnick. Its failure to do so, coupled with its failure to document these incidents in her file as required, as well as the other evidence of record, leads me to conclude that these reasons were pretextual and were not relied on by Respondent in its decision to terminate Resnick. Ipso facto then Respondent has not shown that it would have discharged Resnick for these reasons, absent her protected conduct.

Respondent relies most heavily on the mortgage letter incident in justifying the discharge, as according to Dadukian this incident was the "straw that broke the camel's back." I find this testimony to be quite suspect, particularly in view of the fact that Respondent's own witnesses testified that the decision to terminate Resnick

---

charge essentially because she did not engage in any such activities, is irrelevant. The subjective evaluation of a witness as to his belief concerning the reasons for a discharge is not dispositive, since it is the judge and the Board's function, not the witness' to make such a determination.

[27] I note that even LaPenta, who was called as a witness by Respondent, did not deny making these statements to the employees, and when asked about Resnick's alleged union activities coming up during Respondent's deliberations in discharging her, had a sudden and convenient lack of memory, and could not recall whether the topic was mentioned.

[28] *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982); *Metropolitan Orthopedic Associates*, 237 NLRB 427 (1978); *Henning & Cheadle, Inc.*, 212 NLRB 776 (1974); *System Analyzer Corp.*, 171 NLRB 45 (1968).

[29] See *NLRB v. Savin Business Machines Corp.*, 649 F.2d 89 (1st Cir. 1981), enfg. 242 NLRB 435 (1979).

[30] *The May Co.*, 220 NLRB 1096 (1975); *V & W Castings*, 231 NLRB 912 (1977); *Lammert Industries*, 229 NLRB 895 (1977); *Savin*, supra, 242 NLRB at 437, 438.

[31] *Gulf States United Telephone Co.*, 253 NLRB 603 (1980); *Clinton Inn*, 249 NLRB 198 (1980); *Leonard W. Moore Industries*, 242 NLRB 1188 (1979); *Air Products and Chemicals*, 227 NLRB 1281 (1977); *The May Co.*, supra; *Savin*, supra.

was made in mid-December[32] before the mortgage letter problem occurred.

I would also note that despite Dadukian's testimony that he considered Resnick's behavior to constitute disloyality and lack of trust, and that he would never consider reversing the decision to discharge her as a result thereof, he did not ask Resnick for her version nor offer her an opportunity to explain until after she was notified of the decision to terminate her. The failure of Respondent to do so, supports an inference of discriminatory intent.[33]

I note also that despite the alleged seriousness of this conduct Respondent permitted Resnick to remain as an employee of Respondent for nearly 2 months after the incident occurred.[34] Additionally, when giving the reasons to the New York State Unemployment Agency for discharge, this incident was not mentioned as even one of the reasons for her discharge. Finally, Respondent's termination form filled out by LaPenta failed to disclose this incident, although it was allegedly the "straw that broke the camel's back." Accordingly, based on the foregoing, I find that Respondent has not shown that it would have discharged Resnick because of this incident, even in the absence of her engaging in protected concerted activity.

The final reason advanced by Respondent for terminating Resnick is the alleged insubordination incident on December 27, 1980, regarding the switchboard operator. As to this incident, Dadukian admits that "a major issue was not made of it." Further, as with the mortgage letter incident, it took Respondent nearly 2 months to finally terminate her, notwithstanding this insubordination. Thus, I find that Respondent has failed to show that it would have terminated Resnick for the conduct, absent her union and protected concerted activity.[35]

Accordingly, I find that Respondent discharged Resnick because of its mistaken belief that she engaged in union activity, and because of her activity in complaining about Respondent's lunch hour policy, both to management and to the Department of Labor.[36] Therefore, Respondent has violated Section 8(a)(1) and (3) of the Act, and I so find.

CONCLUSIONS OF LAW

1. Salisbury Hotel is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging and refusing to reinstate Cheryl Resnick because she called the United States Department of Labor concerning Respondent's changing its lunch hour policy and because she engaged in other protected concerted activities concerning such changes, Respondent violated Section 8(a)(1) of the Act.

3. By discharging and refusing to reinstate Cheryl Resnick because of its belief that she engaged in union activities, Respondent violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its employee Cheryl Resnick, I shall recommend that Respondent be required to offer Resnick immediate and full reinstatement to her former position of employment, or in the event that such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges; and to make her whole for any loss of earnings and other benefits she may have suffered because of Respondent's discrimination against her. Her loss of earnings shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

I shall also recommend that Respondent remove from its files any reference to Resnick's discharge, and notify her in writing that it has done so, and that evidence of this discharge will not be used as a basis for future personnel action against her. *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

---

[32] This decision was made shortly after the lunch hour complaints and Resnick's call to the Department of Labor.

[33] *United States Rubber Co. v. NLRB*, 384 F.2d 660 (5th Cir. 1967); *Elk Brand Mfg. Co.*, 253 NLRB 1038 (1981); *Gulf States United Telephone Co.*, 253 NLRB 603 (1980); *Hercules Bumpers Inc.*, 248 NLRB 1047 (1980); *Waterbeds 'N' Stuff Inc.*, 238 NLRB 873 (1978).

[34] Thus, I find it unlikely that Dadukian really believed as he testified, that he suspected Resnick would or intended to pass the information contained in the letter to her landlord. His testimony in this regard is rather incredulous and incomprehensible. Thus, while he claims that he suspected her of transmitting this highly confidential information to her landlord, he requested that she type the letter knowing that she was a tenant in the building of this individual; and Resnick was not even his regular typist. If he was so concerned about Resnick's potential for disclosing this information to her landlord he could have waited until the next day and had his regular secretary type the letter. Moreover, Dadukian was aware that Resnick was not on the best of terms with her landlord, and I find that Dadukian had no basis for any suspicions that she might pass this information on to him.

[35] Although I need not, and I do not make such a finding, it is arguable that Resnick's conduct in this incident could be considered protected concerted activity. Thus it appears that her refusal to obey LaPenta's instructions to perform the switchboard operator's job was based on her implied support for the position of the Union representing the operators, that she should not be performing this unit work. The Board has held that activity can still be protected and concerted, even though such activity embraces the disobedience of an order of management. *Bob Henry Dodge*, 203 NLRB 78 (1973). I note in this connection that the record reveals no evidence of the existence of either a no-strike clause or a grievance procedure in the Local 153 contract.

[36] *Triangle Tool & Engineer*, 226 NLRB 1354 (1976); *Self Cycle Marine & Distributors Co.*, 237 NLRB 75 (1978); *Dimo Ambulette*, supra.

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

Continued

ORDER

The Respondent, Salisbury Hotel, Incorporated, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, or otherwise discriminating against employees, because they contact or complain to the United States Department of Labor or any other governmental agency charged with responsibility for administering laws relating to wages, hours, and terms and conditions of employment, or because they engage in any other protected concerted activity concerning their working conditions.

(b) Discharging, or otherwise discriminating against employees, because of its belief that they have engaged in union activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Cheryl Resnick immediate and full reinstatement to her former job or, if her former job no longer exists, to substantially equivalent employment without prejudice to her seniority or other rights and privileges and make her whole for any loss of pay she may have suffered by reason of her unlawful discharge, in the manner set forth in the remedy section of the decision.

Board and all objections to them shall be deemed waived for all purposes.

(b) Remove from its files any reference to the discharge of Cheryl Resnick, on February 22, 1981, and notify her in writing that this had been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in New York, New York, copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MCI Mining Corporation *and* Roger Jett *and* Wayne Campbell *and* Raymond Combs. Cases 9–CA–23052–1, 9–CA–23052–2, and 9–CA–23052–3

21 April 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 15 December 1986 Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a supporting brief. Charging Party Raymond Combs filed an answering brief to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent,MCI Mining Corporation, Bulan, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d).

"(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a).

"(a) Offer Raymond Combs immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed and make him whole for any loss of earnings and other benefits resulting from his discharge in the manner specified in the remedy section above, and remove from its files any references to his termination on 9 April 1985 and notify him in writing that this has been done and that evidence of this unlawful separation will not be used as a basis for future personnel actions against him."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for engaging in a strike for the purpose of securing satisfactory resolution of your work-related grievances.

WE WILL NOT threaten you with termination for engaging in a strike.

---

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In agreeing with the judge's finding that "the record is more than ample to show concerted activity," we additionally rely on our decision in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). Member Johansen, who did not participate in *Meyers*, agrees the activity was concerted. We, however, find it unnecessary to pass on the judge's reliance on his finding that the employees' concerns were "reasonable." We also disavow as unsupported by the record the judge's finding that employee Combs' attempts to avail himself of the Respondent's problem-solving process were "belittled and dismissed in the eyes of Respondent's personnel people." Finally, although we agree with the judge that the Respondent's loss of production is irrelevant to whether the strike here was protected activity, we disavow his reliance on *East Chicago Rehabilitation Center*, 259 NLRB 996 (1982), as authority for that proposition.

The Respondent has excepted to the judge's conclusion that it violated Sec. 8(a)(1) by repromulgating an unlawful rule regarding discipline of employees engaged in "any" work disruption. The Respondent argues that this conclusion was erroneous because the rule was originally published outside the 10(b) limitations period. We reject this contention of the Respondent based on the unrefuted evidence that this rule was maintained, republished, and enforced within the 10(b) limitations period.

[3] In his remedy, the judge found it necessary to issue a broad order requiring the Respondent to cease and desist from infringing "in any other manner" on the rights guaranteed employees by Sec. 7 of the Act. However, we have considered this case in light of the standard set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have decided that the broad remedial language is not warranted. Accordingly, we shall modify par. 1(d) of the recommended Order to use the narrow injunctive language, "in any like or related manner." We shall also modify par. 2(a) of the recommended Order to require that the Respondent offer to reinstate Combs without prejudice to his seniority or any other rights and privileges enjoyed.

WE WILL NOT maintain or enforce any rule that threatens discipline, including discharge, for being involved in initiating a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Raymond Combs immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL revoke the suspensions of Raymond Combs, Wayne Campbell, and Roger Jett, and make them whole for any loss of earnings and other benefits resulting from their suspensions, less any interim earnings, plus interest.

WE WILL remove from our files any reference to the discharge of Raymond Combs and the suspensions of Raymond Combs, Wayne Campbell, and Roger Jett, and WE WILL notify these employees in writing that this has been done and that the discharge and suspensions will not be used as a basis for future personnel actions against them.

WE WILL issue a notice revoking our notice of 8 October 1985, as repromulgated by a letter to all our employees dated 10 April 1986.

MCI MINING CORPORATION

Patricia R. Fry, Esq., for the General Counsel.
Donald P. Wagner, Esq., of Lexington, Kentucky, for the Respondent.
Tony Oppegard, Esq., of Hazard, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Hazard, Kentucky, on 8 and 9 July 1986. Subsequent to an extension of the filing date, briefs were filed by all parties.

The proceedings are based on charges filed 18 April 1986, by individuals Roger Jett, Wayne Campbell, and Raymond Combs. The Regional Director's consolidated complaint, dated 29 May 1986, alleges that the Respondent, MCI Mining Corporation, of Bulan, Kentucky, violated Section 8(a)(1) of the National Labor Relations Act by suspending and discharging employees because they engaged in concerted protected activities and by maintaining a rule that employees would be disciplined for engaging in a work stoppage and threatening employees with discharge if they did not end a lawful strike. On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Kentucky corporation engaged in the mining and sale of coal. It annually sells and ships coal valued in excess of $50,000 directly to points outside Kentucky and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Respondent, also known as Mountain Coals, Inc., is owned by Cyprus Minerals Company of Denver, Colorado, and it consists of three subsidiary companies—Star Fire Coals, Inc., Lost Mountain Mining, Inc., and Buckhorn Processing Company. Star Fire and Lost Mountain operate separate strip mining sites near Hazard, Kentucky. The coal is processed by Buckhorn Processing. Although none of Respondents employees are represented by a union, they have a history of engaging in strikes in order to obtain concessions from management and to remedy employee grievances. For example, a 3-week work stoppage by employees at all three facilities occurred in January and February 1985 (precipitated by the discharge of an employee for not wearing a hardhat inside a vehicle cab). That strike ended after negotiations between employees and management cumulated in a written commitment by Respondent to negotiate a written seniority policy, and to form an employee/-management communication committee that would meet regularly, as well as an agreement to modify the Company's policy regarding the wearing of hardhats.

On 13 February, after the first strike, Respondent sent a memo to its employees that included the following position statements:

> 2. *Communications Committee*: A communications committee will be established for each facility (Lost Mountain, Star Fire, and Buckhorn). Each committee will be composed of *two hourly employees* from each job at each facility, the Vice President and General Manager, and the Employee Relations Manager. The membership will rotate over a period of time, so that each employee and possibly additional management personnel have the opportunity to work on his or her company's committee. The purpose of the committee will be to discuss issues which remain unresolved after discussion with an employee's immediate foreman and the Mine Manager. We assure you that the committee will meet at least once a month.
>
> . . . .
>
> 12. *Seniority Rights and Training*: The Management of Lost Mountain Mining, Inc., Star Fire Coals, Inc., and Buckhorn Processing Company individually agree that the job bidding and layoff issues need to be clarified and list the following in-

formation as a starting point to better understand job bidding and lay-offs. *These procedures will be reviewed with committees for each of the companies before implementation.*

Job Bidding: If a permanent job vacancy occurs in an operating job line (such as dozer operator, mechanic, truck operator, sampler, blasting operator, etc.) the job will be offered to the employee in that same job line on that same shift starting with the most senior in that particular line. When one horizontal move in that job line is made, the resulting vacancy will be filled by offering the job to the employee in that same job line beginning with the most senior on the remaining shifts. In the event the existing employee in a job line does not want to move to fill a vacancy, the posting proccedure [sic] will be used to select a qualified operator outside that job line. The resulting vacancy will be filled by an employee working outside that classification by publicizing the job throughout the individual company for three working days. Any interested employee may bid on that job. Jobs created by the addition of new equipment will be treated as above.

Mine seniority will govern in filling job bids provided the employee has the physical ability to perform the job and has reasonable knowledge of the job that will enable him or her to begin performing job duties.

An employee will be given a trial period of thirty (30) working days to prove he or she is qualified for the new position. If at the end of the trial period the employee has not demonstrated the ability to perform the job in a safe and efficient manner, he or she will go back to his or her original job.

Job changes through the bidding process, from one job line to another, must be limited to one per employee per year. When employees change job lines, they give up their previous seniority in their previous job line. An employee can hold seniority in only one job line at any one time.

Management and employee representatives subsequently discussed the seniority policy for Star Fire in several of the communications committee meetings. The company proposed creating training positions for some of its jobs, including mechanics and operators. The Company wanted to designate the positions as mechanic I and mechanic II, and operating I and operator II, with the "II" designation being the training position for the "less than full qualified" employee. Employees, through the communications committee, objected to the creation of the training position, but the Company nonetheless issued a seniority policy on 18 April that contained a provision establishing the training positions. Employees immediately threatened to either go on strike or to contact the United Mine Workers Union if the training positions were not abolished. The Company relented and on 22 April Star Fire issued a revised seniority policy, which did not include the training positions.

In May 1985, a layoff of employees occurred at Star Fire. At the same time, its maintenance department needed to hire four additional mechanics. Respondent posted openings for four repairmen, a new job classification that was established so that Respondent could retain some existing employees that otherwise would be laid off rather than going outside the Company to hire fully qualified mechanics. Respondent created the repairman job, which was the equivalent of a training position, without consulting with the communications committee. Nothing was stated to employees or put in writing as to whether mechanics and repairmen would be in the same job line or different job lines for seniority purposes. Four employees, Larry Sloane, J. B. Spencer, Virgil Fredericks, and James Osborn were assigned to the repairman jobs.

When the repairman classification was created, employees Ed Mullins and Roger Jett, who both were communications committee members, objected to the establishment of the new position. Mullins told Mine Manager Bill Harris that Star Fire had agreed not to create a training position without the approval of the employees and Jett warned him that it would lead to a strike. Mullins and Jett both equated the repairman's job with that of the mechanic II proposition that had been rejected by the employees only a month before.

Several strikes occurred during the summer and fall of 1985 after an employee was disciplined for refusing to work on a shift that included working on Sunday, an employee who had not received a job bid notice (while on vacation) walked off the job, and after additional pay was given to the drag line crew. No employees were disciplined as a result of their participation in these strikes.

On 8 October 1985, Respondent issued a notice to all employees that stated:

> During the past several months, our companies operations have been marked by a series of work disruptions . . . . This makes it difficult, if not impossible, to keep current contracts or win additional contracts . . . the work disruptions jeopardize our very livelihood yours and mine—and possible [sic] the existence of Mountain Coals.
>
> Means of communications for all our problems and concerns have been firmly established and are open to everyone—from the hourly employees up through the uppermost levels of management. Therefore, it should be known by every employee that Mountain Coals will not tolerate the actions of individual[s] that promote and initiate any disruptions of our companies operations. Individuals involved in initiating any such disruptions will be subject to disciplinary actions by the Company, up to, and including discharge."

Mine Manager Harris testified that, in the Company's view, the June and July strikes each had been caused by one individual and the notice was directed only at the specific individuals who had shut the job down, not at employees generally, however, the notice specifically referred to and was issued to "every" employee.

Raymond Combs was employed as a mechanic by Star Fire from 1983 until his discharge on 9 April 1986. Combs originally worked the first (day) shift but was moved to the second shift when Star Fires changed its

operation from two shifts to three shifts in October 1985. One of the new repairman, J. B. Spencer, remained on the first shift. Although Combs had family-related reasons for preferring the first shift, he did not protest being moved to the second shift because he believed Spencer had more "company seniority" and he understood that company seniority was the determining factor for shift assignments under the new shift alignment.

In January 1986, Star Fire moved repairman Larry Sloane from second shift to first shift. Combs felt that he should have been given the opportunity to move to day shift ahead of Sloane because he had more job line seniority than Sloane and he successively brought his complaint to Maintenance Superintendent Henry Cherpak, Mine Manager Harris, Human Resources Representatives Tim Johnson and Sharon Maynard, and MCI Vice President and General Manager Robert Slack, arguing that mechanics and repairman were in the same job line, and therefore he should have been given the day shift job ahead of Sloane. Slack ultimately decided that Star Fire's decision to move Sloane to the day shift was in accord with the Company's seniority policy.[1]

Wayne Campbell, a third-shift mechanic who had taken part in the negotiations regarding the seniority policy as a member of the communications committee, testified that there was talk among the men about the moving of the repairman and that he believed that he, Combs, and Vernon Earl, another mechanic, all had been "bypassed," however, he did not voice his concern to management at that time.

In March 1986, the Company decided to move another repairman, Virgil Fredericks, to the day shift to replace Spencer, who had been injured on the job. Combs immediately complained to Cherpak but was told that his opinion had not changed. Combs then met with Maynard, and again complained that Star Fire was violating its job line seniority policy by moving a less-senior repairman around him and he requested a meeting with Robert Migliaccio, the new mine manager.

The following week Combs and Ed Mullins met with Migliaccio and Maynard. Mullins was a day-shift mechanic who previously had been selected by the employees to serve as a spokesman with management during the 1985 conflicts. He did most of the talking with Migliaccio and argued that the repairman position should be abolished because the Company had previously agreed not to establish a training position without the employees' approval. Mullins argued that if the repairman position was not abolished, it should be in the same job line as the mechanic position because the mechanics and repairmen did essentially the same work. Mullins also argued that the Company had violated the seniority policy in another instance when it put two new bulldozers on the job and hired new employees to operate them rather than offering the new equipment to the most senior dozer operators. Migliaccio promised he would investigate these matters further.

The following day, Mullins gave Maynard the original seniority policy proposal that had been presented to the communications committee in 1985 by Star Fire's management as his "proof" (inasmuch as the revisal did not reflect any training positions) that the employees had earlier rejected the mechanics I and II positions. The next week, on 31 March, Mullins met with Migliaccio alone and again discussed the seniority policy issue. At the conclusion of this meeting, Migliaccio announced that he was going to uphold the Company's original position that mechanics and repairmen were two separate job lines for seniority purposes. Mullins told Migliaccio that his decision "could result in a walkout."

That same evening, Migliaccio met with over 70 of Star Fire's first- and second-shift employees. He handed out a copy of the 22 April 1985 seniority policy with a cover memo dated 31 March 1986 and he discussed the employees' concerns regarding the seniority policy.

Combs and Mullins, as well as several other employees, including Buddy Engle, George Short, Blake Haddix, Lathan Nix, and Randy Hurt, argued that Star Fire was violating the seniority agreement. Mullins again mentioned the bypassing of senior operators for the new bulldozers. Operator Lathan Nix testified that he and other employees were "ready to go to the foot of the hill" (an expression that means to go on strike) but were dissuaded by Combs who said he would talk with management further and asked the employees to hold off a few weeks to see if something could be worked out.

Migliaccio held a similar meeting that night with the third-shift employees. Wayne Campbell told Migliaccio that mechanics were also being affected by the decision to allow the repairmen to bypass Combs on to the first shift. Roger Jett, a third equipment operator, who also was selected to represent employees at committee meetings, confirmed that he, as well as other employees, was upset by the creation of the repairman job but that because of concern over jobs and confusion at the time of the May layoff, no earlier complaint was made to management. After the 31 March meeting, however, both Campbell and Jett asked their night-shift foreman to have Migliaccio set up a communications committee meeting to discuss the job line security issue (after the initial meetings in 1985, no further meetings of the committee were held after September, despite the fact that Respondent had indicated that it would hold monthly meetings).

Subsequent to the latter meetings, Nix twice spoke with Migliaccio on the jobsite and told him that if "we" could not settle the job line seniority issue, it would "go to the foot of the hill." Nix and others also told Migliaccio of past agreements between management and the employees on the issue and Migliaccio requested that they produce a company-signed agreement that there would be no repairman. In response, Mullins provided a copy of Respondent's proposal dated 18 April, and another employee provided a group of negotiation documents from the 1985 strike negotiations, which resulted in the memo of 13 February signed by Morris and reflected the above-noted seniority provisions. Migliaccio testified that he subsequently called Morris at his new job assignment

[1] Harris left Star Fire in late January 1986. He was replaced by Robert Migliaccio, who began work on February 24, 1986. Slack replaced Jim Morris (who had participated in negotiations of the seniority policy) as vice president and general manager on January 21, 1986; and Larry Manzanares replaced Bill Pebley as manager of human resources in May 1985.

for Respondent's parent company and said that Morris gave him no specific confirmation of an agreement. Migliaccio then saw Combs on the road, stopped him, and asked for any additional documentation. Combs' said he did not have any and Magliaccio then said "My decision won't make you happy." Combs returned to his work area and told the other four shift mechanics of Migliaccio's decision and they agreed it was time to meet at the foot of the hill Monday morning.

On 8 April Combs arrived at the foot of the hill between 5:30 and 6 a.m. and began letting arriving Star Fire employees know there was a strike. One employee continued to the jobsite, but all others pulled over and between 50 and 100 employees joined the picket line.

Shortly thereafter Migliaccio was notified of the employees work stoppage and went to the site with Maynard. Maynard testified when they first stopped she saw Combs and, after she asked him what was going on, he replied, "Its about this repairman thing, Sharon. I'm the one that stopped these boys here." Migliaccio, however, mentioned no such conversation, but did say everyone crowded around them. Migliaccio told them that there was a company policy against any strike and asked that they go back on the hill and work it out. Combs testified that he initially said nothing, but that someone else yelled out to Migliaccio that: "the only way we can get your attention is to come to the foot of the hill." When Migliaccio then accused Combs of stopping the entire Company from working, Buddy Engle spoke up and told Migliaccio: "He didn't stop me, we stopped ourselves. He wasn't the one that stopped us, because we knowed what was going on." Then, several employees including Combs, Mullins, and Jett spoke to Migliaccio about the repairman-seniority problem. It was decided that the employees would chose a committee to develop a proposal for ending the strike and present it to Migliaccio. The strikers chose Combs, Mullins, and Sloane. These three went on the jobsite and me with Migliaccio, Maynard, and Joel Davis, Star Fire's production superintendent. The committee proposed that the employees would end the strike if Respondent would move Combs to first shift, retain Sloane on first shift, mingle repairmen and mechanics seniority in a single job line, and permit repairmen to take a test to qualify for vacant mechanic positions. The meeting ended without an agreement. Later, on the afternoon of 8 April, some employees from Respondent's Lost Mountain mine stopped at the picket line and told the strikers that the Lost Mountain employees would honor the strike if a few Star Fire employees would come to the Lost Mountain jobsite.

That evening Migliaccio called Combs at his home and arranged to meet him in Hazard. Migliaccio met Combs and handed him a suspension notice, which stated that Combs was immediately being placed on suspension for a period of 10 working days without pay for his admittedly causing a work stoppage at Star Fire on 8 April 1986. The suspension also referred to Respondent's policy notice of 7 October 1985 and warned Combs that if he continued disrupting the work force, it would be forced to discharge him.

After receiving the suspension notice, Combs went to speak with a "spokesman" for Respondent's Lost Mountain facility. The suspension notice and the job line seniority dispute were discussed and the spokesman reasserted an offer, made earlier that day, that the Lost Mountain employees would support the Star Fire strike if some of their employees came to the Lost Mountain site the following morning.

The next morning, Combs went to the Lost Mountain site and found one Lost Mountain employee, Carlin Jones, already at the picket line. Soon thereafter, Wayne Campbell and Roger Jett arrived, as well as two Lost Mountain "spokesmen" who began stopping other employees as they arrived.

Most employees parked their vehicles and did not report to work. Later that morning, Larry Manzanares, Respondent's new human resources manager, and Maynard, Star Fire's human resources representative, arrived at the Lost Mountain picket line and spoke briefly with Combs, Campbell, and Jett. During their discussion, Combs told Manzanares that Star Fire was violating the job line seniority policy. That evening, a letter was delivered to Combs' home, stating that he was terminated: "because of your continued activities in causing further work stoppages at the Lost Mountain Mining and Buckhorn Processing operations."

On Thursday, April 10, most employees went up to the Star Fire office to get their paychecks. All employees received a letter from Respondent stating that "failure on your part to report for your regularly scheduled shift beginning Sunday night, April 13, 1986, will leave the Company no choice but to assume that you have abandoned your job and your services will be terminated effective on date you last worked." The letter also told employees that the employee who had initiated the "disruptions" had been terminated. Attached to each letter was a copy of the 8 October 1985 policy notice.

After learning of the warnings, Combs told the other employees to return to work and that he would handle his case through the Labor Board. Employees returned to work on 11 April 1986, however, when Campbell and Jett reported they were informed that they were suspended for 10 days "as a disciplinary action . . . for causing a work stoppage at Lost Mountain Mining and Buckhorn Processing."

III. DISCUSSION

The issues in these cases arose over a brief work stoppage that followed a series of actions by Respondent in which Raymond Combs was bypassed for transfer to first shift. As discussed below, Combs and other employees perceived Respondent's action to be violative of their seniority rights that they believed the Company had endorsed as part of an agreement that followed their return to work after some earlier work disruptions in 1985.

A. *Concerted Activity*

Respondent, citing *Meyers Industries*, 268 NLRB 493 (1984), argues that Combs' dispute with management involved a purely personal gripe rather than a protected, concerted activity. It further contends that, in any event, it lacked any knowledge of the alleged concerted nature of Combs' complaint, and that its discipline of the three

employees was motivated by its desire to avoid costly work stoppages rather than retaliate against alleged protected concerted activity.

Contrary to Respondent's argument, I find that the record is more than ample to show concerted activity by Combs, Campbell, Jett, and other employees. Respondent also had contact with several employee representatives or "spokesmen" (including Mullins, Campbell, and Jett), both in the context of communications committee meetings and subsequent informal contacts where these spokesmen expressed their concerns over the same matter that most directly affected Combs. It is clear that the issue of job line security was a matter of particular concern to many employees and the subject also was discussed in meetings and written about in management documents during and after the work stoppage that occurred in early 1985.

In May, when the repairman position was created, committee members Mullins and Jett both complained to Mine Manager Harris that the employees had not agreed to it and warned that it could lead to a strike. Combs' seniority concern was presented to management on two separate occasions when he first was moved to second shift after Star Fire began a three-shift operation. In January 1986, Combs attempted to bring his concern to all levels of management and the grievance expressed was tied in with the job line security issue, the creation of training positions, and the rejected proposal to create a mechanic II position, all subjects that employees had discussed with management during earlier communications committee meetings. Although it is apparent that nothing definitive subsequently was put in writing saying that the new repairman positions would be in the mechanics job line for seniority purposes, it is equally apparent that no understanding was reached that they would be separate job lines and clearly nothing was put in writing to this effect.

Committee member Campbell testified that when Combs was bypassed in January, he spoke with others who shared his belief that he, Combs, and other employees also had their seniority bypassed. Although Campbell did not speak to management at this time, Mullins joined with Combs and actively presented the employees' argument to Megliaccio.

It is noted that Respondent contends that because employees have access to a "Problem-Solving Process," it is entitled to legitimately impose discipline to maintain productivity when employees go beyond the process and engage in a work stoppage. It appears, however, that when Combs repeatedly tried to avail himself of the process, his attempts went unrecognized and effectively were belittled and dismissed in the eyes of Respondent's personnel people, especially human resources associate Maynard. Here, Maynard repeatedly gave self-serving testimony to minimize the nature of Combs' complaint and to support her alleged perception of the matter as an isolated personal case of no interest to anyone else. Yet, as she also acknowledged, Combs told her the only time "the Company" would listen is when "they" go to the foot of the hill, the same sentiment shouted out by another employee when, after Mine Manager Migliaccio asked employees to go back to the job and work out their problems.

Respondent also attempts to discount Mullins' participation in the January meeting with Migliaccio because it was Migliaccio who suggested that Combs be accompanied by a spokesman. Mullins, however, testified that Combs had voiced his complaint over Sloane's transfer when it first occurred and that Mullins twice recommended to Combs that he first go to the Company and try to work it out. Mullins' argument to Migliaccio also was made in terms of management's violation of what Mullins termed "our agreement" on seniority issues, as evidenced by Respondent's 18 April policy statement to all employees that omitted the mechanic II proposal that previously had been presented by management.

The independent testimony of several employees also shows that they had their own concern over the seniority policy prior to the actual work stoppage, which itself was supported by several hundred workers.

Specifically, it is shown that Migliaccio met with employees on 31 March and heard complaints from at least five different employees who expressed their concern over violations of the seniority policy. Employees said at that time that they were "ready to go to the foot of the hill" and Campbell specifically told Migliaccio he and others were being affected by the bypassing of Combs. Subsequently, both Campbell and Jett also asked their night-shift foreman to set up a committee meeting to discuss these concerns. Accordingly, I find that Combs' alleged "individual" complaint, clearly was already a matter of group concern and activity that had been communicated to Respondent's mine manager and other supervisors prior to the time of the actual strike.

Under these circumstances it is clear that the strike, with 300 employees participating at both locations, was a continuation of the employees' concerted complaints, regardless of the fact that it was precipitated by management's refusal to reconsider the alleged bypassing of one particular employee. It also is clear that management was well aware that several other employees had independently expressed or joined in the complaint over Respondent's practice of implementation of transfer without apparent regard to seniority. In this connection, I specifically find implausible the testimony by human resources representative Maynard and General Manager Robert Slack to the effect that Combs gratuitously volunteered to each of them that he did not have any backing (also attributed to Mullins), and that he said he individually started the strike. It is contrary to the weight of the credible evidence of other witnesses, and I find such testimony to be so self-serving and lacking in probative value that it cannot prevail over the clear and convincing evidence that numerous employees otherwise engaged in continuing, concerted complaints and that Mine Manager Migliaccio and other supervisors were well aware of the employees' complaints.

I also conclude that inasmuch as Mullins, Campbell, and Jett also were known by management to be "committee" representatives or "spokesmen" selected by the other employees, it should have known that their expressions relating to terms and conditions of employment re-

flected the mutual concerns of other employees. Otherwise, it is clear that Respondent understood that the strike concerned not only Respondent's failure to move Combs to first shift, but also the manner in which the repairman position was being used to interfere generally with seniority rights and it understood that employees in other job lines, including operations and truckdrivers, were concerned about possible changes in their job lines that could result in their loss of opportunities to move to a preferred shift or to a preferred piece of equipment.

The employee concerns directly related to terms and conditions of employment and are clearly reasonable concerns, regardless of the ultimate merit of the underlying complaint with respect to Combs.

Here, the employee concerns and the resulting strike were not based on bad faith or one individuals' personal benefit, see *Interior Alterations*, 264 NLRB 677 (1982), and there is no indication that the employees engaged in any violent, disloyal, or inherently egregious activity that, under some circumstances, might adversely affect their rights to protection under the Act. Respondent's argument that it lost several days of production due to the strike is irrelevant to the question of whether the strike was protected, see *East Chicago Rehabilitation Center*, 259 NLRB 996 (1982). And, accordingly, I conclude that the strike was a protected concerted activity based on the employees' reasonable belief that Respondent was engaged in practices that adversely affected the terms and conditions of their employment. I further conclude that management knew of the concerted nature of the activity when it suspended or discharged employees known to be participants in that activity, see *Consumers Power Co.*, 282 NLRB 130 (1986).

B. *Suspension and Termination*

It is well established that when unrepresented (nonunionized) employees jointly participate in withholding their services (strike) for the purpose of pressuring their employer into resolving to their satisfaction grievances over their rates of pay, wages, hours, or working conditions, they engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7 of the Act, and it is a violation of the Act for their employer to discharge, suspend, or otherwise interfere with, restrain, or coerce them for engaging in such activity. See *San Diego County Assn. for the Retarded*, 259 NLRB 1044 (1982), and cases cited. It also is unlawful for an employer to retaliate against an employee because he picketed, as did Combs, at a location other than his normal place of employment. *Consolidation Coal Co.*, 266 NLRB 670 (1983).

Here, the record shows that shortly after the strike began Respondent met with Combs and two other employee representatives and was told that their demands included a specific request that Combs be moved to first shift and that repairmen and mechanics' seniority be in a single job line. Shortly thereafter Respondent gave Combs a letter suspending him for 10 days for causing the work stoppage at Star Fire. The following day management observed and spoke with Combs, Campbell, and Jett at the Lost Mountain Mine and Buckhorn Processing work stoppage. It then issued the same suspension letter to Campbell and Jett, as well as a followup letter of termination to Combs, stating in each instance that the disciplinary action was taken because of their causing a work stoppage. No contention was made or evidence presented to indicate that Combs, Jett, or Campbell blocked employees' ingress or egress or that they trespassed or otherwise engaged in any misconduct.

Under these circumstances it is undisputed that Combs, Campbell, and Jett were disciplined for their participation in activity that otherwise is shown to be protected and concerted. Accordingly, I conclude that Respondent's action in this regard is shown to be in violation of Section 8(a)(1) of the Act, as alleged.

C. *The Rule and Threat Against Work Stoppage*

In the absence of binding collective-bargaining agreement containing a valid no-strike clause, employees have a right to strike and an employer may not interfere with that right by threatening without qualification to retaliate against employees who exercise such rights. Here, the records show that Repondent issued a notice 8 October 1985, to all employees, which said:

> Individuals involved in initiating any such (work) disruptions will be subject to disciplinary action by the Company up to and including discharge.

This same notice was attached and referred to in the letter that Respondent gave to all employees on 10 April, after the strike had started. This letter also stated that employees "will be terminated" on failure to report for their regular shifts beginning Sunday night, 13 April.

An employer's threats to terminate or discipline employees because they engaged in rights protected by Section 7 of the Act constitute illegal interference. As noted above, the concerted withholding of services in an attempt to resolve grievances over terms and conditions of employment is a protected right. Respondent was well aware of the nature and cause of the employees' strike when it made its termination threat and reissued its disciplinary rule pertaining to work stoppages. As noted by the General Counsel, while strikers may lose their protected status by engaging in serious misconduct or for certain other reasons, no such qualifications were incorporated in Respondent's letter or notice. Here, the timing of the threat and reissuance of the notice on Thursday, the second day of the strike, with an almost immediately effective date for termination after only one additional regular working day, clearly demonstrated the coercive and intimidating nature of Respondent's interference with its employees' rights. Although the rule seemingly threatens only the "initiator" of a work disruption, it threatens to discipline "any" employee who "initiates' a strike, regardless of the possible protected nature reasons for employees to initiate a grievance.

Accordingly, I conclude that Respondent's letter threat of 10 April to terminate employees if they did not return to work and Respondent's reissuance of its 8 October notice with its unqualified and overly broad rule providing for discipline, including discharge, for "individuals" involved in initiating "any" work disruptions,

are both violations of Section (8)(1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Raymond Combs on 9 April 1986 and by suspending Combs on 8 April 1986 and suspending Wayne Campbell and Roger Jett on 9 April 1986 for engaging in a lawful strike, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. By threatening to terminate employees who did not return by 13 April 1986 and by repromulgating a rule providing for discipline, including discharge, for individuals involved in initiating any work disruptions, Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended Wayne Campbell and Roger Jett for 10 days and terminated Raymond Combs, I find it necessary to order it to offer Combs reinstatement to his former position and to revoke the suspension of Campbell and Jett, with compensation for loss of pay and other benefits, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). It also shall remove from its files any reference to the suspensions and termination and notify them in writing that it has been done and that evidence of such unlawful action will not be used as a basis for further action against them. See *Sterling Sugars*, 261 NLRB 472 (1982). Otherwise, because of the serious nature of the violations and an overall display of a general disregard for the employees' fundamental rights, I find it necessary to issue a broad order, requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. See *Hickmott Foods*, 242 NLRB 1357 (1979).

As part of the relief sought, the General Counsel also seeks imposition of a so-called visitatorial clause whereby the Board would be authorized to engage in certain discovery activities in order to monitor compliance. Although the imposition of such a provision recently has become a somewhat common practice, there is no showing that it is of particular applicability to the unfair labor practices involved in this proceeding. Accordingly, the request is denied and no visitatorial clause will be imposed as part of the order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, MCI Mining Corporation, Bulan, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise disciplining its employees for engaging in a strike for the purpose of securing satisfactory resolution of their work-related grievances.

(b) Threatening its employees with termination for engaging in a strike.

(c) Maintaining or enforcing any rule that threatens discipline, including discharge, for being involved in initiating a strike.

(d) In any other manner interfering with, restraining, or coercing employees for engaging in a protected concerted activity in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Raymond Combs immediate and full reinstatement to his former or equivalent position and make him whole for the losses he incurred as a result of the discrimination against him in the manner specified in the remedy section, and remove from its files any references to his termination on 9 April 1985 and notify him in writing that this has been done and that evidence of this unlawful separation will not be used as a basis for future personnel actions against him.

(b) Revoke the suspensions of Raymond Combs, Wayne Campbell, and Roger Jett, and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section, and remove from its files any references to these suspensions and notify them in writing that this has been done and that evidence of these unlawful suspensions will not be used as a basis for future personnel actions against them.

(c) Issue a notice to all employees revoking its notice of 8 October 1985, as repromulgated by its letter to all employees dated 10 April 1986.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this decision.

(e) Post at its Star Fire Coal, Lost Mountain Mining, and Buckhorn Processing facilities copies of the attached notice marked "Appendix."[3] Copies of the notice, on

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of

Continued

forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

McDonnell Douglas Helicopter Company *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Case 28–CA–8428

23 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 8 December 1986 Administrative Law Judge George Christensen issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, the General Counsel excepted to alleged failures by the judge to make certain credibility resolutions of conflicts in the testimony of Lieutenant Hanner and the General Counsel's witnesses concerning the 16 April 1986 incident. Footnote 3 of the judge's decision addresses just such concerns. The judge notes that every conflict has not been specifically resolved, then gives the basis for his findings, and concludes "therefore, any testimony in the record that is inconsistent with my findings is discredited." Implicitly all conflicts are resolved by the footnote. Even resolving the conflicts in the light most favorable to the General Counsel, the evidence fails to establish a violation. The testimonial conflicts pertain to inconsequential facts, which are of no significance in determining whether the Respondent's conduct was violative of the Act.

We agree with the judge's dismissal of the complaint. We note that this case does not present an access issue. Rather, the issue is whether the Respondent, through its agent, Lieutenant Hanner, engaged in conduct that under the specific circumstances of this case tended to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights. The record evidence establishes that the Employer uniformly adhered to a policy of allowing only employees to distribute literature at its employee entrance gates. In furtherance of this policy the Respondent had a legitimate interest in determining the identity of the leafletters. In light of the fact that the Respondent employs over 2000 employees at the plant in question, it is reasonable that the Respondent would need to inquire as to the identity of those leafletting in order to ascertain that they were indeed employees. Further, it is clear that the Respondent, upon learning that the leafletters were employees (with one possible exception), did nothing which interfered with further distribution of the leaflets. Thus, we find that the Respondent's security guard's actions did not violate Sec. 8(a)(1).

Jordan Ziprin Esq., for the General Counsel.
Robert J. Deeny and *Tibor Nagy, Jr., Esqs. (Snell & Wilmer)*, of Phoenix, Arizona, for MDHC.
William T. Ross, of Mesa, Arizona, for UAW.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On 24 and 25 September 1986[1] I conducted a hearing at Phoenix, Arizona, to try issues raised by a complaint issued on 16 May based on original and amended charges filed on 17 and 18 April by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (UAW).

The complaint alleged on 16 April a security officer employed by McDonnell Douglas Helicopter Company (MDHC)—Guard Lieutenant Richard Hanner—surveilled, demanded and wrote down the names of several persons distributing UAW literature to employees entering and leaving MDHC's premises during a midafternoon shift change, thereby violating Section 8(a)(1) of the National Labor Relations Act (Act).

In its answer to the complaint, MDHC admitted at times material it employed Hanner as a guard lieutenant but denied Hanner was acting as its agent, denied Hanner committed the acts attributed to him, and denied violating the Act.

The issues raised by the above are: (1) whether at times material Hanner was an agent of MDHC acting on its behalf; (2) if so, whether Hanner committed the acts attributed to him; and (3) if so, whether MDHC thereby violated the Act.

The General Counsel and MDHC appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Both counsels filed briefs.

Based on my review of the entire record,[2] observation of the witnesses, perusal of the briefs and research, I enter the following[3]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find at all pertinent times MDHC was an employer engaged in commerce in a business affecting commerce and UAW was a labor organization within the meaning of Section 2 of the Act.

[1] Read 1986 after further date references omitting the year.

[2] The General Counsel moved to correct the transcript by changing the word "counsel" at p. 100, 7, to "console." The motion is denied; instead, the word "personnel" shall be substituted.

[3] Although every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony; therefore, any testimony in the record that is inconsistent with my findings is discredited.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

MDHC manufactures military helicopters at Mesa, Arizona. Its facilities include a flight line, hangers, a warehouse, an office building, a large plant, and a parking lot. All the facilities just named are on MDHC property. The buildings are enclosed by a high chain-link fence. After parking their autos within the parking lot, employees pass through one of three gates in proceeding to and exiting from their work stations. One gate has a turnstile released by a guard at a central control room following his comparison of the picture on an identification badge inserted by an entering employee in a slot at the turnstile with the face of the entrant reflected on a screen coupled to a camera at the turnstile. A gate next to the turnstile is opened at shift changes for the use of exiting employees, after displaying their badges to a guard stationed inside the gate. Another gate is the entrance to/exit from the main lobby of the office building. There, guards stationed inside the outer door to the lobby (the door between the parking lot and the lobby) scrutinize the badges of employees coming through the outside door and proceeding towards the inside door (the door leading from the lobby towards the plant) and employees coming through the inside door and proceeding towards the outside door. Guards are stationed at a guard shack inside a third gate in the chain-link fence and monitor the badges of employees passing between the parking lot and the plant.

UAW conducted an organizing campaign at MDHC's facilities in 1985. Early in the campaign (in March 1985), MDHC guards checked badges worn by persons distributing UAW literature to its employees during a shift change on MDHC property (on the parking lot, just outside the three gates described above), noted names of the distributors, checked the names against indexes maintained by MDHC and its parent company, ascertained some of the distributors were MDHC employees and some were employees of other divisions of MDHC's parent company, and barred the latter from further distribution on its premises.[4]

UAW supporters among MDHC's employees frequently destributed UAW literature at the locations described above during shift changes between March and 6 November 1985, when an election was conducted under Board auspices.[5]

Since 6 November 1985, UAW supporters distributed UAW literature at the three locations one in mid-March and on 16 April.[6]

The 16 April distribution occurred at the midafternoon shift change—between 3:20 and 3:50 p.m. Over 2000 employees pass through the three gates during that period. Doris Hunt, an MDHC employee scheduled to begin work on the second shift at 4 p.m., arrived at one of the gates about 3:20 p.m. and began to distribute UAW literature to entering employees and (after 3:30 p.m., when the first shift ended) to exiting employees. A guard stationed inside the gate came out shortly after Hunt began distributing literature, asked what Hunt was doing, was informed she was distributing union literature, asked for a copy, and received one. The guard reentered the gate and reported to someone unknown to Hunt literature was being distributed outside the gate.

Hunt was joined by first shift employee Lana Johnson about 3:35 p.m. and Johnson immediately began assisting Hunt in distributing literature. Distributors John Thomas, Guy Terry, George Johnson, Betty Johnson, and Jerry Fletcher appeared at the other two gates shortly after 3:30 p.m. All but Betty Johnson were first shift employees.[7] All but Betty Johnson wore MDHC identification badges.[8]

MDHC employs a guard force on shifts covering the full 24 hours of each day. Each shift is in charge of a watch commander carrying the rank of lieutenant. The guard force is equipped with sidearms and walkie-talkies while on duty. The guard headquarters are in a centrally located control room. The facility's radio and telephone communications, a control panel monitoring, inter alia, cameras covering the parking lot and the turnstile, are located within the control room. Guards man the control panel.

On 16 April, Guard Lieutenant Richard Hanner was the watch commander for a guard shift ending at 3 p.m. Lieutenant Carl Fullenwider was the watch commander for a guard shift commencing at 3 p.m. On completing his 16 April shift, Hanner turned in his sidearm and walkie-talkie, but remained in the control room to complete some paperwork. He received a message from one of the gate guards about 3:30 p.m. that literature was being distributed at one of the gates and transmitted that information to Fullenwider. The two scrutinized the screens projecting images from the parking lot and noted individuals distributing literature at all three gates but, due to the low resolution of the parking lot cameras, were unable to determine the identity of the distributors or whether they were wearing MDHC identification badges. Fullenwider telephoned MDHC's employee relations director, reported what he and Hanner observed, and on completing the call, informed Hanner he had been directed to get the names of the distributors and determine whether they were MDHC employees and asked Hanner to go to the three gates to carry out those instructions.[9] Hanner agreed to carry out the requested investigation.

---

[4] MDHC had a policy prohibiting distributions on its property by other than employees.

[5] Pursuant to a direction of election issued in Case 28–RC–4300, UAW lost the election, filed election objections and unfair labor practice charges alleging MDHC conduct during the campaign prevented a fair election and violated the Act, a complaint was issued, the complaint allegations and election objections were consolidated for hearing purposes, and a hearing is currently under way.

[6] Two of the 16 April distributors—Doris Hunt and John Thomas—were distributors on 16 April, in mid-March and on numerous other dates between March and November 1985.

[7] Betty Johnson was George Johnson's wife and was employed by a contractor working within MDHC's premises.

[8] Contractor employees were required to surrender their badges before passing through an exit gate.

[9] Fullenwider was still getting his shift organized and had a spur on one heel, which made it painful for him to walk any distance.

About 3:35 p.m. Hanner took a clipboard and pad, left the control room, went to each gate, asked each distributor to display his MDHC identification badge, asked each for his or her name, and wrote the name of each distributor on his pad. He did not ask any of the distributors to cease distribution, he did not threaten any distributor with discipline, and he replied to their inquiries the reason for his actions with statements he was only doing his job, he was carrying out instructions, or the like.

Hanner spent about 1 minute addressing each of the seven distributors and returned to the control room about 3:50 p.m. On his return, he and Fullenwider checked MDHC's employee indexes, confirmed all the distributors other than Betty Johnson were current MDHC employees and identified Betty Johnson as the current employee of an MDHC contractor.[10] Hanner and Fullenwider subsequently prepared and forwarded to employee relations standard investigation reports containing the information employee relations requested; i.e., the names of the seven distributors and their current employee status.

There is no evidence any entries were made in the personnel files of the six MDHC employees, any disciplinary action was taken against the six or that Betty Johnson's employment status was affected.

B. *Analysis and Conclusions*

1. The agency issue

Although Hanner may not have been on paid time while carrying out Fullenwider's request that he investigate the employment status of the distributors,[11] he certainly was carrying out security duties assigned to the guard forces by MDHC management, as the alter ego of the man assigned to perform those duties—Fullenwider. I therefore find that while conducting his investigation and making his report Hanner was an agent of MDHC, acting on its behalf within the meaning of Section 2 of the Act.

2. Commission of the acts alleged in the complaint

I have entered findings on 16 April, that Hanner asked the seven individuals distributing UAW literature on MDHC property to show him their MDHC employee identification badges, asked for their names, wrote their names on a pad, and wrote a report advising MDHC's employee relations director the names of the seven distributors and their employee status, all as alleged in the complaint and denied in the answer.

[10] Which differed from Betty Johnson's statement to Hanner at the gate; i.e., that she was an MDHC employee but had forgotten her identification badge that day and secured a temporary badge while working the first shift, which, in accordance with normal procedure, she turned in on completing her shift.

[11] The record does not disclose Hanner's pay status (salaried or hourly) nor whether he was paid for the time he spent carrying out employee relations' instructions.

3. Did MDHC violate the Act by virtue of Hanner's actions

Conflicts between the rights of a union to communicate with employees on their employer's property and their employer's right to limit union access to that property for that purpose has been the subject of voluminous litigation.

In cases concerning that conflict, the United States Supreme Court has ruled that it is the Board's function "to seek a proper accommodation between the two"[12] ". . . with as little destruction of one as is consistent with the maintenance of the other"[13] and, as the Board noted in a recent case, "the claim of a party to one or the other of these rights will have varying degrees of strength depending on the facts of the particular case."[14]

In this case, most of the over 2000 employees who pass through the gates at the midafternoon shift change passed by the UAW distributors before Hanner arrived. It is doubtful more than a few were prevented from receiving UAW literature during the few minutes Hanner conversed with the seven distributors.

MDHC had a legitimate interest in identifying the distributors to see if they were lawfully entitled to distribute literature on its property and, having ascertained (with one possible exception) they were, neither interfered with nor prevented the distribution and neither threatened to nor instituted any disciplinary action against the distributors.

On these facts, I find MDHC's right to police its property in furtherance of its lawful policies had minimal impact on any employee rights under Section 7 of the Act, and therefore MDHC did not violate the Act by Hanner's actions.[15]

Conclusions of Law

1. At all pertinent times, MDHC was an employer engaged in commerce in a business affecting commerce and UAW was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Richard Hanner was an agent of MDHC acting on its behalf within the meaning of Section 2 of the Act.

3. MDHC did not violate the Act by Hanner's 16 April inspection of the employee badges of the persons distributing UAW literature on MDHC property, his requesting their names, his writing their names on a scratch pad, his checking MDHC employee indexes to determine current employee status, and his preparation and submission of a report to higher management detailing the foregoing.

[12] *Central Hardware Co v. NLRB*, 407 U.S. 539, 543 (1972).

[13] *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

[14] *Fairmont Hotel*, 282 NLRB 139 (1986).

[15] *Uniontown Hospital Assn.*, 277 NLRB 1299, 1307 (1985); *Metal Industries*, 251 NLRB 1523, 1526 (1980); *Maywood, Inc.*, 251 NLRB 979, 986 (1980); *Federated Department Stores*, 241 NLRB 240, 242–243 (1979); *National Steel Corp.*, 238 NLRB 253, 255 (1978).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The complaint is dismissed.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Brinks, Incorporated of Florida *and* Local 555, International Union of Police & Protection Employees, I.S.O.P.G.U. Case 12–CA–10875

23 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 17 September 1986 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief[1] and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brinks, Incorporated of Florida, Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] In adopting the judge's conclusion that the Respondent has not shown that Local 555, I.S.O.P.G.U. is directly or indirectly affiliated with Teamsters Local 390, we note the absence of any objective evidence that the conduct of Local 555's officers was a ruse designed to disguise the de facto control by Local 390, as well as the absence of any evidence that Local 390 even attempted to influence Local 555's affairs. As the judge found, the circumstances of this case are distinguishable from Board cases in which the fatal taint of affiliation has been established. However, we emphasize that should evidence of Local 555's loss of independence and separate identity and purpose be forthcoming, the Respondent's obligation to bargain with it concerning its guards may again be called into question.

Eduardo Soto, Esq., for the General Counsel.

Jeffrey W. Pagano, Esq. (Seligman & Seligman), of New York, New York, and *Leo P. Rock Jr., Esq. (Gray, Harris & Robinson)*, of Orlando, Florida, for the Respondent.

Stephen Davis, Esq. (Davis & Davis), of New York, New York, for Local 555.

Thomas J. Pilacek, Esq. (Pilacek & Cohen), of Orlando, Florida, and *Peter Chiafalo*, of Miami, Florida, for Teamsters Local 390.[1]

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. Local 555, International Union of Police & Protection Employees, I.S.O.P.G.U. (Local 555 or the Petitioner) filed a petition in Case 12–RC–6236 on 15 March 1982 seeking to represent armored car guards employed by Brinks, Incorporated of Florida (the Respondent or the Company) at its Fort Lauderdale, Florida facility. The petition was withdrawn, and a similar petition was filed on 31 March 1982 in Case 12–RC–6244.

A first election was held on 3 June 1982, and the tally of ballots showed six votes for and seven against the Petitioner. The Petitioner filed objections which, after a hearing, were sustained by the Board on 3 December 1982. Thereafter, on 11 January 1983, a second election was held which resulted in eight votes cast for and three against the Petitioner, with no challenged ballots. On 14 January 1983 the Company filed objections that, inter alia, alleged that the Petitioner was "affiliated with Teamsters Local 390, which admits nonguards to membership," and, therefore, that certification would violate Section 9(b)(3) of the National Labor Relations Act (the Act).[2]

The Regional Director for Region 12 issued his Supplemental Decision on Objections, Order and Certification of Representative on 16 February 1983, in which he overruled all the Company's objections and certified Local 555 as the representative of the Company's guards at the Fort Lauderdale facility. With respect to the objections, the Regional Director noted the Company's evidence concerning membership of the Petitioner's officers in Teamsters Local 390, and rejected this evidence as a basis for disqualification of Local 555. He also noted the Company's position that one of the Petitioner's officers was a business partner of Teamsters Local 390, and one was a Teamsters Local 390 steward. This evidence was rejected because it was not shown to be newly discovered or previously unavailable. Finally, the Regional Director considered previously unavailable company evidence to the effect that Teamsters Local 390 President Lark told the Company at a bargaining session that he was prepared to act as an "interceding union" on behalf of Local 555 and negotiate wages for the Fort Lauderdale employees. The Regional Director also noted evidence from Locals 555 and 390 denying these contentions. He rejected the Company's evidence on the ground that, even if true, it did not establish that Local 555 had authorized Local 390 to act on its behalf.[3]

The Company thereafter filed a request for review, in which it repeated the foregoing arguments and requested a hearing.[4] On 2 August 1983 the Board denied the request for review, Member Dennis dissenting in part.[5]

[1] The Company served subpoenas on officers of Teamsters Local 390, which, although not a party to the proceeding, made a special appearance.

[2] G.C. Exh. 1(a), attachment O.

[3] G.C. Exh. 1(a), attachment R.

[4] G.C. Exh. 1(a), attachment S.

[5] G.C. Exh. 1(a), attachment T.

A complaint was issued on 14 September 1983, and alleged in essence that the Respondent had violated Section 8(a)(1) and (5) of the Act by failing to recognize and bargain with Local 555. On 21 September 1983 the Respondent filed its answer admitting in part and denying in part the allegations in the complaint, and also filed a motion to consolidate this case with another case, and to incorporate the record in Case 12–RC–6244. On 7 October 1983 the General Counsel filed a Motion for Summary Judgment. Thereafter, on 19 October 1983, the Board issued a Notice to Show Cause why the motions should not be granted, and the Respondent and the General Counsel filed responses.

The Board denied the General Counsel's Motion for Summary Judgment in its Decision and Order dated 27 August 1985.[6] It noted the Company's contention that the certification contravened Section 9(b)(3) of the Act because Local 555 was affiliated with Teamsters Local 390, an organization which admits to membership employees other than guards. The Board restated the established rule prohibiting relitigation of issues in an 8(a)(5) hearing that were or could have been litigated in a prior representation proceeding in the absence of newly discovered and previously unavailable evidence or special circumstances. In the instant case, the Board found such special circumstances to exist because Local 555's possible affiliation with an organization which admitted nonguards to membership would statutorily preclude its certification. The Board recited the Company's evidence in support of this contention as set forth above.

In denying the General Counsel's Motion for Summary Judgment, the Board remanded the proceeding to the Regional Director for an evidentiary hearing before an administrative law judge on Local 555's "alleged affiliation with an organization that admits nonguards to membership." In the Order itself the Board directed a hearing "on the Company's allegations that certification of Local 555 . . . contravenes Section 9(b)(3) of the Act."[7]

The Regional Director for Region 12 issued a notice of hearing, and hearings were thereafter held before me on 16 and 30 December 1985 and 3, 7, and 8 January, 3, 10, and 21 February, and 28 and 29 April 1986, either on the telephone or in Miami, Florida. Thereafter, the Company submitted a brief. On the entire record and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACTS

I. ALLEGED UNFAIR LABOR PRACTICES

A. *Procedural Rulings*

At the hearing on 30 December 1985, I ruled that the issues before me under the Board's remand Order were limited to evidence previously submitted by the Company as described above and as set forth in the Board's decision. Following a special appeal by the Company from this ruling, the Board reversed, and held that "all relevant evidence" should be received on the Company's allegation that the certification of the Union "contravenes Section 9(b)(3) of the Act."[8]

The Company caused subpoenas to be served on various officers of Local 555, the International Security Officers, Police and Guards Union (I.S.O.P.G.U.), and Teamsters Local 390. The latter filed a petition to quash the subpoena issued to its officer essentially on the ground that it sought information irrelevant to the proceeding. Local 555's counsel protested that the subpoenas were so far-reaching as to constitute an invasion of privacy.[9]

I denied the petition in part and granted it in part, ruling that the Company was entitled to some of the requested documents outright. As to others, I held that I would examine them in camera and receive into evidence those portions which were relevant to this proceeding. Following a special appeal by the Company from this ruling, the same was affirmed by the Board.[10] Local 555 agreed to abide by this procedure. Thereafter, I examined numerous documents submitted by Teamsters Local 390 and Local 555 pursuant to the subpoenas, turned over to the Company those documents to which it was entitled, and read into the record relevant portions of other documents.

B. *Teamsters Representation of Company Employees in South Florida*

The Company has facilities in West Palm Beach, Fort Lauderdale, and Miami, Florida. Teamsters Local 390 at relevant times represented company employees in the West Palm Beach and Miami facilities, but not in Fort Lauderdale. The parties stipulated that Teamsters Local 390 President Lark demanded recognition in the Fort Lauderdale facility in February 1982, and Lark testified that he requested recognition there in almost every bargaining session that he had with the Company. The record contains two such demands in writing, in 1975 and 1981.[11] The Company did not comply with these requests.

C. *The Origin of Local 555*

1. Kenneth Jordan

Kenneth Jordan was the principal organizer of Local 555. Jordan was a tractor-trailer driver at a Consolidated Freightways terminal in the West Palm Beach area. Consolidated's employees were represented by Teamsters Local 390. Jordan was a dues-paying member of Local 390 from 1976 to about 1984, when he stopped working because of an injury sustained in an accident.

At times when he was organizing Local 555, Jordan was also Local 390's steward at Consolidated Freightways. The Company contends that this fact tends

[6] 276 NLRB 1.

[7] Id. at 2. The Board found no merit in the Company's additional argument that it was entitled to a hearing on the alleged criminal background of certain Local 555 agents.

[8] G.C. Exh. 5.

[9] Local 555 also filed a petition to quash.

[10] G.C. Exh. 8.

[11] R. Exhs. 1, 4.

to establish impermissible affiliation between Local 555 and Local 390.

Jordan explained his steward's function as essentially the resolution of grievances. In this connection, he consulted both with his Teamsters superiors and with management. He tried to resolve grievances without "going to paper," i.e., becoming involved in formal proceedings. Jordan denied that he ever engaged in "negotiations" at Consolidated, by which, I infer, he meant contract negotiations. Jordan testified that he received no pay from the Teamsters as a steward. This testimony was corroborated by Teamsters Local 390 President Lark.

The Teamsters bylaws provide that stewards are appointed by the Teamsters local president, unless he considers an election to be advisable, and that the president may relieve a steward of his duties at any time. The steward's duties essentially are to examine dues books, report the presence of nonunion employees, give the secretary-treasurer addresses and telephone numbers, and settle grievances.[12] A steward's manual distributed by the International Brotherhood of Teamsters, of which Jordan had a copy, defines the steward as "that person at the worksite who handles the problems and concerns of the employees and the employees' union."[13] The manual describes the steward's role in resolving grievances, which includes maintenance of constructive relations between management and the union, acting as spokesman for the union, policing the agreement, attending union meetings, and promoting unionism.[14] Peter Chiafalo, a Teamsters steward for 25 years ending in 1980, testified that the Teamsters manual accurately defines the functions of a steward. He denied that stewards have picket line duties or attend executive board meetings (with occasional exceptions) because only "elected" officers attend such meetings.

The foregoing steward's duties appear in section 7 of article VII of Local 390's bylaws, entitled "Officers." Other officers consist of the president, vice president,[15] secretary-treasurer, recording secretary, trustees, warden, and conductors. Article VIII of the bylaws confers a wide range of managerial and policymaking functions on the executive board, whose members consist of the president, vice president, secretary-treasurer, recording secretary and three trustees. Wardens and assistant wardens may attend board meetings only on invitation of the president.[16] There is no provision for attendance of stewards at executive board meetings.

2. Organization of the Local

Jordan testified that his father, age 60, was an unarmed security guard in Florida. Jordan's father had trouble on his job, and relayed this to Jordan. The latter said that, as a Teamsters steward, this annoyed him.

Jordan visited New York in early 1981, and at that time saw Frank Mancini, secretary-treasurer of the I.S.O.P.G.U. Jordan discussed his father's problems with Mancini, who asked Jordan whether he would like to take on the responsibility of a local in Florida. Jordan said that he would think about it. He was "making good money and had nc headaches."

Mancini came down to Florida on a fishing trip in the spring of 1981, and invited Jordan and his son to go along. Mancini asked Jordan whether he had made up his mind, and Jordan answered affirmatively. Mancini then gave Jordan "instructional lessons" on Section 9(b)(3), which "kind of amazed" Jordan. There were further telephone conversations between the two on this subject, and Jordan requested a charter. He received one about June 1981.[17]

Jordan denied that he had any communication with Teamsters Local 390 about his capacity as a Local 555 representative, although he did have communication with the Teamsters as a Local 390 steward at Consolidated Freightways. Jordan also denied any communication with any other Teamsters local. Teamsters Local 390 President Lark denied that anybody from Local 555 ever discussed its organization with him. I credit Jordan's and Lark's consistent and unrebutted testimonies on this issue.

3. The first meeting and election of officers

Local 555's first meeting took place in June 1981 about a week after Jordan received the charter. According to Jordan, the purpose of the meeting was to establish a union of security guards in Florida. Seven persons were present at the first meeting: Jordan; his father, Charles Jordan; John Pluchino, Van Stafford; Marty Marciaro; Sam Cannigliario; and Steve Hochhauser. Of these, Stafford and Charles Jordan had worked as security guards. Although the record is not clear, the first meeting was apparently held either in an office or in Jordan's residence.

Kenneth Jordan was elected president and Marciaro vice president. Marciaro was an automobile mechanic in 1981 and a tractor-trailer driver in Miami in 1982. Marciaro's father, Vincent Marciaro, was then secretary-treasurer of Teamsters Local 390, but did not attend any Local 555 meetings. Marty Marciaro resigned from Local 555 about 1983.

John Pluchino was elected secretary-treasurer. He was a member of Teamsters Local 390, and worked as a tractor-trailer driver for one of the Ryder companies, where he was a Local 390 steward for about 6 months in 1982. In late 1983, Jordan asked Pluchino to resign from Local 555 because of alleged improprieties where he worked, and Pluchino complied. Jordan testified that he consulted with attorneys before asking Pluchino to resign, but did not consult with anybody else.

Steve Hochhauser was elected recording secretary. Like Jordan, Hochhauser was employed at Consolidated Freightways. Although the record is not specific, I infer that Hochhauser, like Jordan, worked as a truckdriver.

[12] R. Exh. 3, sSec. 7.
[13] R. Exh. 8, p. 2.
[14] Id. at 2, 3.
[15] Although there is no express provision for a vice president in art. VII, I infer that this is a missprint because that article skips from sec. 1 (president) to sec. 3 (secretary-treasurer), while art. VIII specifically refers to a vice president. R. Exh. 3.
[16] Art. VIII, sec. 1 (R. Exh. 3).
[17] The charter was proffered to the Company during the hearing.

As noted, Jordan left work because of an accident in 1984. About that time, according to the stipulation of the parties, Hochhauser became an "appointed"[18] Teamsters steward at Consolidated, a position which he continued to hold at the time of the hearing. On the basis of this stipulation, the Teamsters bylaws, and Chiafalo's testimony that stewards do not attend Local 390 executive board meetings because only elected officers do so, I infer that the other Local 390 stewards, including Jordan and Pluchino, were also appointed.

Charles Jordan, Cannigliario, and Stafford became trustees. Stafford was a member of Teamsters Local 390.

Jordan credidly testified that the individuals who were present "didn't realize why we could only accept guards [but] agreed to go on those guidelines of only guards."

Examination of Jordan by the Company's counsel reads in part as follows:

> Q. Isn't it true, Mr. Jordan, that with respect to your Union right now, that currently you have no members as such: is that true?
>
> A. Yes.

Jordan further testified on cross-examination that Local 555 was operating "temporarily" under the bylaws of the International, but that it could not adopt bylaws and a constitution "until [it had] members." Pursuant to the Company's subpoena issued to Jordan, the "constitution of the Independent Watchman's Association"[19] was turned over to the Company, and was utilized by it during cross-examination of Jordan, but was not introduced into evidence. Jordan agreed that he was a member of the Local 555 executive board according to the provisions of this document, that the constitution required him to be bonded, and that he was not bonded.

Local 555 records indicate that it held meetings beginning about July 1981.[20] Jordan testified that they were held monthly. Although the evidence is somewhat sparse, I conclude that some meetings were held in an office, which was moved at one time, and that some meetings were held in Jordan's residence after his injury about 1984.

D. *Teamsters Local 390 President Lark's Bargaining Session with the Company in January 1983*

1. Summary of the evidence

As set forth above, Local 555 won the second election with respect to the Fort Lauderdale employees on 11 January 1983. Teamsters Local 390 President Lark met with company officials in that month, ostensibly with respect to the wages of Miami and West Palm Beach employees.[21]

Company District Manager Norman Whitcomb testified that Lark opened the meeting with the statement that he was there to negotiate wages for Miami and Fort Lauderdale employees. Company official Tom Cannon corrected him, saying that the subject under discussion was the wages of Miami and West Palm Beach employees. At that point, according to Whitcomb, Lark said that he understood the Company had lost the election with Local 555 in Fort Lauderdale, and that he was there to represent the Fort Lauderdale employees. He asked the Company whether it was aware that the principals in Local 555 were members of Local 390. Lark also said it would be easier to deal with him on behalf of the Fort Lauderdale employees. The Company declined to do so.

The testimony of former company executive Tom Cannon, recorded in another proceeding, is substantially the same. Lark said that he was ready to negotiate for Miami and Fort Lauderdale, that the Company had lost the election in Fort Lauderdale, that the president of Local 555 was a member of the Teamsters, and that the Company would be "better off dealing with the Teamsters in the long run that the security union."[22]

The testimony of Local 390 President Lark is equivocal on the question of whether it was he or company official Cannon who first raised the issue of the victory of Local 555 in the 11 January election. And, Lark conceded, he may have said that some members of Local 555 were also members of Local 390. However, on the significant issue of whether Lark claimed to represent Local 555, the Local 390 president denied that he told the Company that he was there to negotiate on behalf of Local 555, and denied that the latter had ever authorized him to do so. He denied telling the Company that he was prepared to act as an "interceding union" for Local 555. Lark testified: "What the Company did was took a statement and turned it around to their advantage. I told the Company that if they didn't want to deal with 2 unions, I would negotiate a contract for the Fort Lauderdale [employees] on behalf of Local 390."

Local 555 President Jordan denied that he ever talked to Lark about the guard union.

2. Factual analysis

The evidence is insufficient to establish that Lark told the Company that Local 390 was prepared to act as an "interceding union" and to negotiate for the Fort Lauderdale employees on behalf of Local 555. Lark himself denied any assertion of such representative status and there is no testimony from the company witnesses explicity affirming that Lark asserted such status. Indeed, Company Official Cannon testified that Lark said the Company would be "better off dealing with the Teamsters." Local 555 never authorized Local 390 to act for it. What Lark did tell the Company is that Local 390

---

[18] Pursuant to the Company's request in its posthearing brief, the transcript is corrected by striking the word "acquainted" in L. 8 on p. 1050 and substituting in lieu thereof the word "appointed."

[19] Local 555's counsel represented that the Independent Watchman's Association was the former name of the current I.S.O.P.G.U., and that the name was changed in 1980.

[20] In describing Local 555 documents on the record, I originally mischaracterized a record of sign-in sheets (with no substantive discussion) as a record of meetings. Thereafter, I discovered the record of the meetings, with some substantive discussion of them, and made their contents available to the Company.

[21] The testimony of former company official Tom Cannon, recorded in another proceeding, fixes the date of the meeting as 19 January 1983 (R. Exh. 7).

[22] R. Exh. 7.

was prepared to represent the Fort Lauderdale employees if the Company did not want to deal with two unions, and that this would be easier for the Company.

E. *The Issue of Financial Assistance to Local 555*

Teamsters Local 390 President Lark denied that his local gave any gifts or moneys to any affiliated local in 1983 other than the International. He was then shown the Local 390 LM-2 report to the Department of Labor for 1983, signed by him, which shows $120 as a contribution, gift, or grant to an "affiliated labor organization."[23] Lark stated that he did not know the recipient of the $120, but said that it may have been for a party or retirement dinner run by another Teamsters local. He denied that the report meant that Local 390 was affiliated with any organization other than the International, and denied that either he or Local 390 gave any money to Local 555.

The 1982 or 1983 tax return of Local 555 President Jordan was submitted by Local 555 to the Company and Jordan was interrogated on the basis of information in this document. According to Jordan, he commingled some of his own funds with those of the Local because the latter did not have a bank account. He denied receiving money from any labor organization other than Local 555 and denied paying out money to any labor organization. The only money that he received, other than a return of expenses from Local 555, was his salary from his employer and an inheritance.

The evidence is insufficient to establish that Local 390 gave financial assistance to Local 555.

F. *Jordan's Relationship with Antonio Abaroa*

The parties stipulated that Antonio Abaroa was a Teamsters Local 390 steward at the company location in Miami from December 1981 through about August 1982, and that he resigned about that time. The Company contends that Local 555 President Jordan's relationship with Abaroa establishes a conflict of interests on the part of Local 555 sufficient to warrant revocation of the certification.

Jordan testified that he received a telephone call from Abaroa in early 1982 which he did not fully understand. The two then met in a restaurant, and thereafter had telephone conversations in which Abaroa explained his problems. He was having trouble with District Manager Whitcomb, and was in danger of losing his job. According to Jordan's hearsay report, Abaroa was apparently dissatisfied with his representation by Teamsters Local 390. He asked Jordan to have the Teamsters "thrown out" of the company location in Miami, and replaced by Local 555. Jordan replied that it was difficult to get a union decertified, and that Abaroa needed the support of a certain percentage of the employees. Abaroa spoke to the Miami employees, with no results indicated by the record.

Jordan said that he was "trying to be a Teamster steward," and that Abaroa's request put him in "an extremely bad spot." Jordan was both a Teamsters steward and the organizer of Local 555 in Fort Lauderdale, he explained. He had no interest in what was going on in Miami, and believed it to be "none of [his] business." "And without the cards . . . I had no authority to go near it. And I wouldn't go near it," Jordan testified.

Local 555 records indicate that Abaroa was present at a Local 555 meeting on 14 August 1983. Jordan testified that the principal subject of discussion at this meeting was a possible strike at the Company in Fort Lauderdale, and that a strike was authorized. Abaroa did not participate in this discussion, according to Jordan. He merely stopped in to say, "Hello," and was in another room. Jordan testified: "All that I was worried about is that I got a hundred percent vote out of Fort Lauderdale. And I [was at] a very heated meeting. That's all I was interested in. I wasn't involved with Miami, Tony Abaroa, or anybody else, West Palm Beach wasn't involved in it. All I was interested in was Fort Lauderdale."

II. LEGAL ANALYSIS AND CONCLUSIONS

A. *The Issues*

As set forth above, the Company's objection to the second election which gave rise to this proceeding was that Local 555 "is affiliated with Teamsters Local 390, which admits nonguards to membership," and that the certification is thereby precluded by the Act. The Board, however, has stated that the issue is whether the certification of Local 555 "contravenes section 9(b)(3) of the Act" (in any manner). That section, after authorizing the Board to decide units appropriate for collective bargaining, continues in relevant part as follows:

> *Provided*, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Although the Board has concluded that special circumstances here warrant departure from the rule prohibiting relitigation of issues which were or could have been raised in the prior representation hearing, this proceeding is still based on the Company's objection to the second election and its request for a hearing, and is conducted pursuant to the Board's Rules and Regulations governing such proceedings. It is well established that, in such hearings, the burden of showing grounds for setting aside an election is on the party seeking to do so.[24]

[23] R. Exh. 5.

[24] *Emerson Electric Co. v. NLRB*, 649 F.2d 589 (8th Cir. 1981), enfg. 247 NLRB 1365 (1980); *IDAB, Inc.*, 269 NLRB 554, 570 (1984), enfd. 770 F.2d 991 (11th Cir. 1985).

B. *The Issue of Whether Local 555 Admits Nonguards to Membership*

As noted above, the Company's objection to the certification is that Local 555 is affiliated with Local 390, which admits nonguards to membership. The Company has not claimed that the certification is invalid because Local 555 itself admits nonguards to membership. Yet this question is an issue in this proceeding because of the Baord's Order that relevant evidence be received on the Company's allegation that the certification "contravenes Section 9(b)(3) of the Act." It is obvious that that section would bar certification if Local 555 itself admits nonguards to membership.

It is equally obvious that, although two of the Local 555 officers had worked as guards (Stafford and Charles Jordan), the other officers had worked or were working as nonguards. The issue is whether they had been admitted to Local 555 "membership" as that term is used in Section 9(b)(3) of the National Labor Relations Act.

The Labor-Management Reporting and Disclosure Act of 1959 defines a "member" of a labor organization as "any person who has fulfilled the requirements for membership in such organization,"[25] and the National Labor Relations Act memorializes "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership."[26]

The problem in this case is that we do not know Local 555's rules for membership. Although a copy of the International constitution, presumably containing the membership rules, was delivered to the Company pursuant to its subpoena, the same was not introduced into evidence. Local 555 President Jordan repeatedly testified on cross-examination by the Company that Local 555 "had no members," and was operating temporarily under the International constitution. The Company presented no evidence to rebut Jordan's testimony. Indeed, that testimony was elicited by the Company.[27]

The fact that the newly certified labor organization has not acquired any members does not make it defunct or in any way invalidate the certification as long as it continues in existence and is willing and able to represent the employees. *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958). This function Local 555 is clearly willing and able to perform.

There is no evidence that the organizers of Local 555 intend to flout the proscriptions of Section 9(b)(3). On the contrary, they "agreed to go on the guidelines of only guards" as members of the organization. Although the record is unclear as to the date that they intend to resign their nonguard jobs, presumably this would be prior to formal acquisition of membership status. The Board has previously accepted such statement of intention to abide by the requirements of the statute as rebuttal of other evidence suggesting acceptance of nonguards into membership. *International Security Corp.*, 223 NLRB 1129 (1976).[28] The same inference is warranted here.

I conclude that the Respondent has not contended, nor has it sustained its burden of establishing, that Local 555 admits nonguards to membership.

C. *The Divided Loyalty Issue*

1. The rationale of the status

The Company argues that certification is barred because of divided loyalty of Local 555 officers. The legislative history of the divided loyalty rationale for enactment of Section 9(b)(3) has recently been set forth by the Court of Appeals for the Second Circuit in pertinent part as follows:

> The conference chose the language, it said, because it found persuasive the exposition by the lower court in *Jones & Laughlin*, 154 F.2d 932 (6th Cir.), that guards who belong to a union representing plant employees would experience conflicting loyalties in the event of a strike because their obligation to the employer and the community would be incompatible with their obligation to the striking union.
>
> . . . .
>
> The Board and reviewing courts have consistently found that although in enacting Section 9(b)(3) Congress may have focused primarily on the particular situation in *Jones & Laughlin*, the broad language which it chose to use encompasses not merely divided loyalties at a company plant, but the potential for divided loyalty that arises whenever a guard is called upon to enforce the rules of his employer against any fellow union member . . . .
>
> It has been held uniformly in the last thirty years . . . that armored car security personnel . . . are guards within the meaning of Section 9(b)(3). . . . The Potential for divided loyalty is present whether or not the same employer is involved . . . .
>
> . . . .
>
> We are convinced that, based on the language and legislative history of Section 9(b)(3), the Board was warranted in interpreting the section as proscribing Board direction to an employer to bargain with a mixed guard union despite prior voluntary recognition of that union by the employer. There is sufficient support for the Board's conclusion that in enacting the statute, Congress knowingly decreased the stability of bargaining relationships in order to further its objective of protecting employers from the potential for divided loyalty.

[25] Sec. 3(o) of the Labor-Management Reporting and Disclosure Act provides:

> "Member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

[26] Sec. 8(b)(1)(A) of the National Labor Relations Act. For discussion of the legislative history and interrelationship of these sections of the two statutes, see *Hughes v. Iron Workers Local 11*, 287 F.2d 810 (3d Cir. 1961), cert. denied 368 U.S. 829 (1961).

[27] See *Pinkerton's Detective Agency*, 124 NLRB 1076, 1078 (1959).

[28] See also *General Motors Corp.*, 80 NLRB 317, 318 (1948).

Teamsters Local 807 v. NLRB, 755 F.2d 5, 8–10, (2d Cir. 1985), denying review of 270 NLRB 787 (1984).

In the case of armored-car guards, as here, the Board has stated as follows:

> The danger of divided loyalty which Congress sought to eliminate may not be quite so far-reaching in the case of armored-car guards, but it is, nevertheless, present. A conflict of loyalty could arise, for example, if the guards should be called upon to deliver money or valuables to one of their customers whose employees were represented by the same union as represented the armored-car guards and the employees of the customer were on strike and picketing the premises of the customer.

Armored Motor Service Co., 106 NLRB 1139, 1140 (1953).[29]

2. The Company's application of the rationale

The Company appears to apply the foregoing rationale to this case in two different ways. The first argument reads as follows:

> S. Hochhauser and K. Jordan, as being both officers and members of Teamsters Local Union No. 390, as well as being officers of Local 555, would be caught in the classic conflict of loyalty dilemma should the interests of Teamsters Local Union No. 390 collide with the interests of Local 555. Thus, under such circumstances, since Shop Stewards served at the discretion of the President, they are bound to perform those acts and effectuate those Local Union goals as are directed by the President of Teamsters Local Union No. 390. The interests of Local 555 can be, and are at odds with the interests of Teamsters Local Union No. 390 due to the very existence of Section 9(b)(3). Since K. Jordan and S. Hochhauser were and/or are Shop Steward Officers of Teamsters Local Union No. 390, while at the same time being President and/or Secretary-Treasurer Officers of Local 555, the conflict exists.[30]

The Company points to the Abaroa incidents as examples of this conflict:

> There was Abaroa, requesting that a guard union organize the guard employees of Respondent's Miami location at a time when a petition . . . would have been timely. There was Abaroa, communicating to a Local 555 Officer, and Teamsters Local 390 Officer that Teamsters Local 390 was failing to fairly represent the employees.
>
> What side did K. Jordan pick in this graphic example of why the Board refuses to certify guard unions affiliated with non-guard unions? K. Jordan said it all when he testified: "I was trying to be a steward."
>
> In other words, K. Jordan disregarded the needs of employees who could have been represented by a guard union, and followed the policy of the Teamsters Local Union 390 President, who was negotiating the collective bargaining agreement with Respondent. This is not a surmised conflict, rather it is an example of those types of conflicts that Congress sought to eliminate by the passage of Section 9(b)(3).[31]

In other language the Company appears to link the divided loyalty rationale to the statutory prohibition against affiliation of a guard with a nonguard union:

> Accordingly, the essence of Section 9(b)(3) is the concept of divided loyalty. That is guards who belong to a union which is comprised of or controlled by non-guards would experience conflicting loyalties to their employer and their union which would be incompatible . . . . Divided loyalties are concerns not only present under the circumstances in different units of the same facility of an employer, but the potential for divided loyalties also arises whenever a guard is called upon to enforce the rules of an employer against any fellow union member of an affiliated union who is employed by a different employer.[32]

3. Discussion

As set forth above, the potential division of loyalty which Congress sought to eliminate was that which a guard might experience when caught in the dilemma of trying to enforce his employer's rules against his fellow union members, either in his employer's plant or, in the case of armored-car guards, during attempted deliveries at another employer's plant. In either event, the entity which Congress sought to protect was the guard's *employer* or another *employer*.

There is no evidence that Congress sought to protect a *labor organization* against potential division of loyalty when one of its members or officers is a member or officer of another *labor organization*. Yet, this is what the Company's argument amounts to. The Company contends that the Local 555 officers, some of whom were also Local 390 stewards, were caught in "the classic conflict of loyalty" between two unions.

It is obvious that there was a conflict between the two unions. It existed at the Company's Fort Lauderdale facility. It was there that Local 555 President Jordan and his colleagues sought and obtained certification despite the fact that Jordan was a Local 390 steward in another area (West Palm Beach) and other Local 555 officers had similar Local 390 affiliations. And it was at Fort Lauderdale that Local 390 President Lark unsuccesfully sought recognition of Local 390 from the Company despite the recent election result in favor of Local 555.

But this union competition is not the "conflict of loyalty" with which Congress was concerned in enactment of Section 9(b)(3). Neither Local 555 nor Local 390 is an

[29] See also *Teamsters Local 344 (Purolator Security)*, 228 NLRB 1379 (1977), enfd. 568 F.2d 12 (7th Cir. 1977); *Teamsters Local 639 (Dunbar Armored)*, 211 NLRB 587 (1974).

[30] R. Br. 27.

[31] Id. at 33–34.

[32] Id. at 30.

employer employing guards who are members of still another labor organization. Local 555 President Jordan did not experience any divided loyalty between duties (as a guard) owed to his employer (Consolidated Freightways) and those owed to Local 555 or Local 390—Jordan was a truckdriver not a guard.

Nor did Jordan owe any obligation to Abaroa or the Company's employees at its Miami facility, there represented by the Teamsters. Local 555 was not certified as the representative of the Company's Miami employees—it was certified for an entirely different unit, the employees in Fort Lauderdale. There is no evidence that Local 555 in any way wavered from this responsibility. The Company's argument that Local 555 was somehow obligated to rescue other units elsewhere in the country from representation by other labor organizations is without precedent or logic.

As indicated, the Company also argues that divided loyalty exists when a guard union is "controlled" by nonguards or when a guard union is called on to enforce rules against members of an "affiliated" union. This argument depends on the Company's contention that Local 555 is directly or indirectly affiliated with a nonguard union, an argument which I now consider.

D. *The Affiliation Issue*

1. The Company's position

The Company relies on the fact that Local 555 officers Jordan and Hochhauser (and, apparently, Pluchino), at times, were Local 390 stewards when they were also Local 555 officers, and that other Local 555 officers were Local 390 members.

The Company's principal authority is *Brinks, Inc.*, 274 NLRB 970 (1985). In that case a Teamsters local had previously been recognized by the employer as the representative of a unit of guard and nonguard employees. After the employer withdrew recognition from the Teamsters local, two employee guards composed bylaws using the Teamsters local's bylaws as a model. The first meeting of guard employees was held at the Teamsters local's office, at which two representatives of the International Brotherhood of Teamsters and the Teamsters local president were present. Immediately thereafter, at another meeting where only employee guards were present, the previously composed bylaws were adopted and officers were elected.

The guard who was the main force behind the guard union was also an elected trustee of the Teamsters local and participated actively in its policymaking board. He was also an active member of the Teamsters Joint Council, and was paid an officer's fee for each meeting of the board or the council which he attended. This individual was also a Teamsters local steward for the employer's guard employees. The Teamsters and guard union bylaws were similar in most respects, as were the authorization cards of the two unions. The guard union cards were based on the Teamsters cards.

On this evidence the Board found that the guard union was indirectly affiliated with the Teamsters local. It relied principally on the fact that the individual primarily responsible for the existence of the guard union was a "paid officer and policymaker" of the Teamsters local, and that the guard union's only meeting occurred at the Teamsters local's office immediately following a discussion attended by Teamsters officials. The Board concluded (id. at 971 fn. 4):

> [T]he close affiliation of the [guard union] and [the Teamsters local], including a common officer, had existed for at least 10 months at the time of the hearing. We are not convinced that the [guard union] is free to and does in fact set its own policies and courses of action.

The Company relies on other cases in which the Board reached similar conclusions. In *Armored Transport*, 269 NLRB 683 (1984), a Teamsters local had previously represented the unit, and the petition for the guard union was signed by two full-time representatives of the Teamsters who negotiated and administered collective-bargaining agreements. Further, the Teamsters representatives intended to keep their jobs with the Teamsters if they were certified as representatives of the guards. The Board found that the two petitioners were indirectly affiliated with the Teamsters based on their "employment as full-time Teamsters business agents." Id. at 684.

In *Stewart-Warner Corp*, 273 NLRB 1736 (1985), a Teamsters local filed and then withdrew a representation petition. Following this a series of conversations and meetings took place: (a) an unknown informant told the individual who ultimately became the guard union president that the Teamsters had "encountered a problem because security guards had to be organized by a union which represents only guards"; (b) a Teamsters business agent and organizer told the future guard union president that the Teamsters wanted him to "take off where they left off," and, after soliciting interest in a guard union, the future president asked the Teamsters business agent for advice on the next steps to take; (c) the future guard union president later met with Teamsters officers who were his longtime friends at a Teamsters office, and was given advice on securing a showing of interest, together with a prepared petition; (d) the future guard union president and others who had agreed to be officers met with the Teamsters business agent, who presented them with a showing-of-interest petition signed by some of the employer's guards; and (e) the Teamsters business agent gave the future guard union president a completed representation petition requiring only his signature and advice on what to do after filing. The Board ruled that these and other factors indicated a lack of freedom on the part of the guard union in formulating its own policies, and thus supported a finding of indirect affiliation.

In *Wackenhut Corp.*, 223 NLRB 1131 (1976), the guard union secretary-treasurer served as salaried assistant to the president of the nonguard union (District 2, MEBA), while the guard union president was himself employed by District 2. A contract negotiated by the guard union stated that it was "affiliated" with the nonguard union. District 2's secretary-treasurer and the secretary to its president were authorized to sign checks on behalf of the guard union, and District 2 promised financial assistance to the guard union if needed. District 2 also provided

free office space and business and secretarial services to the guard union. The Board found that the latter did not have "freedom and independence in formulating its own policies and deciding its own course of action" (id. at 1132).

In *Willcox Construction Co.*, 87 NLRB 371 (1949), a guard union affiliated with the International Longshoremen's Association (ILA) was dissolved, and, on the same day, the International Watchman's Association (IWA) was formed. Later, IWA granted a charter to a guard union local. Despite assertions of independence of the IWA and its local from any other labor organization, the IWA president was also president of an ILA affiliate, from whom he received expense allowances in addition to his IWA salary. Three IWA vice presidents served as officers of or delegates to ILA organizations, and participated in formulating IWA's policies. The Board found that these facts evidenced indirect affiliation between the IWA and the ILA.

2. Discussion

With the exception of the Local 390 stewardships of Jordan, Hochhauser, and Pluchino, the foregoing indicia of indirect affiliation are not present in this case. Thus, the evidence is insufficient to establish that Local 390 gave financial or organizational assistance to Local 555. The Board has concluded in another case that the absence of these two factors was sufficient to negate an inference of indirect affiliation despite the fact that the nonguard union allowed the guard union to use its meeting hall and had the same attorney. *Philadelphia College of Medicine*, 213 NLRB 259 fn. 3 (1974).[33]

In this case, unlike some of those cited by the Company, there was no prior representation of the unit in question by a nonguard union (Local 390), followed by loss of such representative status and subsequent activity suggesting an effort to circumvent Section 9(b)(3) with a captive guard union. Local 390 did not represent the Company's Fort Lauderdale guards, and there is no evidence that it started Local 555 to gain such representation indirectly. The genesis of Local 555 was Jordan's dissatisfaction with the working conditions of his father, a guard.

The first guard union meeting did not take place on nonguard union premises, and Local 390 did not provide office space or secretarial services to Local 555. Local 390 officers did not speak to Local 555 officers about the affairs of the latter union, nor attempt to bargain with the Company on its behalf. Local 555 was governed by the constitution of its own International, not bylaws modeled after those of the Teamsters.

The Company's case thus comes down to the Local 390 stewardships—Local 555 President Jordan at Consolidated Freightways until about 1984, Recording Secretary Hochhauser at that location thereafter, and Secretary-Treasurer Pluchino for about 6 months in 1982 at a Ryder company.

[33] See also *New York Hilton*, 193 NLRB 313 (1971), *Ingersoll-Rand Co.*, 119 NLRB 601 (1957).

The Company argues that these Local 555 officers were, as Local 390 stewards, also officers of Local 390[34] and that their status as "common officers" establishes direct or indirect affiliation of Local 555 with Local 390.

Because the duties of Local 390 stewards are defined by its bylaws in the section entitled "Officers," it may reasonably be inferred that Local 390 considers them to be officers. However, the issue is whether they are officers with stature sufficient to establish that their concomitant participation in the operation of Local 555 manifests its "affiliation" with Local 390. They are not members of the Local 390 executive board, which decides union policy, nor is there any evidence that they do in fact exert influence on policy decisions. Rather, their function is limited to the settlement of grievances at the plant level. As Local 390 stewards, they are appointed by the Local 390 president, serve at his pleasure, and are not compensated.

None of the "common officer" cases cited by the Respondent involves individuals so limited in responsibility and perquisites in their nonguard positions. All received monetary compensation in one form or another for their nonguard union duties[35] and, unlike the facts here, the records affirmatively show that their nonguard union jobs were continuing in nature. All had responsibilities greater than the stewards' resolution of grievances here, ranging from negotiation and administration of collective-bargaining agreements (in *Armored Transport*, supra) up to the presidency of a nonguard union affiliate (*Willcox Construction Co.*, supra).[36]

The Company argues that the Teamsters president's removal power over Local 390 stewards evidences Local 390 control over Local 555 because some of the Local 555 officers were Local 390 stewards. However, it is at least questionable that the unpaid Local 390 steward jobs were more important to Jordan and his colleagues than were the factors which motivated them to start a guard union. Further, there is no affirmative evidence of any such attempt at control of Local 555, and the Company's argument is not a substitute for evidence. What the Teamsters president's removal power does emphasize is the disparity between the status of Teamsters stewards and that of the other officers considered by the Board in the "common officer" cases.

Because of these differences, I cannot conclude that the stewardships of Jordan, Hochhauser, and Pluchino are, standing alone, sufficient to warrant a finding that Local 555 is indirectly affiliated with Local 390.

In the "common officer" cases, the Board did not base its findings of affiliation merely on the existence of such

[34] The Company cites *Electrical Workers IBEW Local 1392 v. NLRB*, 786 F.2d 733 (6th Cir. 1986), enfg. 273 NLRB 1540 (1985); and *Gould Corp.*, 237 NLRB 881 (1978), enf. denied 612 F.2d 728 (3d Cir. 1979). These cases deal generally with the issue of whether an employer may single out a steward for selective discipline because he participated in an unlawful work stoppage.

[35] I infer that the "full-time employment" of the Teamsters representatives in *Armored Transport*, supra, was not gratuitous.

[36] The fact that Local 555 Vice President Marciaro's father was a Local 390 officer is not significant because he did not attend any guard union meetings, and there is no evidence that he has any influence over its operations.

officers. Rather, as the ultimate fact in each case, such officers and other evidence showed that the guard union in question was not free to formulate its own policies and courses of action.

No such finding is warranted on the facts in this case. Although Jordan and Hochhauser may have been dutiful stewards for the Teamsters in the West Palm Beach area, they were, through Local 555, competitors of the Teamsters for representation of the Company's guards in the Fort Lauderdale facility. Local 555's independence from Local 390 is additionally demonstrated by the fact that Jordan, its president, compelled Pluchino, also a Local 390 steward, to resign from Local 555.

For these reasons I conclude that the Company has not sustained its burden of establishing that Local 555 was directly or indirectly affiliated with a nonguard union.[37]

In accordance with my findings above and on consideration of the entire record,[38] I make the following

CONCLUSIONS OF LAW

1. Brinks, Incorporated of Florida is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 555, International Union of Police & Protection Employees, I.S.O.P.G.U. is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time guards employed by the Respondent at its 1361 S.W. 20th Terrace, Fort Lauderdale, Florida office, including drivers, messengers, cashiers, assistant cashiers, and money room clerks; excluding all other employees and supervisors as defined in the Act, constitute a unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act.

4. On 16 February 1983 the above-named Union was certified as the exclusive bargaining representative of all employees in the aforesaid unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. The aforesaid certification does not contravene Section 9(b)(3) of the Act.

6. By refusing on or about 24 August 1983, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all its employees in the appropriate unit, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, Brinks, Incorporated of Florida, Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 555, International Union of Police & Protection Employees, I.S.O.P.G.U. as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time guards employed by the Respondent at its 1361 S.W. 20th Terrace, Fort Lauderdale, Florida office, including drivers, messengers, cashiers, assistant cashiers and money room clerks; excluding all other employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Fort Lauderdale, Florida, copies of the attached notice marked "Appendix."[40] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[37] Because of this conclusion, the second half of the Company's "divided loyalty" argument, described above, is also without merit.

[38] The record is corrected by inserting the word "may" between the words "You" and "very" in L. 13 on p. 832 of the transcript.

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[40] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER RECOMMENDED that the Company's objections in Case 12–RC–6244 are overruled in their entirety.

IT IS FURTHER RECOMMENDED that the prior Order denying the General Counsel's Motion for Summary Judgment[41] is vacated, and the same is granted as modified here.

IT IS FURTHER RECOMMENDED that to ensure the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, the initial period of certification shall be construed as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.

[41] *Brinks, Inc. of Florida*, 276 NLRB 1 (1985).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, wages, hours, and other terms and conditions of employment with Local 555, International Union of Police & Protection Employees, I.S.O.P.G.U. as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time guards employed by us at our 1361 S.W. 20th Terrace, Fort Lauderdale, Florida office, including drivers, messengers, cashiers, assistant cashiers and money room clerks; excluding all other employees and supervisors as defined in the Act.

BRINKS, INCORPORATED OF FLORIDA

Pittsburgh Metro Area Postal Workers Union a/w American Postal Workers Union, AFL–CIO (United States Postal Service) *and* Vicki Austin. Case 6–CB–6862(P)

24 April 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 23 September 1986 Administrative Law Judge Robert T. Wallace issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed exceptions, a supporting brief, and a brief in reply to the General Counsel's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pittsburgh Metro Area Postal Workers Union a/w American Postal Workers Union, AFL–CIO, Pittsburgh, Pennsylvania, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT attempt to punish anyone for not conforming with the Union's policy on noncooperation with USPS-sponsored drives for contribution to causes such as Combined Federal Campaign, the Blood Drive, and the Savings Bond Drive, and for filing charges against the Union with this Board.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

PITTSBURGH METRO AREA POSTAL WORKERS UNION A/W AMERICAN POSTAL WORKERS UNION, AFL–CIO

Thomas R. Davies, Esq., for the General Counsel.
Anton G. Hajjar, Esq. (O'Connell, Schwartz & Anderson), of Washington, D.C., for the Respondent.

DECISION

ROBERT T. WALLACE, Administrative Law Judge. On a charge filed by Vicky Austin, an individual, on 19 July 1985, a complaint was issued on 30 August 1985. Hearing was held on 14 January 1986.

The complaint,[1] as amended both prior to and at the hearing, alleges that the Pittsburgh Metro Area Postal Workers Union a/w American Postal Workers Union, AFL–CIO (an admitted labor organization within the meaning of Sec. 2(5) of the National Labor Relations Act) violated Section 8(b)(1)(A) and (b)(2) of the Act by failing fairly to represent and attempting to cause the United States Postal Service (USPS) unlawfully to discriminate against Austin and two other employees (Tina Taylor and Chuck Warren) at the Bulk Mail Center (BMC) in Warrendale, PA.

Based on the entire record, including by observation of the witnesses and after due consideration of briefs filed by the General Counsel and the Union, I make the following findings, conclusions, and recommended order.

Jurisdiction is established by Section 1209 of the Postal Reorganization Act, 39 USC 101 et seq. (1970).

---

[1] On 2 January 1987 the Respondent filed a motion to dismiss the General Counsel's exceptions on the basis of untimeliness and mootness. On 20 January 1987 the Board granted the Respondent's motion to withdraw that portion of its motion to dismiss that relates to untimeliness. The General Counsel filed an opposition to the Respondent's motion on 27 January 1987. The Board, having duly considered the matter, denies the Respondent's motion to dismiss the General Counsel's exceptions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent did not violate Sec. 8(b)(1)(A) and (2) of the Act by refusing to endorse personal convenience requests submitted by employee Austin, we necessarily also find that there is no violation with respect to the Respondent's refusal to endorse similar requests submitted by employees Taylor and Wurm.

We note that the judge twice inadvertently referred to Wurm as Warren and incorrectly cited *Steelworkers Local 1397 (U.S. Steel Corp.)*, 240 NLRB 848 (1979), as *United Steelworkers of America, Local 397.*

[1] This proceeding had been consolidated for hearing with a complaint against the United States Postal Service in Case 6–CA–18524(P). In the latter case, I granted the above-named Union's request to withdraw its charges, and the complaint therein was severed and subsequently dismissed.

For many years prior to April 1985,[2] the Union and USPS jointly sponsored a number of charitable and community-oriented activities at the BMC including solicitation of contributions for the Blood Bank, Savings Bond Drive, and for the Federal Government's counterpart of the United Way which is called the Combined Federal Campaign (CFC). As to the latter, USPS typically allowed training of solicitors and solicitation to occur on BMC premises during working hours. For its part the Union, among other things, assisted in distributing promotional literature and pledge cards, nominated volunteer rank and file employees to serve as solicitors, and endorsed their written requests for temporary changes in work schedules to permit attendance at training sessions and solicitation at propitous times. Union endorsement enabled USPS to approve the requests without having to pay time and one-half for work performed "out of schedule."[3] This is so because of an exception[4] in the applicable collective-bargaining agreement releasing USPS from its obligation to pay premium rates when variances are temporary and granted to accommodate written "personal convenience" requests of employees. Such requests, however, must bear the endorsement of a union representative before being presented for supervisory approval.

About 1 April, however, newly appointed management at the BMC began to implement a program perceived by the Union as impinging on long-established local practices and seniority rules in areas such as leave, overtime, and holiday scheduling;[5] and at a general meeting held on 20 April the membership of the Union unanimously approved a resolution opposing the "take-back" effort and adopting a policy of noncooperation with management in regard to the Blood Bank, Savings Bond Drive, CFC, and similar activities. The resolution also instructed union officers to provide and promote union-led counterpart programs; and this was done.

The dispute continued through 31 October. During that period an unprecedented number of seniority based grievances (over 2000) were filed. Management sharply limited the amount of on-duty time which stewards could spend investigating and processing grievances. The approval ratio of union endorsed employee personal convenience requests for changes in schedules to permit attendance at events such as family reunions, sporting meets, picnics, and union meetings went from about 9 out of 10 to about 1 out of 10.

On 6 June, Austin—a clerk and union member with relatively little (6 years) seniority—presented two personal convenience requests to Joseph Miller, the Union's chief grievance officer at the BMC. In one she sought Saturday off in lieu of Wednesday during workweek ending on 5 July in order to serve as a coordinator of the management sponsored Blood Drive. In the other she asked for the same change but during the following week so that she could attend a meeting of safety captains.[6] She avers that her goal was to aid worthwhile programs and at the same time also obtain a day off on weekends.

Both requests were promptly endorsed by Miller and approved by management. He states that requests to attend safety meetings were and continue to be routinely endorsed by the Union because cooperation in matters of plant safety benefits labor as well as management and is provided for in the collective-bargaining agreement.[7] Concerning the request to aid in the Blood Drive he explains that he signed because at the time he was unclear as to whether the Union's policy of noncooperation applied to endorsement of schedule changes sought for that purpose.

On 10 July Austin presented two more requests to Miller. Together the requests, if endorsed by the Union and subsequently approved by management, would have given her weekends off in place of her normal layoff days (Tuesday and Wednesday) during a 4-week period extending from 9 August through 6 September. Her purpose, as stated on the request form, was to receive training and to serve as a canvasser for the management-sponsored CFC.

This time Miller sought instructions from the president of the Union before taking any action on the requests. The latter told him that the policy did indeed apply to requests of the type submitted by Austin. Miller so advised Austin and declined to endorse her requests. His failure to do so constitutes the violation of a duty of fair representation alleged in the complaint.

I find no violation.

In exercising its right under the bargaining agreement not to waive (by endorsement) premium pay for out-of-schedule work that bargaining unit members wish to perform for "personal convenience," the Union's duty of fair representation requires that it not act arbitrarily, or in a discriminatory manner, or with bad faith.[8]

Austin's request to participate in the management-sponsored CFC ran counter to the Union's policy of noncooperation in drives of that type. That policy, unlike the situation in a case involving postal workers in St. Louis, Missouri,[9] was not an ad hoc creation of a

[2] Unless otherwise indicated all dates hereinafter cited are in 1985.

[3] Each permanent position at the BMC consists of a job description together with a schedule of working times and days off (layoff days) applicable thereto. Positions are awarded on the basis of bids with seniority being the determinative factor. Temporary details to same-level jobs also are awarded on the basis of seniority. Positions entailing weekends off are preferred and so are held by employees with the most seniority.

[4] The exception derives from an arbitrator's interpretation (the so-called Gamser Award, issued in 1975–G.C. Exh. 14) now reflected in sec. 233.23 of a time and attendance manual published by USPS (G.C. Exh. 3) which is made part of the agreement (G.C. Exh. 2) by sec. 19 thereof.

[5] The complaint does not allege, nor does the Union contend here, that management breached its duty to bargain in making the changes.

[6] Safety captains' meetings are held only on weekdays; and as to the Blood Drive and other campaigns for voluntary contributions, Austin explains that because of differing mailflow and manning situations weekends vs. weekdays, the latter are more favorable for solicitations. In her words: "It made the job easier and took less man-hours [on weekdays]."

[7] On 11 July Austin sought and received Miller's endorsement on another request to attend a safety meeting by substituting Saturday for Wednesday as her day off, this time during the workweek ending on 9 August.

[8] *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Miranda Fuel Co.*, 140 NLRB 181 (1962).

[9] *Postal Service*, 240 NLRB 1198 (1979), enfd. in relevant part 618 F.2d 1249 (8th Cir. 1980).

single union official. Rather, the policy was duly and unanimously adopted at a general meeting of union members; and despite unfortunate potential adverse affect on worthwhile charitable endeavors, the policy itself, as well as its application to the Union's contractual right to waive or not to waive premium pay,[10] have a legitimate union-related object, i.e., to leverage management into abating or rescinding actions perceived as unfair to labor. Accordingly, I find no arbitrary action or abuse of discretion. Further, there is no evidence that in applying the policy the Union discriminated against Austin[11] or otherwise acted in bad faith.[12]

As noted, Austin filed her charge with the Board on 19 July. On 16 August she filled in for the general clerk in the superintendent's office. Temporary assignments to that job normally went to the most senior qualified clerk on a list of volunteers. But in this instance management did not follow that procedure by first offering the assignment to all employees on the list having greater seniority than Austin. One of those (Ethel Daily) asked Miller to investigate and grieve the matter on her behalf; and he did so. Arlyn Parrish, another clerk with more seniority than Austin, claims that Miller approached her on 16 August and asked whether she had been offered the job. After she responded: "Yes," he urged her to bump Austin because "we don't want her in there." She declined. Austin continued to work in the superintendent's office throughout the day. The grievance was settled in Daily's favor when, in a letter to Miller dated 10 October (R. Exh. 5), USPS acknowledged its mistake and agreed to adhere to the practice of choosing temporary clerks from the list on the basis of seniority.

Although I credit Parrish's testimony and find that Miller harbored a personal reason for not wanting Austin "in there" (i.e., he resented her dissident attitude and the fact that she had filed a charge against the Union), I see no reason to conclude that bias played any significant role in his initiation and conduct of the investigation and subsequent filing of the grievance. Miller was acting in his capacity as steward on request of a clerk (Daily) having more seniority than Austin and he had reason to believe that a grievable issue arose from failure to offer her the assignment to the superintendent's office. However, he did not confine his efforts solely to investigating the grievance. He went further and sought to persuade Parrish to change her mind and exercise her seniority to oust Austin from the temporary office job, and I find that in doing so he attempted unlawfully to retaliate against Austin for cooperating with management contrary to union policy[13] and for filing charges under the Act.[14]

[10] The General Counsel contends that the Union erred in not announcing that the policy of noncooperation extended to endorsements of personal convenience requests. I find no fault. The policy clearly contemplated application to actions which involve exercise of discretionary power by the Union.

[11] Indeed, the Union is shown to have declined to endorse subsequently submitted requests for schedule changes to permit Taylor to obtain CFC training, and Warren to participate in CPR classes held under management auspices.

[12] Compare *American Postal Workers*, 250 NLRB 761 (1980), in which endorsement of a requested schedule change to permit an employee to attend Naval Reserve meetings was found to have been unlawfully conditioned on his joining the Union.

CONCLUSIONS OF LAW

1. Respondent Union violated Section 8(b)(1)(A) of the Act by attempting to punish a member of the bargaining unit for not conforming with union policy of noncooperation with USPS-sponsored campaigns for voluntary contributions and for filing charges against the Union with the Board.

2. It is not shown to have violated the Act in any other respect.

THE REMEDY

Austin incurred no financial detriment as a result of the unlawful conduct of the Union found above. Accordingly, an appropriate remedy here is a cease-and-desist order as well as a requirement for notice posting. There is no need for a special "visitatorial" clause for discovery purposes as requested in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Pittsburgh Metro Area Postal Workers Union a/w American Postal Workers Union, AFL-CIO, Pittsburgh, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Attempting to retaliate against employees for not conforming with union policy of noncooperation in USPS-sponsored drives for contributions to causes such as the Combined Federal Campaign, the Blood Drive, and the Savings Bond Drive, and for filing charges against the Union under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its headquarters and at the USPS Pittsburgh Bulk Mail Center in Warrendale, Pennsylvania, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent

[13] See *Steelworkers Local 397*, 240 NLRB 848, 849 (1979); *Operating Engineers Local 139 (AGC of Wisconsin)*, 273 NLRB 992 (1984).

[14] See *Oil Workers Local 2-947 (Cotter Corp.)*, 270 NLRB 1311 (1984); *Teamsters Local 79 (Carl Subler Trucking)*, 269 NLRB 1132 (1984).

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

Marico Enterprises, Inc. *and* Local 1-J, Service Employees International Union, AFL-CIO. Cases 2-CA-21619 and 2-CA-21703

24 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 23 December 1986 Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Because we agree with the judge and adopt his finding that the discharge of Pauyo was not unlawful, we find it unnecessary to pass on the judge's alternative finding that even if the discharge were found to have been unlawful, Pauyo's altercation with employee Mitchell disqualified Pauyo from reinstatement.

Chairman Dotson agrees with the judge's alternative finding.

James Wasserman, Esq., for the General Counsel
Harry N. Turk, Esq. (Epstein, Becker, Borsody & Green, P.C.), for the Respondent.
Roger H. Madon, Esq. (Sturm & Perl), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was tried before me in New York, New York, on 29 and 30 September 1986.[1] The order consolidating cases, consolidated complaint, and notice of hearing issued on 25 July, and was based on charges filed on 14 April and 4 June and amended charges filed on 16 April and 2 July. The consolidated complaint alleges that Marico Enterprises, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act by discharging employee Joseph Pauyo because he joined and assisted Local 1-J, Service Employees International Union, AFL-CIO (the Union), and engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The consolidated complaint further alleges that certain of Respondent's employees concertedly ceased work and went on strike commencing 2 April in protest of the above-mentioned unfair labor practice and although the employees unconditionally offered to return to work on 21 May (actually 27 May), Respondent refused, and continues to refuse, to reemploy employees, also in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

There being no dispute, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

In about mid-March, the Union began organizing Respondent's production and maintenance employees, most of whom are Haitian and speak Creole. On 27 March the Union filed a petition with the Board to represent Respondent's production and maintenance employees; the parties stipulated that Respondent received this petition on Monday, 31 March. The events in question occurred on Wednesday, 2 April. On that day, shortly before 3 p.m. an announcement was made over the plant's loudspeaker system informing the employees that representatives of the U.S. Immigration and Naturalization Service (Immigration) had arrived at the facility. That announcement triggered a confrontation between Pauyo and Jules Cohen, Respondent's president, which resulted in Pauyo's discharge within the hour. The General Counsel alleges that this discharge resulted from Pauyo's union and protected concerted activities on behalf of the other employees, although Respondent contends that Pauyo was discharged solely because of the dangerous condition he was creating at the plant.

Shortly before 3 p.m. that day, an announcement was made over the loudspeaker stating: "Wedler, your mother is on the phone," or some similar words, which was a signal to alert the employees that Immigration was at the facility. At that time, employees began leaving the plant through all available means. Pauyo testified that his supervisor, Wilfred Guillome, told the employees that Immigration was at the facility, and anyone who did not have their green card should follow one of the employees who would take them out of the plant. About four employees from his department left. Shortly thereafter, after most of the employees returned, two fellow employees spoke to Pauyo in Creole and told him that they felt that Cohen had called Immigration and they wanted him to speak to Cohen because he speaks English well. At that point Pauyo walked to the shipping department;

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1986.

Cohen was already there, not far from where his office is.

Cohen testified that shortly before 3 p.m. that day, he was "advised" that Immigration was at the plant (although he never saw them) and when he walked out of his office he saw employees running out of the door. Martin Fishman, Respondent's controller, testified that the two Immigration agents came into the first entrance of the building; he noticed them and spoke to them before they entered the plant itself. They said that they were from Immigration, and

> said they were not here at this time to do anything . . . they would like to come back at another time and they would like to have a list of our payroll and at that time anyone they would ask, they would want to see if they had a green card or not.
>
> While we were talking, they noticed a lot of people were leaving the building. One of them casually, jokingly remarked, is it a coffeebreak, I have never seen people running so fast in all my life, and I said no again he assured me that they were not here to do anything at that time. Again they wanted a list of payroll at a future date. He would not give me a date, it would be somewhere in the near future. At that time they would ask people for green cards. If people did not have a green card, they would not stop anyone from working, they would not arrest anyone or take anyone out of the building. The only thing they would do, they would ask people to make appointments to go downtown to fill out necessary papers and if need be, to go before a hearing, and that's the only thing, they asked if we would voluntarily comply with that, which I told them we would.

Fishman asked them why they were at the plant and they said that they could not tell him, but that they routinely do investigations in Rockland County because of the large number of Haitians there. They left without entering the plant.

Pauyo testified that on the prior day, for the first time since he had been employed by Respondent (December 1985), the supervisors were asking employees for their green cards and, those that did not have it, were told to bring it in the following day. Cohen testified that there was a "green card check" on 1 April; his son, Howard Cohen was in charge of it. "We do that occasionally" to keep their employment records timely. Howard Cohen did not testify on this subject. Bruce Tucker, Respondent's distribution manager, testified that Howard Cohen was responsible for green-card checks at the facility; although he is not directly involved in them, they take place every 4 or 5 months.

There was testimony from four witnesses (Pauyo, Cohen, Tucker, and Supervisor Pauline Garbelotto) regarding the subsequent confrontation between Pauyo and Cohen. Pauyo testified that he approached Cohen in a large area adjacent to the shipping and receiving department; at the time, approximately 45 employees were milling about nearby. Pauyo told Cohen that he would like to talk to him; Cohen asked what he wanted to talk about and Pauyo said that some of the employees felt that Cohen had something to do with Immigration's presence at the plant. Cohen asked, "You want to have a discussion?" and when Pauyo said that he did, Cohen turned to the large group of employees standing nearby and asked, "Do you want him to be your spokesperson? Do you want him to talk for you?" The employees who understood English answered, "yes" immediately; the others, after having Cohen's question translated, answered "yes" in French and Creole. Cohen then said, "Let's have a discussion right here and now."

Pauyo said that the employees were wondering about the coincidence of Respondent being notified on Monday of the Union's petition, Tuesday the supervisors were checking green cards and telling those employees without one to bring it to work the following day, and on Wednesday the Immigration agents appeared at the plant. "I told him that seemed too much like a coincidence, and the people think that you had something to do with it." Cohen said that he had nothing to do with Immigration's presence at the plant that day; he had orders to get out, and their presence messed up his production. Pauyo said that the employees were unhappy about other things as well; Cohen asked what they could be unhappy about, "They got a job and they're getting paid." Pauyo said that the employees were fearful that if they speak to him about a grievance they could be fired and that if they want a raise they have to speak to a supervisor about it; on occasion, instead of a raise, the employees' pay has been decreased. He said that the employees need somebody to represent them, someone who could speak for them and get things accomplished. Cohen then accused Pauyo of being one of the employees who brought the Union in; Pauyo denied it and repeated that the employees needed somebody to speak for them. Cohen then said, "You must be one of the ones who started this whole shit about the Union." Pauyo said that he did not say anything about a union, he was talking about "somebody" representing the employees, but "maybe a union may be the best thing for them." Cohen then made an obscence gesture with his middle finger in front of Pauyo's face. Pauyo told him it was "very childish" to make such a gesture and he could see why the employees would want a union and he made the same gesture to Cohen. Cohen then said: "I want you out of my place, get out of here, you're fired." Pauyo said that he had done nothing wrong and was not going any place; they could punch his timecard, but he was not leaving the plant. Cohen then told the employees to either return to work or go home. Pauyo returned to his department and saw Cohen walk to where the timecards were located.

Shortly thereafter some fellow employees told Pauyo that Cohen took his timecard. Pauyo went to the office and saw that his card was not with the others; he approached Cohen and asked him, "Why did you fire me, why did you punch out my card." Cohen said that he did it because Pauyo was creating a riot and disturbance. Pauyo said, "You asked for a discussion and I gave you a discussion and now you want to fire me" Cohen called Pauyo "a wise ass" who talked about things that did not

need to be talked about and "there's not going to be a union in my place." He said, "I want you out." Pauyo said that he would not leave; Cohen could call the police if he wished to do so. Some fellow employees took him by the arm and walked out of the plant with him.

Cohen testified that prior to Pauyo stepping forward and speaking to him, approximately 45 employees were standing around near the shipping area of the plant; he asked them to leave and return the following morning. Someone asked if he had called Immigration; he said that he did not.

> Well, Mr. Pauyo had started chiming in [at] that point, and he all of a sudden became their spokesman and he went to the opening in front of these people and started going into a harangue about how we had been treating the people like slaves.

Pauyo said that Cohen was a tyrant who was taking advantage of the employees because they were poor, and accused Cohen of calling Immigration, which Cohen denied. "I told him that I am very surprised that you are telling me you want a union representative, I always had an open door, I always help the people out." He also said that his wage rate is comparable to union rates and to answer allegations of wage cuts, when new and faster machinery is installed, he is entitled to cut the piece-rate for that machine. Pauyo kept repeating the same arguments and, at one point, "the argument started to get heated." Pauyo then moved his body back and forth as though he were engaging in sexual intercourse. The employees began laughing and Pauyo "got louder and louder, and carried on more and more and the people became more and more excited with all of this."

> It was as if he was on stage and he was having a ball for himself. I was trying to get the people out of there because of the fact that there could be some damage, people are liable to get hurt congregating like that. They are in an area where it's a shipping area, there are rolls of goods around, there's boxes around, there's things around there and they weren't standing in any clear aisle, they were standing wherever they could stand, and I felt that it was really an inflammatory situation and I wanted the people to go home and come back tomorrow morning.

Cohen testified that he had two safety-related fears, one for the employees and one for himself. A large number of people close together, getting agitated could fall over each other or cartons if they tried to leave the area at the same time. "Who knew what was going to happen? . . . My valiant guess at that time, for whatever it's worth, was that there could be a problem as far as people getting hurt." As to the perceived danger to himself, he testified that with the recent overthrow of Duvalier in Haiti, "the people had a very strong nationalistic feeling and it looked terrifying enough . . . I really didn't know what could happen, but it seemed to my educated guess that there was a potential there." Cohen then asked Pauyo to please leave and return the following morning; Pauyo said that he would not leave unless Cohen punched his card out. Cohen told him to stop being foolish and to leave. Pauyo repeated four or five times that he would not leave until Cohen punched him out. "At that point I had enough." He instructed his personnel director to punch his card out and he terminated Pauyo. "He asked to be fired five different times, and the fifth time as the situation was getting hotter and hotter, that's when I did it." Pauyo still refused to leave, but shortly thereafter, some fellow employees lead him out of the plant. The other employees left calmly.

Cohen testified that during this confrontation with Pauyo he never made an obscene gesture at Pauyo; "to accent a point" during a very heated conversation, "from Mr. Pauyo's point," he pointed his second finger toward Pauyo. "I may have said shit. What kind of bullshit is this or something like that." Other than that, he did not raise his voice and used no obscenity and he was "very calm and collected" during this discussion; he was not getting upset.

Tucker testified that he was working on the dock about 40 feet away from the incident when he heard "loud noises"—"people screaming." He walked toward the area where the noise was coming from and saw Pauyo standing in front of Cohen with about 40 to 50 employees surrounding them. Pauyo was "screaming loudly" that Cohen had called Immigration and had cut Pauyo's piece-rate wage on his machine. "Mr. Cohen was trying to calm him down"; he told Pauyo that he did not call Immigration as it would not be in his interest to do so. Pauyo continued to scream at Cohen with his arms flailing; he said that Cohen was an oppressor who was taking advantage of his people. Pauyo then made a sexual gesture of back and forth movements of his hips and made an obscene gesture with his middle finger to Cohen; Cohen returned the gesture. After Pauyo made the gesture with his hips the employees began laughing. They became "very agitated, egging Joe on," although they were speaking Creole, Tucker did not know what they were saying. Cohen then asked the crowd "if this is the type of person that they would like representing them, representing the people as a union member." Cohen then asked Pauyo to leave because everyone was upset; Pauyo said that he would not leave unless Cohen fired him. Cohen again asked him to leave so that everyone would calm down. "Joe still acting as wild as during the whole time said that he would not leave, that Mr. Cohen would have to fire him before he would leave." Cohen asked him, "Do you want me to fire you?" Pauyo said, "yes," and Cohen said, "Okay, you're fired." Tucker did not observe anything subsequent to that.

Garbelotto testified that while she was working she heard the code words for Immigration over the plant's loudspeaker system and observed employees running out of the plant. She then saw Pauyo approach Cohen as he was coming out of his office, and yell at him, "You called Immigration because you do not want the union in the shop." Cohen attempted to answer, but Pauyo "never gave Mr. Cohen a chance to explain. He just kept yelling and making gestures." Pauyo then yelled that Cohen was cutting their wages and they needed more money "and Mr. Cohen was just standing there, and

every time he would try to talk to him, he would just yell right back at him." Pauyo made an obscene gesture to Cohen with his middle finger; she did not observe Cohen return the gesture. She never heard Pauyo ask Cohen to fire him, but "he just said something what are you going to do, fire me?" She did not hear Cohen tell Pauyo that he was fired. During this period, "Mr. Cohen was very calm and talking very nonchalant to him." About 15 to 20 employees were standing in the area. "As he was talking and yelling to Mr. Cohen they were all clapping and telling him, go ahead give it to him, give it to him . . . I mean, it was such a thing, I never saw this in all my life in factories that I've worked, Never."

About 3:30 p.m. as Pauyo was leaving the plant a large number of employees followed him out of the plant; at the time, employees told him, "We're not putting up with this and if he is going to fire you and he's going to do things this way, we all leaving." He testified that "just about everybody that was in the crowd walked out"; only the supervisors remained. Someone called the Union and made an appointment to meet with a union representative on the following morning. On the morning of 3 April, about 7 a.m., Sonia Corujo, organizer for the Union, arrived at her office; about 15 of Respondent's employees were already there. Because the employees spoke Creole, they chose one of their group to act as an interpreter; he told Corujo of the events of the prior day and that they walked out because Respondent fired Pauyo. Another employee complained about Respondent's lowering the employee's piecework rate while another employee complained that Respondent did not respect them. Corujo then went to the plant with these employees; when they arrived she saw a large number of employees in the parking lot; she spoke to a number of them; "the basic thing that they were yelling about. They had fired Joe because Joe spoke for us." She then passed out picket signs to the employees; the picket signs said union recognition.

On 27 May, the following letters, on union stationery individually signed by 35 striking individuals, were delivered by the Union to Respondent, "The undersigned requests to return to work unconditionally and immediately." By letter dated 28 May, Respondent, by Cohen, wrote to these individuals:

> We received your letter on May 27, 1986 in which you requested to return to work unconditionally and immediately.
>
> This is to advise you that your job has been filled by a permanent replacement and that there is no other job opening at the present time. However, your name will be place [sic] on a preferential hiring list and you will be offered employment when there is a job opening which you are qualified to perform.

Carlos Mitchell was hired by Respondent about 7 April as a strike replacement; about 10 April there was an altercation between him and Pauyo that Respondent alleges disqualifies Pauyo for reinstatement even if his discharge violates Section 8(a)(1) and (3) of the Act.[2] Mitchell (whose employment with Respondent ceased in July) testified that he was employed on the dock at the plant and Pauyo yelled from the picket line that he would get him if he started working for the Respondent. On 19 April, Mitchell went on his 10 a.m. break; as he reached the end of Respondent's parking lot and was about to cross the road, to get to a deli Pauyo drove up in his car and said, "Carlos, I'm going to kick your ass later." Mitchell crossed the road and as he got to the store, Pauyo came behind him and pushed him from behind; Mitchell turned around and grabbed Pauyo with his arms around his waist. At that point, a number of other people joined Pauyo in hitting and kicking Mitchell. Shortly thereafter, a van carrying employees arrived, followed shortly thereafter by Howard Cohen. At that time the hitting ceased. Mitchell testified that he hurt his wrist, suffered cuts and bruises, and was treated at a local medical center. Howard Cohen testified that on the day in question he observed Mitchell cross the picket line and saw Pauyo lean out of the window of his car and say something to Mitchell. Because it was about 100 feet from the dock to the street he could not hear what was said. He then observed Pauyo park his car, get out, run across the street, and push Mitchell from behind. Mitchell grabbed Pauyo, who began to punch him. A number of other strikers also began to punch Mitchell, while Corujo attempted to stop them. Two dock employees then drove across the street in one of Respondent's vans and broke up the fight. Howard Cohen then ran across the street and Mitchell "was a little shaken, but he was pretty good. He was cursing, he was very angry."

Pauyo testified that on the day in question, as he was driving his car into Respondent's parking lot, he saw Mitchell getting ready to cross the street to go to the deli across the street from the plant. He told Mitchell that what he was doing was wrong; by working, he was taking money out of the strikers' pockets. Mitchell used some obscenities and made an obscene gesture to Pauyo. Pauyo then parked his car and crossed the street to where Mitchell was standing and told Mitchell that what he was doing was wrong; Mitchell said that he had to make a living too. Pauyo said that he had informed Mitchell of the situation before he began working there and Mitchell said that he did not care. Pauyo said, "Why are you coming off like that? You want to fight me or something?" Mitchell said that he did, and when Pauyo began to remove his jacket, Mitchell took his sweater off and swung at Pauyo while his jacket was halfway down. Pauyo then grabbed Mitchell around the waist (from the front) and pushed him onto the trunk of a car where he held him while Mitchell kept punching him or attempting to punch him. Shortly thereafter, some of the pickets and Howard Cohen came and broke up the altercation.

As stated, supra, the 35 employees unconditionally applied to return to work on 27 May; on the following day,

[2] Shortly prior to the commencement of the instant hearing, Region 2 and the Union entered into a unilateral settlement agreement of a complaint that alleged, inter alia, that "Respondent's pickets, including striking employee Joseph Pauyo, physically assaulted an employee."

Respondent informed them that their jobs had been filled by permanent replacements. Respondent defends that it failed to reinstate these employees because its business had substantially decreased shortly prior to this time.

Respondent's payroll states that for the workweek ending 4 April, it employed 113 unit employees. For the workweek ending 11 April, 45 employees were employed. For the workweek ending 30 May, 88 unit employees were employed by Respondent. For the workweek ending 19 September, Respondent employed 48 unit employees. Received into evidence were Statements of Income of Respondent for the 6-month period ending 31 July 1985 and for the year ending 31 January; these statements were prepared by an accounting firm with the following caveat:

> All information included in these financial statements is the representation of the management of Marico Enterprises, Inc. A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

The sales for the above 6-month period were approximately $6,800,000, with income before taxes and officers salary of $372,000; the same figures for the year were $13,800,000 and $463,000. Also received into evidence were monthly cumulative statements of income for May, June, and July and monthly sales of Respondent from February through July; these were prepared by Respondent's controller Martin Fishman, from Respondent's ledgers and journals. The sales and preofficer salary loss for the 4 months through 31 May were $3,414,000 and $230,000; through 30 June, $3,840,000 and $344,000, and through 31 July, $4,200,000 and $510,000 Sales by month (as compiled by Fishman) were:

February	$963,000
March	$1,100,000
April	$660,000
May	$679,000
June	$425,000
July	$388,000

Fishman testified that prior to April, Respondent's monthly sales figures ranged from $900,000 to $1,200,000.

Howard Cohen testified that after the strike commenced, Respondent placed an advertisement in the newspaper for employees and he immediately began interviewing and hiring employees. When he hired people, he informed them that he was hiring them for a permanent position with Respondent. The last employee was hired about the end of May. He also testified that because business was "horrendously slow" (unlike anything Respondent had previously experienced) Respondent laid off 4 to 6 employees in mid-May and 8 to 10 employees in July.

Prior to the commencement of the strike, Respondent manufactured sheets and comforters (for waterbeds) at its Nanuet facility and mattress pads at its Muncey facility until about May. Since about 1 September, Respondent has sublet the Muncey facility to Benny's Fashions, which makes all the mattress pads and about 5 percent of the sheets for Respondent at this facility. Prior to the strike, Benny's Fashions only made sheets for Respondent.

III. DISCUSSION AND ANALYSIS

The substantial conflicts between the witnesses' testimony regarding the 2 April confrontation between Pauyo and Cohen necessitates credibility findings in that regard. Careful observation of the witnesses, and readings of the transcript, convince me that both Pauyo and Cohen were less than credible in their testimony regarding the incident. They each had good reasons to fabricate their testimony and portions of their testimony is simply not believable. My observation of Garbelotto and Tucker convince me that their testimony of the incident (although not faultless) is a much more reliable recitation of the facts; they appeared to be testifying to the facts as best as they could remember them and had less reason to lie than Cohen and Pauyo. That is not to say that I totally discredit Pauyo and Cohen's version of the incident; however, where there are major conflicts in their testimony, I credit the testimony of Garbelotto and Tucker.

Initially I discredit Pauyo's testimony that when Pauyo first told Cohen he would like to talk to him Cohen turned to the other employees and asked them if they wanted Pauyo to be their spokesperson. My observation of Cohen (and the fact that a large number of the employees do not speak English) convince me that this is highly unlikely. Rather, I find that (as testified to by Tucker) this occurred near the conclusion of the confrontation when Cohen asked the employees if Pauyo was the type of person they wanted to represent them. I find that Pauyo began the incident by saying that the employees felt that Cohen had called Immigration, which Cohen denied. Pauyo told Cohen that it seemed like more than a coincidence that Respondent received notice of the Union's petition on Monday, there was a green card check on Tuesday, and Immigration appeared at the facility on Wednesday. Pauyo then said that the employees were unhappy about other things as well, their inability to speak to him and having their piecework rate cut by Respondent, and that was why they felt that they needed a union. Cohen said that he always had an open-door policy for the employees, and he only cut the piecework rate when he installed new and faster machinery. He said that he was surprised that they wanted a union.

Crediting Garbelotto, Tucker, and (to a lesser degree) Cohen, I find that Pauyo kept yelling and making gestures (Garbelotto), was screaming loudly with his arms flailing (Tucker), or went into a harangue (Cohen). Pauyo said that Cohen was an oppressor (or tyrant) taking advantage of his Haitian employees. Pauyo then made the back and forth gesture with his hips imitating sexual intercourse; these gestures caused the other em-

ployees to laugh and become agitated, clapping and giving encouragement to Pauyo. Pauyo then made an obscene gesture to Cohen with his middle finger, a gesture Cohen returned. Pauyo kept screaming at Cohen without giving him a chance to answer. Cohen asked the other employees if this was the type of person they wanted to represent them. Cohen then asked Pauyo to leave because everyone was agitated and upset; Pauyo refused to leave unless he was fired. Cohen repeated the request to Pauyo ("still acting as wild") who said that Cohen would have to fire him before he would leave. Cohen asked, "Do you want me to fire you?" Pauyo said he did and Cohen said, "You're fired." The issue is, simply stated, was Pauyo discharged because he stood up to represent his fellow employees regarding their grievances and recent union organization, or was he discharged because of the way he did it (i.e., the obscenities and insults he used), and does that deprive him of the protection of the Act.

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board set forth the rule it will henceforth apply in discrimination cases such as the instant matter: "First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Initially it should be noted that the appearance of Immigration representatives at the facility 2 days after Respondent received notification of the Union's petition, and 1 day after an unusual green card-check at the facility, although highly suspicious, is not relevant to the ultimate conclusion herein as it did not precipitate Pauyo's discharge. What began the process that culminated in Pauyo's discharge was his decision (protected, of course) to discuss that fact, and others, with Cohen.

It requires no citation that Pauyo's initial action of speaking to Cohen, after being encouraged to do so by fellow employees, constituted protected concerted activities; in fact, Respondent, in his brief, agrees, "although Pauyo's activity may initially have been protected by Section 7, any such protection was lost because of his insubordinate conduct."

Both the General Counsel and Respondent cite numerous cases in their briefs regarding how far an employee may go in his protected concerted activities before losing the protection of the Act. This issue generally arises in two areas: the prosecution of grievances, bargaining, or other union business by shop stewards or others who are both union officials and employees of the company and general (often spontaneous) concerted activity by an employee outside the realm of union business.

As to the former, *Hawaiian Hauling Service*., 219 NLRB 765 (1975), principally a deferral case, quoted approvingly from *Bettcher Mfg. Corp.*, 76 NLRB 526 (1948):

> A frank, and not always complimentary, exchange of views must be expected and permitted the negotiators if collective bargaining is to be natural rather than stilted. The negotiators must be free not only to put forth demands and counterdemands, but also to debate and challenge the statements of one another without censorship, *even if, in the course of debate, the veracity of one of the participants occasionally is brought into question.* If an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method of retaliation), or employees would hestitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives.

In *Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964), enfd. 351 F.2d 584 (7th Cir. 1965), a union committeeman was discharged because he called the plant superintendent a "horse's ass" during a discussion of an employee's grievance. The Board found the discharge unlawful because the characterization "was protected activity because it was part of the *res gestae* of the grievance discussion." In *Calmos Combining Co.*, 184 NLRB 914 (1970), after a grievance discussion had been completed, and those participating had, apparently, returned to work, the plant manager heard the shop steward shouting. He asked him to stop shouting and was told: "You can't shut me up, I'll shout all I want to." He again asked him to be quiet, but the steward said, "I don't give a damn what you say, I'll shout all I want to, and if you don't like it, tell me to leave." The Board found that the steward's

> continued intrasigence was not a part of the *res gestae* of the grievance discussion [citing *Thor*, supra]. Rather, the order to stop shouting was a reasonable and lawful order that should have been obeyed, and his refusal to do so was not related to Harts' protected processing of the grievance.

In *American Telephone Co.*, 211 NLRB 782, 783 (1974), the Board stated:

> However, we have long recognized that the disagreements which arise in the collective-bargaining setting sometimes tend to provoke commentary which may be less than mannerly, and that the use of strong language in the course of protected activities supplies no legal justification for disciplining or threatening to discipline an employee acting in a representative capacity, except in the most flagrant or egregious of cases.

In *Southern Bell Telephone Co.*, 260 NLRB 237, 240 (1982), the administrative law judge (as affirmed by the Board) stated:

> Recognizing that it is generally the employees of the employer who have been elected or designated by the union as officers of the union to represent it in the administration of the contract and the resolution of grievances, the Board has held that employees, when engaged in such activity, are protected

> by Section 7 of the Act for conduct, attitudes, and statements which might not otherwise be protected. However, as noted by the Employer in its brief in which it largely ignores the fact that Leuckan was acting in his capacity as chief steward in the confrontation here at issue, an employee so engaged may lose the protection of the Act if his conduct becomes so flagrant that it threatens the employer's ability to maintain order and respect in the conduct of its business or threats to "foul up" the employer's operations.

As to employee obscenities, or other strong language, during general concerted activities (rather than union activities), the Board stated in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979):

> The Administrative Law Judge cited no decisions, however, and we know of none, where the Board has held that an employee's use of obscenity to a supervisor on the production floor, following a question concerning working conditions, is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations. To the contrary, the Board and the courts have recognized (as did the Administrative Law Judge in passing) that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act.
>
> The decision as to whether the employee has crossed that line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way provoked by an employer's unfair labor practice.

Likewise, *Chrysler Corp.*, 249 NLRB 1102, 1109 (1980), which stated: "The employees' right to engage in concerted activity may permit some lee-way for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." In *Firch Baking Co.*, 232 NLRB 772 (1977), the employee was asked by management what was bothering him. His answer blamed his difficulties on the lack of competence of the production supervisor and personnel manager, and did so in a loud and excited manner. This resulted in a suspension. The Board found this violated the Act as his comments were not so egregious or outrageous to deprive him of the Act's protection. The Board stressed two factors for finding no loss of the Act's protection: that the employee was invited by the company to state his views, and "the exchange of remarks occurred in a private office meeting and not on the plant floor where it could have had a negative effect on these supervisors' status in the eyes of other employees".

In *Webster Men's Wear*, 222 NLRB 1262, 1267 (1976), a 16-year-old employee was fired for profanities and name calling directed at his store manager. However, the Board found that the circumstances there, especially the fact that the store manager ". . .freely resorted to the use of provocative statements and profanity in resisting the employee's complaint," warrant finding that the discharge violated the Act:

> While the namecalling and profanity participated in by Schmidt are certainly not to be condoned, nevertheless, such conduct must be evaluated in this context. And, I am persuaded that, on balance, 16-year-old employee Schmidt who was attempting to present an employee grievance was caught up in this "moment of animal exhuberance."

In the situation herein, the credited evidence establishes that Pauyo's actions were unprovoked; other than returning Pauyo's obscene gesture with his middle finger, Cohen attempted to answer Pauyo's allegations and have him leave the area. In addition his outbursts (not excused by youth as in *Webster Mens Wear* supra) were extreme and on the plant floor in the presence of a large number of employees. I also find insufficient evidence to establish that Cohen fired him because he stood up to represent the employees, and the Union. The only evidence in this regard is Cohen's statement to the employees, near the end of Pauyo's presentation: "Is this the type of person you want to represent you?" However, this, apparently, refers to Pauyo's obscene and abusive actions rather than his union or concerted activities. In addition, Pauyo continually refused to leave unless he was fired; it was not until Cohen made three requests for Pauyo to leave (all refused) that he fired him. In *Pacific Intermountain Express Co.*, 264 NLRB 388 (1982), an employee refused to obey his supervisors repeated order, even when warned that his failure to do so would result in termination. The Board found the discharge lawful as the employee "brazenly flouted" his supervisors direction, which constituted "the ultimate challenge to Respondent's authority." I find the instant situation analogous.

On the basis of the above, I find that although the General Counsel sustained its burden under *Wright Line*, supra, Respondent also met its burden of proving that Pauyo would have been discharged even absent the union or concerted activity. Having found that this discharge did not constitute an unfair labor practice, it follows that the strike that followed was not an unfair labor practice strike. Therefore, Respondent's refusal to reinstate the strikers did not violate the Act. Accordingly, I shall recommend that the complaint be dismissed.[3]

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

---

[3] It should be noted that even if I had found that his discharge violated the Act, I would have found that his altercation with Mitchell disqualified him from reinstatement. I found Mitchell to be a more credible witness as his testimony seemed more reasonable; as Mitchell was about to cross the street to go to the deli, Pauyo stopped his car and made a comment to Mitchell. Pauyo could have left it at that; instead, he parked his car and crossed the street to get to Mitchell, making it more likely that Pauyo instigated the altercation. In addition, Mitchell was by himself although Pauyo had his supporters nearby across the street, making it less likely that Mitchell would start the fight. I therefore find that Pauyo began swinging at Mitchell and for this reason, he should be denied reinstatement. *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any conduct in violation of the Act as alleged herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

It is ordered that the complaint be dismissed in its entirety.

---

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

International Union of Operating Engineers (Stone & Webster Engineering Corporation) ***and*** **Carl Mattocks**

International Union of Operating Engineers, Local 478 ***and*** **Carl Mattocks.** Cases 39–CB–597–1 and 39–CB–597(2–3)

24 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 10 June 1985 Administrative Law Judge Winifred D. Morio issued the attached decision. The Respondents filed exceptions and supporting briefs, and the General Counsel filed a brief in answer to the Respondents' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, International Union of Operating Engineers, Local 478, Hamden, Connecticut, and International Union of Operating Engineers, Washington, D.C., their officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph (A),2(g), and reletter the subsequent paragraphs.

2. Substitute the following for paragraphs (B),1(a) and (B),1(b).

"(a) Ratifying the discipline imposed by Respondent Local 478 on Carl Mattocks for performing supervisory duties.

"(b) In any like or related manner restraining or coercing Stone & Webster in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances."

3. Substitute the attached notices for those of the administrative law judge.

[1] Respondent Local 478 has excepted, inter alia, to the judge's finding that discriminatee Carl Mattocks is an employer-representative within the meaning of Sec. 8(b)(1)(B) of the Act, arguing that the Supreme Court, in *Florida Power Co. v. IBEW*, 417 U.S. 790 (1974), rejected the "reservoir doctrine," which the judge relies on to support her finding. We find no merit to Local 478's exception for, like the judge, we find nothing in the *Florida Power* decision to suggest that the Supreme Court disapproves of the doctrine. In any event, the facts in this case clearly establish, and the judge found, that Mattocks "possessed and exercised the authority to resolve [employee] grievances," so that even without regard to the "reservoir doctrine" it is patently clear that Mattocks is an employer-representative within the intent of Sec. 8(b)(1)(B) by virtue of his authority to adjust grievances.

Chairman Dotson, although adhering to the reservoir doctrine, notes the Second Circuit's disagreement therewith (see fn. 2 below); consequently, he relies solely on Mattock's actual authority to process and resolve grievances in affirming the judge's finding of a violation in this case.

Member Stephens expresses no view concerning the validity of the reservoir doctrine; he relies on the evidence that Mattocks possessed grievance adjustment authority and was thus clearly a representative within the meaning of Sec. 8(b)(1)(B). *NLRB v. Electrical Workers IBEW Local 323*, 703 F.2d 501, 505 (11th Cir. 1983), cert. denied 464 U.S. 950 (1983).

We also find, in agreement with the judge, that the $1000 fine imposed by Local 478 on Mattocks resulted from the latter's performance of his supervisory duties and not from any alleged disparaging remark about the Union Mattocks may have made to employee Fiorello. In this regard we note that despite Fiorello's assertion in his grievance to the Union that Mattocks had made certain disparaging remarks about Local 478, during the hearing on his grievance Fiorello asserted only that he had been improperly discharged by Mattocks, and did not present evidence or raise the question of the alleged disparaging remarks.

Respondent Local 478 has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Contrary to the judge, we do not find the Respondents' defense to the 8(b)(1)(B) complaint allegation to be "patently frivolous." The judge, as noted, relied on the "reservoir doctrine" to find an 8(b)(1)(B) violation. The Respondents, however, argued that the "reservoir doctrine" had been overruled by the Supreme Court's *Florida Power* decision and cited the Second Circuit's decision in *NLRB v. Rochester Musicians Assn. Local 66*, 514 F.2d 988 (2d Cir. 1978), which held, inter alia, that the Supreme Court in *Florida Power*, supra, had "effectively undermined [the] conceptual basis" of the "reservoir doctrine." While, as noted, we do not agree that the "reservoir doctrine" was overruled in *Florida Power*, nevertheless, the Respondents' defense that it had been overruled and that the judge erred in relying on it cannot, in light of the Second Circuit's decision in *Rochester Musicians Assn.*, be viewed as frivolous. Moreover, we note that the judge's finding that Mattocks was a Sec. 2(11) supervisor and an employer-representative within the meaning of Sec. 8(b)(1)(B) was, for the most part, based on her decision to accept as true the testimony of the General Counsel's witnesses concerning Mattocks' duties. In light of the above, we shall not order Respondent Local 478 to reimburse the Board and Mattocks for litigation costs and other expenses incurred by them in this proceeding.

[3] Respondent International Union of Operating Engineers excepts to the judge's inclusion of certain broad remedial language in the recommended Order and notice, noting that the judge found that a narrow order was appropriate in the case of Respondent International. We find merit to Respondent International's exception and shall, accordingly, delete such broad language from the Order and notice.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

TO ALL MEMBERS OF LOCAL 478, INTERNATIONAL UNION OF OPERATING ENGINEERS

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce Stone & Webster Engineering Corporation in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances by requiring a response to charges, fining and suspending from membership, or otherwise disciplining Carl Mattocks, or any other supervisor-member, for performing supervisory duties for Stone & Webster or any other employer.

WE WILL NOT in any other manner engage in conduct that is violative of the Act or that restrains or coerces Stone & Webster, or any other employer, in the selection of its representative for the purpose of collective bargaining or grievance adjustment.

WE WILL rescind the fine levied against Carl Mattocks and remove from our records all reference to the charges against him and the imposition of the fine.

WE WILL restore Carl Mattocks to his status as a member in good standing with all attendant rights and will remove from his record all reference to his suspension.

WE WILL notify Carl Mattocks, in writing, that the fine and suspension have been rescinded, that all records of the charge, fine, and suspension have been removed and that he will be restored to full membership.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 478

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

TO ALL MEMBERS OF LOCAL 478, INTERNATIONAL UNION OF OPERATING ENGINEERS

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce Stone & Webster Engineering Corporation in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances by ratifying the discipline imposed on Carl Mattocks by Local 478 because he performed supervisory duties.

WE WILL NOT in any like or related manner restrain or coerce Stone & Webster in the selection of its representatives for purpose of collective bargaining or adjustment of grievances.

WE WILL remove from our records the denial of the appeal filed by Carl Mattocks about the disciplinary action imposed by Local 478 against him for the performance of his supervisory duties and remove all references to the charge, fine, and suspension imposed on Carl Mattocks by Local 478 and we will advise him, in writing, that we have done so.

INTERNATIONAL UNION OF OPERATING ENGINEERS

Jonathan B. Kreisberg, Esq., for the General Counsel,
Burton S. Rosenberg, Esq., of Hamden, Connecticut, for Respondent Local 478.
Richard Griffin, Esq., of Washington, D.C., for Respondent International.
Ronald D. Lasky, Esq. (Gross, Hyde & Williams), of Hartford, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WINIFRED D. MORIO, Administrative Law Judge. This case was tried on 25 February 1985 at Hartford, Connecticut. On 11 October 1984 the Officer-in-Charge for Subregion 39 issued an order in which he consolidated cases and issued a consolidated complaint in Case 39–CB–597(1–2) against the International Union of Operating Engineers (Respondent International) and the International Union of Operating Engineers, Local 478 (Respondent Local 478). The consolidated complaint alleged, in substance, that Respondent Local 478 violated Section 8(b)(1)(B) by suspending Carl Mattocks because he exercised his supervisory authority and that Respondent International violated Section 8(b)(1)(B) by its denial of Mattocks' appeal of this suspension.

The Officer-in-Charge for Subregion 39 on 23 November 1984, issued a second order, in which he consolidated cases and issued a second amended consolidated complaint in Case 39-CB-597(1-3). This second amended consolidated complaint reiterated the violations set forth above and added an allegation that Respondent Local 478 had violated Section 8(b)(1)(B) when it imposed a fine on Carl Mattocks because he exercised his supervisory authority.

An amendment was made to this second amended consolidated complaint on 29 January 1985 in which it was

alleged that the above-described conduct by Respondent International and Respondent Local 478 also violated Section 8(b)(1)(A) because Mattocks was an employee within the meaning of Section 2(3) of the Act who had the responsibility to effectuate the layoff and discharge of employees of Stone & Webster Engineering Corporation (Stone & Webster/Company).

Respondent International and Respondent Local 478 filed answers to these amended consolidated complaints in which they denied the commission of the unfair labor practices, although Respondent Local 478 admitted that it had suspended Mattocks and Respondent International admitted that it had denied the appeal of that suspension.

All parties were afforded the opportunity to be heard, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by all parties. Based on the entire record, and from my observation of the demeanor of the witnesses, and after due consideration I make the following

FINDINGS OF FACT

I. JURISDICTION

Stone & Webster Engineering Corporation (Stone & Webster/Company), a Massachusetts corporation with an office and place of business in Boston, Massachusetts, is and has been engaged, as a general contractor, in the building and construction industry building a nuclear power plant in Waterford, Connecticut. Annually, Stone & Webster in the course and conduct of its business operations, purchases and receives at its jobsites materials and supplies valued in excess of $50,000 directly from points outside the State of Connecticut. The parties admit and I find that Stone & Webster is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS

The parties admit and I find that Respondent Local 478 and Respondent International are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

A. *Mattocks' Duties and Responsibilities*

Respondent Local 478 admitted that it had suspended Carl Mattocks, and Respondent International admitted that it had denied his appeal of that suspension.[1]

The record reveals that Mattocks has been a member of Respondent Local 478 since 1953 and that during the past 14 years Mattocks has been employed by Stone & Webster, as a master mechanic, in connection with the construction of a nuclear power facility at Millstone Point, in Waterford, Connecticut. At the present time, and for the last 10 years, Mattocks has been working on Unit III at the Millstone site. According to Edwin Browning, senior labor relations supervisor for Stone & Webster, the cost of construction for Unit III will be in excess of $3 billion. At the present time there are 1600 employees at the site, although in the past there have been as many as 3500 employees at the site. The general superintendent of construction at the site is C. B. Sprouse, and the chief construction supervisor is Robert Nickerson, who also has the title of equipment supervisor. Nickerson has overall responsibility for the work performed by the various crafts at the site, including the work of the boilermakers, millwrights, teamsters, and operating engineers.[2] Browning testified that the chain of command for the boilermakers and millwrights includes a foreman, a general foreman, and a construction supervisor who is the individual who reports directly to Nickerson. According to Browning, the chain of command for the operating engineers does not include a foreman, general foreman, or construction supervisor. Rather, the operating engineers on the site report to Mattocks, who, as master mechanic, is on the same level as the general foreman for the other crafts. Mattocks reports directly to Nickerson.

The record reveals that in February 1982 there were 75 operating engineers, 57 boilermakers and boilermakers/welders, 23 millwrights, and 40 teamsters at the site. In February 1983, there were 107 operating engineers, 44 boilermakers and boilermaker welders, 35 millwrights, and 60 teamsters; in February 1984, there were 64 operating engineers, 34 boilermakers and boilermakers/welders, 52 millwrights, and 67 teamsters; in February 1985, there were 27 operating engineers, 3 boilermakers, 36 millwrights, and 37 teamsters.[3]

It does not appear that Mattocks has the authority, directly, to hire or discharge employees. However, according to Browning, the Company considers that it is Mattocks' responsibility to "carry out" the Company's policies with respect to the hire or discharge of employees. Browning did not elaborate on what he meant by that statement. Mattocks, however, did testify that his recommendations with respect to the hire or discharge of employees are accepted. Further, according to uncontradicted testimony by Mattocks, although his supervisors decide whether there is a need for additional operating engineers, he decides whether there is a need for additional mechanics. His recommendations as to which particular employee should be hired for either category are followed by Nickerson. Mattocks claimed that until about 13 months before the hearing in the instant case he called the Respondent Local 478 hall to secure operating engineers and the individuals he requested always were referred to the site.[4] Patrick Milardo, an employee, testified that he had been unable to secure a job at the site, although he had tried repeatedly to be referred through Respondent Local 478. However, he was referred by the

[1] The Respondents did not present witnesses during the hearing.

[2] There are several other crafts at the site including carpenters, electricians, ironworkers, pipefitters, etc. It is unclear whether Nickerson has overall responsibility for all these crafts.

[3] These figures include employees who were present at the site and does not include foremen.

[4] There was only one instance when an employee recommended by Mattocks was not referred. This incident involved an employee, Ralph Gigliotti and the Respondent Local 478's refusal to refer Gigliotti was found to be a violation of the Act in *Operating Engineers Local 478 (Stone & Webster)*, 274 NLRB 567 (1985).

local after he spoke with Mattocks about a job at the site.

Mattocks is advised by Nickerson or other management representatives when it is necessary to lay off employees, but it is Mattocks who decides which specific employee is to be laid off. In some instances, when the qualifications of the employees are equal, Mattocks will recommend that the employee with the least amount of service be laid off. On the other hand, if in Mattocks' opinion the qualifications are not equivalent, he will decide which employee is the most qualified and he will recommend that that employee be retained. In both situations, Mattocks' recommendations are followed.

Nickerson determines whether overtime work is necessary with respect to the construction work. However, it is Mattocks who decides whether maintenance overtime work is necessary and his recommendations with respect to such work are accepted by Nickerson. It is Mattocks who assigns overtime work and while much of this assignment is routine, it is Mattocks who makes the final decision about who will receive such work. It appears that employees can refuse overtime work without being subject to discipline.

On a daily basis Mattocks receives from Nickerson a list of the equipment to be used for that day. Mattocks then meets with all the operating engineers before the start of work and he assigns the particular employee to the particular equipment to be used on that day. It is Mattocks who decides which employee is best qualified to operate the equipment and his decision is based on his independent evaluation of the employee's capabilities. In some instances, the assignment is routine in nature, however, if there is a question about an employee's qualifications it is Mattocks' sole responsibility to make the decision as to which employee should be used. Mattocks, Patrick Milardo, and Gregory Nicholas, two operating engineers on the job, all testified that Mattocks regularly moves employees from one machine to another and these moves, also, are based on a decision made solely by Mattocks.[5]

The proper maintenance of equipment on the job is also part of Mattocks' duties. In the course of fulfilling this duty, Mattocks ascertains the cost for the repair to the equipment and he discusses with Nickerson both the need and cost for the repair of the equipment. However, it is Mattocks who decides which employee will repair the particular piece of equipment, again based on his independent evaluation of the capabilities of the employee. Although Mattocks does not have the direct authority to hire employees, he does decide, based on his examination of the employee's background, whether the new employee can perform independently or needs to be assigned to a more experienced employee and he will choose which of the older employees will train the new one.

In addition to the above duties, Mattocks also maintains the timecards for the operating engineers. Mattocks fills in the employee's name and badge number and the time worked by the employee and he signs the card in the section marked, "Approved General Foreman."[6] This card is then submitted to Nickerson for his signature. This card is used by the time department to determine the employee's pay. The record indicates that it is Mattocks who checks the operating engineers in each morning when he assigns them their work. The record fails to reveal that Nickerson is aware, on a daily basis, of the hours worked by each operating engineer.

Browning testified that Mattocks has the authority to resolve employee complaints and to grant permission to employees to leave work early, although he was unaware of any specific situation where Mattocks exercised this authority. Although Browning claimed that Mattocks could recommend that employees be disciplined, he also was unaware of any instance when Mattocks did recommend such discipline. Browning further claimed that the Company relied on Mattocks to report matters of a disciplinary nature, but he could not recall an occasion when Mattocks made such a report. According to Browning, the Company expects that all employees will report a breach of the Company's rules.

According to Mattocks, he frequently resolves the complaints that the operating engineers have with other crafts and he does this in discussions with the supervisors of the other crafts. He also testified that he has discussed an employee's personal problems and he regularly permits employees to leave work early, if there is a family problem, without discussing the matter with management representatives. Milardo and Nicholas both testified that they have discussed both their personal problems and problems that they have had with other crafts and Mattocks has resolved the problems. Further, according to both employees, they have asked and received permission from Mattocks to leave work early and Mattocks has granted this permission directly to them without any discussion of the matter with management representatives. It appears that operating engineers call Mattocks, rather than the personnel department, if they cannot work due to illness or if they will be late for work. Nicholas also testified that Mattocks has criticized his work and that all orders for operating engineers are received from Mattocks.

Mattocks has his own office, which is located in the maintenance area about 250 feet away from Nickerson's office. Nickerson visits Mattocks at his office several times a day, but the visits are of a short duration. It does not appear that any other operating engineer has an office or is in frequent contact with Nickerson. The position of master mechanic is covered by the collective-bargaining agreement in existence between the Company and Respondent Local 478. Mattocks is paid 25 percent above the highest rate paid to other bargaining unit employees. The parties stipulated that the contractual basis on which Mattocks received the additional moneys was "the maintenance of standards clause provided for in the agreement pursuant to a past practice of the parties that payment of a master mechanic would be 25 percent above the highest rate."

[5] The parties stipulated that employees Frank Bonita, James Leonard, and Houston Vaughn, if called, would testify in accordance with the testimony of Milardo and Nicholas about Mattocks' duties.

[6] There is another section on this card that is marked, "Signed-Foreman."

B. *Prior Events*

As noted, Mattocks has been a member of Respondent Local 478 since 1953 and, according to Mattocks, he did not have problems with the Local until 1983. In that year, Mattocks openly supported Ralph Gigliotti, who was also a member of the Local and an employee of Stone & Webster, for the position of business manager against the incumbent, Elwood Metz. Mattocks also testified at an unfair labor practice hearing on a charge filed by Gigliotti in which Gigliotti claimed that representatives of the Local had interfered with his job because of his opposition to Metz. The Board in that case found that Respondent Local 478 had violated Section 8(b)(1)(A).[7] There was also a factual finding that Respondent Local 478 had sent a telegram to Stone & Webster in which it stated that the Local did not recognize Mattocks as the master mechanic on the job. It does not appear that there was any change in Mattocks' duties because of this telegram. A further charge was filed by Gigliotti against the Local alleging a violation of Section 8(b)(1)(A) because representatives of the Local refused to refer Gigliotti for employment because of his opposition to Metz. The Board found that the Local had violated Section 8(b)(1)(A) as alleged.[8]

C. *The Charge by Michael Civitillo*

Michael Civitillo was hired by Stone & Webster about 17 December 1982 as a mechanical heater mechanic and he continued in that position until early 1983 at which time he was scheduled to be laid off because of a lack of the type of work he performed. However, Mattocks learned that a mechanic who had been employed to check liquid levels on the equipment was scheduled to leave and he recommended to Nickerson that Civitillo be hired and Civitillo was hired. At the time that Mattocks spoke to Nickerson about Civitillo, Nickerson told him that job would last only until the fall. At some point in August 1984, Civitillo approached Mattocks about the possibility of being retained in the same position for a longer period of time because he needed an additional 1-1/2 years of employment. In the course of this conversation, Civitillo indicated to Mattocks that Mattocks had an obligation to keep him because Civitillo had supported the Gigliotti slate in the election. Mattocks became angry at this statement by Civitillo and stated that he had not made promises to anyone for their support.

On 14 September 1983 Civitillo filed a charge against Mattocks in which he contended that Mattocks had violated certain articles of the constitution of Respondent International and the bylaws of Respondent Local 478. Civitillo claimed that Mattocks had erroneously accused him of not putting oil in a truck, but when he checked the truck it was at least three quarts overfull and, therefore, the incident was being fabricated to get rid of him after the election was over. Mattocks submitted a signed statement to representatives of the local in which he explained that a teamster had reported an oil shortage on a truck that had been examined by Civitillo, and wh Mattocks had the truck checked by Michand, anoth mechanic, they found that there was an oil shorta Mattocks reported the incident to Nickerson but wh Mattocks determined that the engine had not been da aged he did not pursue the matter. In this statemer Mattocks claimed that Civitillo had not been dischar because of the oil incident, he had been laid off wh Stone & Webster decided that the position held by Ci tillo was unnecessary.

On 10 November 1983 a pretrial hearing was he before Respondent Local 478's executive board to co sider the charge filed by Civitillo.[9] The board includ Elwood Metz, the business manager; James McParlar the recording secretary; and business agents Joseph D laney, James Keyes, Michael Rapuano, and Way Genyes. Both Mattocks and Civitillo appeared before t board. During this proceeding, Mattocks submitted other statement in which he claimed that Civitill charge was false, that Civitillo's layoff was due to a duction in force and not dereliction of duty, that the cision to reduce the work force was made by the Co pany and not by him, and that the power to hire or f was limited to the management of Stone & Webst Mattocks also submitted statements from Nickerso Clarence Michaud, a mechanic, and Monroe Beebe, acting master mechanic. Nickerson claimed, in his sta ment, that he had eliminated certain positions, includi the position of oil checker.[10] In his statement, Micha claimed that he checked the oil level on a truck afte driver complained and he found the oil level to be lo Beebe, in his statement, claimed that the practice using a maintenance engineer to check oil levels was d continued on 14 September 1983.[11] There were oth documents submitted by Mattocks to support his cla that he had not been at work during the period when vitillo was laid off. According to Mattocks, Civitillo a presented evidence to the board, although not in form of affidavits. At some point during the proceedi Metz stated that Mattocks had laid off Civitillo for pol cal reasons, which Mattocks denied. Metz then ask Mattocks why he had kept Patrick Milardo[12] and l off Civitillo and Mattocks explained that Milardo h qualifications that were needed on the job and it was the best interests of the Company to retain Milar Thereafter, the board met in closed session and decid unanimously, to send the charge to trial before the membership. In the proceedings involving Mattoc appeal to the Respondent International, the members the executive board claimed that they had decided present the issue to the full membership because th

[7] *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382 (1984).

[8] *Operating Engineers Local 478 (Stone & Webster)*, 274 NLRB 567 (1985).

[9] Art. XXIV, sec. 7(o) of the International constitution provides the local executive board or any other board established for the pur of investigating charges has the discretion to hold a pretrial hearing. purpose of such a hearing is to define the issues and to make a prel nary determination whether a charge has merit. The board has the thority to decide not to proceed with the case.

[10] Nickerson did not refer to Civitillo by name, he referred to the p tion held by Civitillo.

[11] Neither Michaud nor Beebe referred to Civitillo by name.

[12] Milardo had run on the Gigliotti ticket for the position of presi of the Local. He was unsuccessful in his bid.

viewed the matter as a no-win situation for the executive board due to the fact that the case involved allegations of political motivation between two supporting the slate, which had run in opposition to the executive board. Mattocks was informed, subsequent to the hearing, that a trial would be held on the charge during a union meeting on 13 January 1984.

However, before that date, Mattocks was summoned to appear before the executive board on 19 December 1983. Mattocks was the only witness who testified concerning this meeting. Present at this meeting were representatives of Respondent Local 478, including Metz, the business manager, Joseph Mallozzi, the Local's president, McParland, the recording secretary, business agents Keyes, Rapuano, Genyes, Robert Gates, the union steward, and Edward Moffet and Robert Giacia.[13] Mattocks testified that Metz started the meeting by reading a statement, allegedly signed by Anthony Fiorella, a former employee of Stone & Webster. In this statement, Fiorella claimed that Mattocks had caused Fiorella to be terminated by Stone & Webster. Metz requested Mattocks to sign the statement, which Mattocks refused to do because he said it was not correct. When Mattocks refused to sign the statement, Metz began to question him about the hire and discharge process at Stone & Webster and he insisted that Mattocks was instrumental in that process. Mattocks replied that he did not set up the process, he followed it. At this point, Metz became angry and he began to use foul language and make obscene gestures. Metz also said, "We're going to try you next month and we're going to straighten you out." At this point, Mattocks asked what the Company would do if he agreed to make changes in the hire and discharge procedures and Mallozzi stated that he would take care of Stone & Webster. During this meeting, Metz accused Mattocks of being the campaign manager for Ralph Gigliotti, which Mattocks denied. Metz then stated that Mattocks' daughter had been treasurer of Gigliotti's committee, which Mattocks admitted.

Subsequent to this meeting, Mattocks attempted to file internal union charges against Metz, but he was unsuccessful. Mattocks requested forms in order to file these internal charges, but he was told by McParland that he did not have the forms, he could file his charge on any paper he had. Mattocks then filed a detailed statement, on 3 January 1984, concerning the events of 19 December 1983. In this statement, Mattocks noted that he had been called to an executive board meeting on the evening of 19 December and that during this meeting Metz had interrogated him about the hiring process at Stone & Webster, had accused him of being instrumental in that process, had demanded that he sign a statement to that effect and had become abusive to him when he refused to do so. Mattocks concluded his statement with the comment that this conduct by Metz was in violation of article XXIV of the International constitution. Notwithstanding the detailed nature of this statement, it was returned to Mattocks by Mallozzi, allegedly because it was not addressed to the recording secretary and was not specific with respect to the time, place, or details of the alleged offense. Mattocks did not attempt to file another charge.

The trial on the charge filed by Civitillo was held on 13 January 1984, during the course of a regular union meeting and Mallozzi, president of Respondent Local 478, presided at the meeting. Civitillo presented his case but Mattocks was represented by Patrick Milardo. There were approximately 300 members present at this proceeding. The trial commenced with Civitillo's charge being read to the membership and Civitillo then gave some of his work background with the Company. According to Civitillo, in April 1983 Gigliotti advised him that there was a job available on the second shift as an oil checker and Civitillo got the job. About a month later, Civitillo was informed by the union steward that he was to be laid off. Civitillo, however, was not laid off due, he claimed, to Mattocks' intervention on his behalf. Civitillo indicated that Mattocks had intervened because they were both actively involved in the Gigliotti campaign at the time. Civitillo also indicated that it was Mattocks who specifically assigned him to his oil-checking duties. Civitillo's statements at this proceeding were not entirely clear but he did make two points. The first point was that Mattocks had the authority to have him discharged and he exercised that authority and caused his discharge. The second point was that the "oil incident" was created so that Mattocks could have him discharged because he no longer needed him after the union election. With respect to the first point Civitillo stated the following:

> Nickerson may have made the lay-off but the only way he can evaluate the job is from what Mattocks tells him.

Civitillo also claimed that Nickerson did not know him and could not evaluate him. Thus, he stated:

> So how can this man make any judgment about any engineer when he doesn't know them and doesn't know what the qualifications of the engineers are, so Mattocks had to know.

Civitillo repeatedly made the point that Mattocks could do what he wanted at Stone & Webster and when Mattocks decided he no longer needed Civitillo he got rid of him.

With respect to the second point, Civitillo was asked whether he thought he was laid off after the election because he was no longer needed. In response, Civitillo stated:

> That is definitely the opinion that I got. As a matter of fact I saw it coming right after the election. That's why I smelled a rat when they were trying to fabricate all of these incidents for the departure of Civitillo.

Civitillo called two witnesses, Donald Pettengill and Robert Gates, in support of his position. According to both individuals, Civitillo was scheduled to be laid off on

[13] Mattocks was not sure of the positions held by the last two individuals but he did state that not everyone present was a member of the executive board.

21 October 1984 but after the oil incident Mattocks told them that Civitillo was a "troublemaker" and he would not be there until 21 October 1984.

Milardo cross-examined Civitillo on behalf of Mattocks. Mattocks then read the statement he had filed in response to the charge wherein he denied that the oil incident was the reason for Civitillo's layoff. Mattocks also read statements by Nickerson and Michand. Nickerson, in his statement, explained that he had decided on the reduction in force and this had caused Civitillo's layoff. Michand's statement supported the version of the oil incident given by Mattocks. At the conclusion of the hearing, Milardo stated that Mattocks was not responsible for Civitillo's layoff. He also said that the leadership of Respondent Local 478 was using Civitillo to get at Mattocks because Mattocks had supported Gigliotti in the election against Metz. At the conclusion of the hearing the membership then voted, and the tally was guilty, 191; not guilty, 109, with 3 void ballots. On 19 January 1984, by letter, Mattocks was advised that he was suspended for 3 years from the rights of membership, including attendance at union meetings, but he was still obligated to pay dues.

On 26 January 1984 Mattocks filed an appeal of his suspension with Frank Hanley, general secretary-treasurer of the Respondent International. Mattocks filed copies of all the exhibits produced during the trial, together with the Civitillo charge and the decision rendered by Respondent Local 478. The thrust of Civitillo's charge was that Mattocks had caused Civitillo to be laid off. Mattocks also advised the International that he had not been provided with a copy of the transcript of the hearing, although he had asked and paid for it. Mattocks reiterated his position that he had not been responsible for Civitillo's layoff. On 22 June 1984 Mattocks filed an additional statement in support of his appeal. In this statement, he noted that he had supported the party opposing the incumbent leadership of the Local and, thereafter, he had suffered several incidents, including slashed tires, demolition of his car, physical injury, obscene phone calls, physical threats by Metz and the processing of frivolous charges against him with approval by Metz. Mattocks stated, again, that he was being harassed because of his support for those who had opposed Metz.

On 27 June 1984 Mattocks' appeal was heard by a panel of vice presidents of the Respondent International. Respondent Local 478 was represented by Joseph Mallozzi, president, Michael Rapuano, vice president, James McParland, recording secretary, Wayne Geynes, financial secretary. Mattocks was not present and was not represented. On 13 July 1984 the panel issued its report to the general executive board. In this report, the panel stated that Civitillo accused Mattocks of manipulating the hire and discharge process at Stone & Webster to keep Civitillo on the payroll when Civitillo supported Gigliotti against Metz and later had manipulated the hire and discharge process to have Civitillo's position abolished after the election was over and Civitillo no longer was needed. In this report, the panel stated that Mattocks had denied that he had control over the hire and discharge process at Stone & Webster and further denied that he had caused Civitillo's layoff. During the proceeding, before the panel, McParland stated that while Mattocks did not have final say over the hire and discharge process, he, effectively, controlled it by his recommendations to management. The panel, unanimously, agreed that Mattocks' appeal should be denied.

On 6 August 1984 Frank Hanley, general secretary-treasurer of Respondent International, advised Mattocks, by letter, that his appeal had been denied. In this letter, Hanley stated that at a meeting held on 13 July 1983 the general executive board of the Respondent International had denied Mattocks' appeal based on the evidence considered by the panel designated by it. The evidence considered by the panel, as noted above, included the assertion by Civitillo that Mattocks had the authority to hire and discharge at will at Stone & Webster and McParland's assertion, as a representative of Respondent Local 478, that Mattocks effectively controlled the hiring and discharging of operating engineers at Stone & Webster.

D. *The Charge by Anthony Fiorello*

On 11 January 1984 Mattocks was notified that a second charge was filed against him by Anthony Fiorello, a former employee of Stone & Webster. In this charge, Fiorello claimed that Mattocks had caused Fiorello, Ralph Capello, Bart Miranda, and others to lose their employment. Fiorello also claimed that Mattocks had said the Company should sue Respondent Local 478 because an earlier strike by the surveyors was illegal. Finally, Fiorello stated that Mattocks had caused his loss of employment. The charge alleged that these actions by Mattocks violated the International constitution and the bylaws of the Respondent Local 478.

On 26 January 1984 Mattocks forwarded a statement to McParland with respect to the charge filed by Fiorello. Mattocks stated, in this document, that Fiorello was laid off on orders by management because of a defective machine; that Ralph Capello was laid off by management when the rental on the machine he operated expired; Bart Miranda also was laid off on management orders to permit repairs to be made on the machine that he operated. On 5 June 1984 Mattocks was advised, by letter, that a pretrial hearing would be held 14 June 1984 on the charge filed by Fiorello. Mattocks did not attend this pretrial hearing and, on 18 June 1984, he was advised, by letter, that on the recommendation of the executive board that the matter would be presented to the full membership on 14 September 1984. Mattocks did not attend this meeting. Patrick Milardo testified that he was present at this membership meeting and attempted to represent Mattocks, but was denied the right to do so. According to Milardo, Fiorello, Capello, and Miranda stated only that they were unjustly terminated and they considered that Mattocks was responsible for their terminations. They did not offer any details concerning their terminations and did not call witnesses in support of their charges. On 5 October 1984 Mattocks was advised by letter from McParland that he had been found guilty of the charge brought by Fiorello by a vote of the membership and that a fine of $1000 had been imposed by the president of the local.

E. *Mattocks' Testimony Re Civitillo, Fiorello, Capella, and Miranda*

Basically, Mattocks' testimony concerning the oil incident followed the statements he made before the executive board and during the trial on Civitillo's charge. According to Mattocks, the incident arose when he was approached by a teamster who complained that the oil in the engine of his truck was low, it was showing on the pressure gauge. Mattocks had Michand, another mechanic, check the oil and Michand told Mattocks that the oil was a gallon low. At that point, Mattocks asked someone to locate the union steward because he thought the engine had been damaged. He also reported to Nickerson that the engine had been damaged and that Civitillo had given him a false report about the amount of oil in the truck. The steward could not be located and the truck was needed, so Mattocks directed someone to add the required amount of oil. The truck was able to be used because the engine had not been damaged and Mattocks took no further action about the incident. Mattocks denied that the incident caused Civitillo's layoff. The layoff was due solely to a reduction in force and it was effectuated by Nickerson when Mattocks was on leave.

According to Mattocks, Fiorello had been operating his machine for about 5-1/2 years. During this period of time, the jib on the main boom had become bent due to the normal operation of the machine. The machine was inspected on a routine basis and after one such inspection Mattocks determined that the jib had a 9-1/2 degree bend and he considered this to be a dangerous condition. He reported the condition to the safety section and they put a "do not use" tag on the machine. He also reported the situation to Nickerson who directed Mattocks to shut the rig down and lay off the operator. Mattocks shut the rig down and asked to see the union steward to discuss Fiorello's layoff. However, the two men did not come to discuss the matter with Mattocks, rather, they discussed it with representatives of the labor relations section. Fiorello was not called to testify in this hearing.

Mattocks also testified that Capello operated equipment that had been rented. When the rental period expired, Nickerson advised Mattocks to lay off the operator, which he did. Capello also was not called to testify. Mattocks also advised Nickerson that the machine operated by Miranda should be shut down for repairs. Nickerson agreed and directed Mattocks to lay off the operator, which Mattocks did. Miranda did not testify in this hearing.

IV. ANALYSIS

A. *The Status of Mattocks*

The General Counsel contends that at the time of the events involved herein Mattocks was a supervisor within the meaning of Section 2(11) of the Act. The Respondents deny that assertion. Section 2(11) of the Act states the following:

> The term "supervisor" means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine clerical nature, but requires the use of independent judgment.

It is well established that the possession of any one of these criteria is sufficient to establish that an employee is a supervisor within the meaning of the Act.[14] As noted, Respondents did not present witnesses to testify concerning Mattocks' status. Rather, they relied on the testimony adduced from the witnesses presented by the General Counsel and they contend that the testimony of those witnesses establishes that Mattocks' duties were similar to those of the master machine in *Operating Engineers Local 673 (Westinghouse Electric Corp.)*, 229 NLRB 726 (1977). In that case, the Board found the master mechanic was not a supervisor but merely a conduit through which certain company officials were able to execute their decisions. However, there are several differences between the two cases. In *Westinghouse*, the Board found that the bulk of the testimony was conclusionary in nature. This is not the situation in the instant case. Moreover, the master mechanic in *Westinghouse* testified that all decisions to hire or discharge employees were made by management. In this case, however, Mattocks testified, without contradiction, that he made the decisions concerning whether additional mechanics were needed and his recommendations were always followed by Nickerson. He also testified that his recommendations concerning the hire or discharge of other employees also were accepted without question by Nickerson. That testimony was unrefuted. In fact, statements made by Civitillo at the membership meeting and testimony by Milardo support Mattock's testimony. It was Civitillo's position that Mattocks controlled the hire and discharge of employees at Stone & Webster and that he used that authority to have Civitillo discharged. Milardo testified that he had been unable to secure work at Stone & Webster until he spoke to Mattocks. In addition, the evidence discloses that Metz insisted at the 19 December 1983 meeting that Mattocks had control over the hire and discharge process at Stone & Webster and McParland told the panel of the general executive board that Mattocks effectively controlled the hire and discharge process at Stone & Webster.

In *Westinghouse*, the Board also considered the extent of the master mechanic's authority to assign work and found that the master mechanic merely executed management decisions about which employees should be assigned to a particular piece of equipment or job. In this case, Mattocks testified that Nickerson gave him a list of the equipment to be used each day but he decided which employee was to be assigned to the equipment or job based on an evaluation, made solely by him, of the employee's abilities. This testimony was supported by Mi-

[14] *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948), cert. denied sub nom. *Foreman's Assn. v. Edward G. Budd Mfg. Co.*, 335 U.S. 908 (1949); *Sheet Metal Workers Local 85 (Suburban Sheet Metal)*, 273 NLRB 523 (1984).

lardo and Nelson. It was also supported by Civitillo's statements at the membership meeting. According to those statements, Nickerson did not know the employees and did not know their qualifications and it was Mattocks who knew the employees' qualifications and decided what work they should perform.

Browning, the Company's representative, Milardo and Nelson, who worked directly for Mattocks, all testified that Mattocks effectively recommended most actions that affected the operating engineers at the Millstone site. Based on my observation of these witnesses and of Mattocks, I credit that testimony. Thus, I find that Mattocks effectively recommended the hire and discharge of employees; assigned work to employees, based on an evaluation of their abilities made solely by him; rotated employees on machines according to his determination of what was needed; determined which employee was entitled to perform overtime work; decided whether new employees required additional supervision; allowed employees to leave work early or arrive late to work; approved employee timecards and resolved employees' complaints. Accordingly, I find that Mattocks was a supervisor within the meaning of Section 2(11) of the Act. *Electrical Workers Local 340 (Nutter, Inc.)*, 271 NLRB 995 (1984).

Respondents contend that even if Mattocks did possess supervisory authority, as defined in Section 2(11) of the Act, they were unaware of that fact at the time the disciplinary actions were taken against Mattocks. In support of this assertion, Respondents note that Mattocks consistently denied his supervisory status. That statement does not reflect accurately Mattocks' position. Rather, Mattocks denied that he had the authority, independently, to hire or discharge any employee at Stone & Webster. He also denied that he had discharged Civitillo or caused his discharge. That testimony is consistent with his testimony in this proceeding. However, as stated, supervisory authority is not determined solely by the authority to independently hire or discharge employees. The power to recommend, effectively, such action, to evaluate employees based on an independent judgment, to resolve grievances, and to control the work conditions of employees on a daily basis also establishes supervisory authority. Respondents were well aware that Mattocks possessed this type of authority. In fact, as noted, Metz accused Mattocks of controlling the hire and discharge process at Stone & Webster and McParland told the general executive board that Mattocks effectively controlled the process. Both Respondents had full knowledge of Civitillo's assertion that Mattocks could do whatever he wanted at Stone & Webster, that he was Stone & Webster. It was the basis of his charge and of the charge filed by Fiorello. It is difficult, in these circumstances, to find that Respondents were unaware of Mattocks' status.[15] However, if they were not aware a cursory examination of the statements made by Civitillo should have alerted them to the possibility of his supervisory status. Moreover, assuming that Respondents were unaware of Mattocks' supervisory status such a lack of knowledge would not constitute a defense to a finding of a violation of Section 8(b)(1)(B) of the Act. There is nothing in the language of that section that suggests that *scienter* is an element of that violation. *Sheet Metal Workers Local 85 (Suburban Sheet Metal)*, 273 NLRB 523 (1984). Nor is the issue Respondents' good faith or lack thereof. *Wisconsin River Valley District Council of Carpenters (Skippy Enterprises)*, 211 NLRB 222, 227 (1974).

[15] Further, it is difficult to accept that Metz was unaware of Mattocks' status at one of the major projects in the area, a project that was the source of employment for many operating engineers.

B. *Mattocks' Status—Section 8(b)(1)(B)*

The pertinent part of Section 8(b)(1)(B) states:

> It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce . . . an employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances.

Respondents contend that under the language of the statute a violation of Section 8(b)(1)(B) cannot be found in the discipline imposed on Mattocks unless it can be shown that he possessed the authority to act as a collective-bargaining representative or had the authority to adjust grievances for the Company. This record, they argue, fails to disclose evidence of such authority.

It is the position of the General Counsel that under the Board's "reservoir doctrine" all individuals who possess supervisory status within the meaning of Section 2(11) are employer representatives within the intent of Section 8(b)(1)(B), although the individuals in question may not be vested with the specific authority to act as collective-bargaining representatives or to adjust grievances.

The concept of the reservoir doctrine was stated in *Toledo Lithographers Local 15-P and 272 (Toledo Blade Co.)*, 175 NLRB 1072, 1079 (1969), as follows:

> For Section 8(b)(1)(B) forbids a union's restraining and coercing "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" and this protection of the employer's right to "selection" must be construed as protection not only the employer's continuing reliance upon supervisors already selected, but his right at any time to make and rely upon a selection of representatives from an uncoerced group of such supervisors whose loyalty to him has not been prejudiced and who he believes would be peculiarly qualified to represent him in the handling of grievances.

It is Respondents' position, however, that the concept of "reservoir doctrine" was overruled by the Supreme Court's decision in *Florida Power & Light Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790 (1974), and in support of that position Respondents cite the following language from that case:

> The conclusion is inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of Section 8(b)(1)(B) only when that discipline may adversely

affect the supervisor's conduct in performing the duties of and acting in his capacity as grievance adjustor or collective bargainer on behalf of the employer.

Respondents further argue that the Second Circuit in *NLRB v. Musicians Local 66 (Civic Music Assn.)*, 514 F.2d 988, 992–993 (2d Cir. 1975), held that *Florida Power Light* effectively undermined the conceptual basis of the "reservoir doctrine." I do not argee that the "reservoir doctrine" was overruled by the Supreme Court's decision in *Florida Power & Light*, with all due respect to the Second Circuit. In fact, the Supreme Court referred to the *Toledo Blade* case in its decision. Moreover, an examination of the decision in *Florida Power & Light* discloses that the Court, in that case, was concerned with the issue of whether a union's discipline of a supervisor can violate Section 8(b)(1)(B) unless it adversely affects "the supervisor's conduct in his capacity as a grievance adjustor or collective-bargaining representative." On the other hand, the "reservoir doctrine" deals with the issue of whether a supervisor must possess actual authority to act as a collective-bargaining representative or to adjust grievances or whether it is sufficient that the supervisor be part of the group from which the employer chooses such a representative. These are not the same issues. Further, it should be noted that subsequent to the *Rochester* decision the Board stated that it would adhere to the "reservoir doctrine." *Teamsters Local 296 (Northwest Publications)*, 263 NLRB 778 fn. 6 (1982). It has continued to do so to date. *Sheet Metal Workers Local 85 (Suburban Sheet Metal)*, supra; *Electrical Workers IBEW Local 340 (Nutter, Inc.)*, 271 NLRB 995 (1984); *Electrical Workers IBEW Local 11 (Bergelectric Corp.)*, 271 NLRB 25 (1984). Accordingly, I find that Mattocks was an employer representative within the intent of Section 8(b)(1)(B) of the Act. Moreover, based on this record I also find that Mattocks possessed and exercised the authority to resolve grievances. Browning testified that Mattocks had such authority and Milardo and Nelson both testified that he frequently resolved grievances that they had with other crafts. Respondents contend that when Mattocks resolved these grievances he did so as the representative of Respondents. There is no evidence in this record to support such an assertion. Rather, it is evident that Milardo and Nelson brought their complaints to Mattocks in his supervisory capacity and that he resolved those grievances in that capacity. The Board has interpreted the term grievances to include both personal and contractual grievances, *Electrical Workers IBEW Local 340*, supra; *Norwalk Typographical Union 529 (Hour Publishing Co.)*, 241 NLRB 310 (1979); *Newark Newspaper Pressmen's Union 8 (Newark Star Ledger)*, 194 NLRB 566, 570 (1971). In the instant case, both Milardo and Nelson testified that they also brought their personal difficulties to Mattocks and he assisted them with their difficulties. The fact that some of these grievances were of a minor nature does not diminish Mattocks' role as an adjustor of those grievances, *Columbia Typographical Union 101 (Washington Post Co.)*, 207 NLRB 841, 847 (1973).

C. *Reasons Advanced by Respondents for the Discipline of Mattocks*

Respondents contend that not every discipline of a supervisor-member violates Section 8(b)(1)(B). It is true that the Supreme Court has stated that a union does not violate Section 8(b)(1)(B) when it disciplines supervisor-members who perform rank-and-file work during a strike. However, that is not the situation present in the instant case. Civitillo, Fiorella, Capella, and Miranda did not accuse Mattocks of performing their work, they accused him of causing their discharge. Although, in reality, Mattocks was not responsible for the discharge of Civitillo or Capella, and only indirectly responsible for the discharge of Fiorella and Miranda, that is not the issue. The issue is why was Mattocks, a supervisor within the meaning of Section 2(11) and the intent of Section 8(b)(1)(B), called to appear before the executive board of Respondent Local 478, why was he suspended, and why was he fined. The entire thrust of the charges and statements made by Civitillo and others was that Mattocks had total control over the hire and discharge of the operating engineers at the Millstone project and he used that authority to cause their discharge. Mattocks was disciplined by Respondent Local 478 because of the manner in which the Local believed he exercised his supervisory duties. The discipline was a clear attempt to gain control over Mattocks and to make him a representative of the Union, rather than a representative of management. Section 8(b)(1)(B) was enacted by Congress to prevent this type of conduct. As the Board stated in *San Francisco-Oakland Mailers Union 18 (Northwest Publications)*, 172 NLRB 2173 (1968). "In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representative." The Board, also, has stated that a union violates Section 8(b)(1)(B) of the Act when it subjects a supervisor-member to internal union discipline because he exercises his supervisory authority contrary to the wishes of the Union. *Teamsters Local 839 (Bechtel Corp.)*, 271 NLRB 1209 (1984); *Longshoremen ILA Local 10 (Pacific Maritime)*, 254 NLRB 540 (1981).

However, Respondent Local 478 contends that it was not responsible for the discipline of Mattocks, that the charges were filed by members, not officers of the Union, and that it was the members who decided whether Mattocks was guilty of the charges. Further, Respondent Local 478 contends that when it fined and suspended Mattocks its "sole purpose was to enforce the traditional kinds of rules that every union relies upon to maintain its organization and solidarity." These arguments are not persuasive. Although the charges were filed by members, the decision to present the matter to the full membership was made by the executive board. The executive board had the discretion, by the terms of the International constitution, to proceed or not proceed with the charges. At the time that the executive board decided to proceed with the charges, they were fully aware that the charging parties claimed that Mattocks had total control over the hire and discharge process. However, the executive board claimed that they had to process Civitillo's charge because they did not want to

become involved in a dispute between two members of the Gigliotti slate who had opposed the Metz slate. I am not persuaded by that explanation. Rather, I find that the board proceeded with the charges because Mattocks refused to accede to a demand made by Metz at the meeting on 19 December 1983. According to unrefuted testimony by Mattocks, at this meeting Metz demanded that Mattocks make changes in the hire and discharge process at Stone & Webster to comply with the wishes of the Union and when Mattocks refused, Metz responded, "We are going to try you next month and we are going to straighten you out." Based on the evidence in this record, I am convinced that the executive board proceeded with these charges because Mattocks refused to change the hire and discharge process of Stone & Webster to conform to the wishes of the executive board. The record also establishes that the president of Respondent Local 478 presided at the membership meetings where, again, he heard the accusation by the four individuals that Mattocks controlled the hire and discharge process. Moreover, the evidence in the record establishes that both Metz and McParland knew that Mattocks, effectively, controlled the hiring process at Stone & Webster. In these circumstances, it was incumbent on the officers of Respondent Local 478 to exercise their discretion not to proceed with the processing of the charges. The failure by these officers to do so establishes that if they did not initiate the process, they condoned and ratified the actions of the membership and, thus, are responsible for violations of the Act. Accordingly, I find that Respondent Local 478 violated Section 8(b)(1)(B) of the Act.

Respondent Local 478's second argument relates to the proviso to Section 8(b)(1)(A). However, it is well established that the proviso does not involve alleged violations of Section 8(b)(1)(B). As the Board stated in *San Francisco-Oakland*, the provisio, which refers to the right of a labor organization to prescribe its own rules, is limited to Section 8(b)(1)(A) and protects only legitimate internal union affairs.

D. *Respondent International's Contention That Its Affirmance of the Respondent Local 478's Action Does Not Constitute Conduct Violative of the Act*

Respondent International contends that under the holding in *Electrical Workers IBEW Local 134 (Illinois Bell)*, 192 NLRB 85 (1971), an international can only be held liable if a local's action "on its face" violated the Act and if the disciplined member raised, on appeal, the question of whether the discipline violated the Act. However, Respondent International does note that in recent cases the Board has focused only on whether a local's action, as presented to an international on appeal, "on its face" constituted a violation.

It is the position of the General Counsel that Respondent International violated the Act when it provided its stamp of approval to actions of Respondent Local 478, which were violative of the Act.

In *Bricklayers (McCleskey Construction)*, 241 NLRB 898 (1979), a local union requested its international to enforce a fine which it had imposed against an employee, who was a job superintendent, because he refused to sign the Local's contract which had been negotiated with a multiemployer association. The individual who was fined did not file an appeal with the international and the international placed him on the delinquent list and expelled him. The Board held that the international had a duty to investigate the action and had it done so even the "slightest review" would have disclosed the nature of the individual's job. In *Electrical Workers IBEW Local 11 (Bergelectric Corp.)*, the international did not merely "rubber stamp" the findings of the local as had been the case in *McCleskey*, it conducted an investigation and reviewed the record. Nevertheless, the Board found that the international violated the Act because it had the opportunity, after its investigation, to reverse the action of the local but it had failed to do so. The Board held that international had violated the Act because it had approved the local's conduct and it, therefore, shared its liability.

In the instant case, Respondent International argues that it was unaware of Mattocks' status, that he not only failed to bring his supervisory status to the attention of the representatives of Respondent International, but that throughout the proceedings before Respondent Local 478, he consistently denied that he had caused the discharges of the four members. However, even a cursory review of the proceedings before Respondent Local 478 would have made Mattocks' status evident and Respondent International concedes that during its investigation of Mattocks' appeal it had the transcript of those proceedings. In those proceedings, Civitillo accused Mattocks of causing his discharge because he had the authority to do so. Civitillo also claimed that Mattocks controlled the hire and discharge of employees at Stone & Webster. Thus, the issue of Mattocks' status was clearly before Respondent International. The fact that Mattocks denied that he was responsible for those particular discharges did not relieve Respondent International of its obligation, particularly where it was fully aware of Civitillo's statements and the reasons advanced for the discipline. Moreover, Respondent International was aware of Mattocks' status from the report of its own panel. In that report, the panel noted that Civitillo claimed that Mattocks had "manipulated" the hiring process to cause his discharge. The panel also advised the general executive board that during its investigation of the appeal, Mc Parland, Respondent Local 478's representative told them that "while as Master Mechanic Mattocks did not have final say over hiring and firing, he effectively controlled the process through his recommendations to management." Notwithstanding Respondent International's protestations that it was unaware of Mattocks' supervisory status, it is evident from the record that Respondent International was well aware of Mattocks' status when it denied Mattocks' appeal. Accordingly, I find that Respondent International, both from the proceedings conducted by Respondent Local 478 and the investigation of its own panel, was aware of Mattocks' supervisory status at the time it denied his appeal. Therefore, I find that Respondent International violated Section 8(b)(1)(B) of the Act.

E. *The Alleged 8(b)(1)(A) Violation*

The General Counsel argues that if Mattocks is not found to be a supervisor Respondent Local 478 and Respondent International, nevertheless, can be found to have violated Section 8(b)(1)(A) of the Act because Mattocks was disciplined for performing his assigned work duties which included the reporting of infractions of company rules.

Respondent Local 478 contends that there was no company rule that required Mattocks to report that Civitillo had failed to maintain the oil level on a truck, or to discriminatorily recommend that Fiorello be laid off or suggest to the Company that it sue the Union for breach of a no-strike clause. Respondent International contends that Mattocks never advised the International that he had a duty to report infractions of company rules and, therefore, it was unaware of that fact. These contentions are not persuasive.

Assuming that I had not found that Mattocks was a supervisor, I would, nevertheless, find that there was a violation of Section 8(b)(1)(A). In *Carpenters (Hopeman Bros.)*, 272 NLRB 584 (1984), and *Chemical Workers Local 604 (Essex International)*, 233 NLRB 1239 (1977), the Board found that a union violated Section 8(b)(1)(A) of the Act when it fined an employee who was required to report infractions of company rules, after the employee reported such an infraction by another employee. In the instant case, Browning testified that it was part of Mattocks' duties to report violations of company rules. Both Browning and Mattocks testified, without contradiction, that it was Mattocks' responsibility to ensure that equipment was properly maintained. In the course of the performance of his assigned duties, Mattocks reported Civitillo's failure to properly maintain his truck, which was an infraction of company rules. Mattocks was suspended by Respondent Local 478 because Civitillo contended that this action by Mattocks caused his discharge. This suspension by Respondent Local 478 was upheld by Respondent International. Accordingly, if I had not found that Mattocks was a supervisor within the meaning of the Act, I would have found that Respondents' action against him, as a result of the Civitillo charge, would have constituted a violation of Section 8(b)(1)(A) of the Act.[16]

THE REMEDY

Having found that Respondent Local 478 and Respondent International have engaged in certain unfair labor practices in violation of Section 8(b)(1)(B), I shall recommend that they be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondent Local 478 having unlawfully disciplined Carl Mattocks and Respondent International having ratified that unlawful discipline, I shall recommend that they be required to remove from their files all references to these unlawful disciplinary actions and notify Carl Mattocks that they have done so and advise him that the unlawful discipline will not be used against him in any way. In addition, I shall recommend that Respondent Local 478 be required to restore Carl Mattocks to membership in good standing and make him whole for any losses he may have suffered as a result of his suspension from membership and rescind the unlawful fine and make him whole for any moneys he may have paid for the fine with interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

In addition to these standard remedies, the General Counsel has requested that a broad cease-and-desist order issue, that reimbursement for expenses incurred in investigation, preparation, presentation, and conduct of the case be allowed, that copies of the notice be forwarded to all members, and that a copy of the notice be read by Elwood Metz at Respondent Local 478's membership meeting.

The officers and representatives of Respondent Local 478, including Elwood Metz, its business manager, have demonstrated a total disregard for their responsibilities under the National Labor Relations Act. As noted, in two recent cases the Board found that Respondent Local 478 and its officers and representatives violated the Act by interfering with the job of Ralph Gigliotti, a member of the Local, because of his opposition to Elwood Metz, its business manager. In the instant case, the executive board of Respondent Local 478 permitted charges to be processed against Carl Mattocks, a known supporter of Gigliotti, although they were well aware of Mattocks' supervisory status. It is evident that Respondent Local 478 is a repeat offender and has demonstrated a proclivity to violate the Act. Accordingly, I shall recommend that a broad remedial order issue against it.

The record in this case does not establish that Respondent International had knowledge prior to the events herein of the prior violations of the Act by Respondent Local 478 or was party to those violations. I, therefore, shall not recommend that a broad cease-and-desist order issue against Respondent International. However, I do note that Respondent International is now on notice of the disregard for the law demonstrated by officers of Respondent Local 478, including Edward Metz, its business manager.

The Board, in *Tiidee Products*, 194 NLRB 1234 (1977), held that it had the authority to award litigation costs in situations where a respondent engaged in frivolous litigation. In *Hecks, Inc.*, 215 NLRB 765 (1974), the Board distinguished situations where the issues raised by a respondent were debatable from those situations where the issues raised were patently frivolous. In a subsequent case, *Fetzer Broadcasting Co.*, 227 NLRB 1377 (1977), litigation costs were awarded by the administrative law judge when he found that the offending party had intentionally used defenses that were meritless on their face in

[16] The record does not disclose that Mattocks reported any infraction of company rules by Fiorelia, Capella, and Miranda. Rather, Mattocks reported that the equipment operated by them required repairs or that the lease on the equipment had expired. Although Mattocks made these reports as part of his assigned duties and these reports did lead to the layoff of these individuals for which Mattocks was disciplined by Respondents, I am not convinced that this is the type of situation contemplated by *Carpenters (Hopeman Bros.)*, supra, or *Chemical Workers (Essex International)*, supra.

a clear attempt to burden the process of the Board.[17] And in *J. P. Stevens & Co.*, 239 NLRB 738, 772 (1978), the administrative law judge, with Board approval, awarded litigation costs when he found there were no significant factual controversies and when it was established that the respondent had displayed a willful and persistent defiance of the law. The record in the instant case also establishes that there were no factual controversies. Metz and McParland knew that Mattocks was a supervisor and he was disciplined because representatives of Respondent Local 478 believed that he had exercised that supervisory authority to cause the four discharges. Respondents did not present witnesses because it recognized that there were no debatable or credibility issues. Respondent Local 478 relied on statements of its counsel to advance its defense (i.e., that the Local was forced to process the charges because the members filed the charges). That statement is patently frivolous. The executive board had total discretion not to proceed with the charges but they chose to proceed, notwithstanding that both Metz and McParland were fully aware of Mattocks' supervisory status. Moreover, Mallozzi, the Local's president, suspended Mattocks although he presided over the trial and heard Civitillo's statements that it was Mattocks who controlled the hire and discharge process at Stone & Webster. Accordingly, because I find that there were no debatable or credibility issues presented by Respondent Local 478, because the defense advanced by it was patently frivolous, and because it has demonstrated a persistent and willful defiance of the law, I shall recommend that it be required to reimburse the Board and Carl Mattocks for all expenses incurred in the investigation, preparation, presentation, and conduct of this case, including reasonable counsel fees, salaries, witness fees, transcript costs, printing costs, travel expenses, per diem, and other reasonable expenses. *Tiidee*, supra.

Although, I have found that Respondent International was aware of Mattocks' supervisory status at the time it denied his appeal, I do not find, in all the circumstances, including a lack of evidence of a persistent defiance of the law, that the Respondent International should be held jointly or severally liable for the payment of the monetary costs awarded against Respondent Local 478 and I shall not make such a recommendation.

I shall recommend also that Respondent Local 478 be required to mail to the home of each of its members a copy of the notice marked "Appendix A" signed by Elwood Metz Jr., its business manager. For reasons stated before, I shall not recommend that the Respondent International be required to forward to its membership a copy of the notice marked "Appendix B."

CONCLUSIONS OF LAW

1. Respondent Local 478 and Respondent International are labor organizations within the meaning of Section 2(5) of the Act.

2. Stone & Webster is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Carl Mattocks is, and has been at all times material herein, a supervisor within the meaning of Section 2(11) of the Act, selected by Stone & Webster for the purpose, among other things, of the adjustment of grievances and collective bargaining within the meaning of Section 8(b)(1)(B) of the Act.

4. Respondent Local 478, by requiring Carl Mattocks to plead on charges and by fining and suspending him from membership in Respondent Local 478 for performing supervisory work, has restrained and coerced Stone & Webster in the selection and retention of its representatives for the purposes of collective bargaining and adjustment of grievances, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

5. Respondent International, by ratifying the discipline imposed by Respondent Local 478 on Carl Mattocks because he performed supervisory duties, has engaged and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

(A) Respondent Local 478, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining and coercing Stone & Webster in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances by trying, suspending from membership, fining, or otherwise disciplining Carl Mattocks, or any other supervisor-member, for the performance of supervisory duties.

(b) In any other manner engage in conduct that is violative of the Act, or that restrains or coerces Stone & Webster, or any other employer, in the selection of its representatives for purposes of collective bargaining or grievance adjustment.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and remove from its records the fine and membership suspension imposed on Carl Mattocks because of his employment with Stone & Webster.

(b) Restore Carl Mattocks to his status as a member in good standing in Respondent Local 478 with attendant rights.

(c) Notify Carl Mattocks, in writing, that the fine has been rescinded, that records of the charges and fine against him have been expunged, and that he will be re-

[17] Although the parties did settle this case prior to the issuance of an Order by the Board, the Board stated that it adopted the findings and conclusions of the administrative law judge. This case was cited in *Admiral Merchant Motor Freight*, 265 NLRB 134 (1982).

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

stored to his status as a member in good standing with all attendant rights.

(d) Post in conspicuous places at the meeting halls, offices, and hiring halls of Respondent Local 478, where notices are customarily posted, for 60 consecutive days, copies of the attached notice marked "Appendix A."[19] Copies of the notice, on forms provided by the officer in charge for Subregion 39, shall be signed on behalf of Respondent Local 478 by Elwood Metz Jr., its business manager. Reasonable steps shall be taken by Respondent Local 478 to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Reproduce and mail to the home of each of its members a facsimile of the aforesaid notice signed by Elwood Metz Jr.

(f) Sign and return to the officer in charge sufficient copies of the notice for posting by Stone & Webster, if willing, at all places where notices to employees are customarily posted.

(g) Pay to the Board and Carl Mattocks the reasonable costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this proceeding before the Board.

(h) Preserve and, on request, make available to the Board or its agents for examination all records necessary to disclose whether the disciplinary actions taken against Carl Mattocks were expunged from his record.

(i) Notify the officer in charge in writing within 20 days of the date of this Order what steps Respondent Local 478 has taken to comply.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(B) Respondent International, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Ratifying the discipline imposed by Respondent Local 478 on Carl Mattocks, or any other supervisor-member, for performing supervisory duties.

(b) In any like or related manner restraining or coercing Stone & Webster, or any other employer, in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the denial of the appeal filed by Carl Mattocks for the discipline imposed on him by Respondent Local 478 because of his performance of his supervisory duties at Stone & Webster.

(b) Remove from its files any reference to the denial of the appeal filed by Carl Mattocks and any reference to the disciplinary action imposed by Respondent Local 478 on Carl Mattocks and notify Mattocks in writing that it has done so.

(c) Post in conspicuous places at its offices and hiring halls, where notices are customarily posted, for 60 days, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the officer in charge for Subregion 39, shall be signed on behalf of Respondent International by an officer of Respondent International.

(d) Preserve and, on request, make available to the Board or its agents for examination all records necessary to disclose whether the denial of the appeal and the disciplinary action taken against Carl Mattocks were expunged from his record.

(e) Notify the officer in charge in writing within 20 days of the date of this Order what steps Respondent International has taken to comply.

Charles Koffler, Lair Koffler, Steve Ferriea, Wilbert Boepple, Ben Gantt and Frank Wong, a Partnership, d/b/a Benkiser Electric *and* International Brotherhood of Electrical Workers, Local 595. Case 32–CA–8302

28 April 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

Upon a charge filed by the Union 22 August 1986, the General Counsel of the National Labor Relations Board issued a complaint 29 October 1986 against the Company, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act.

Although the Respondent was properly served copies of the charge and complaint, it has failed to file a proper answer. Subsequent to the issuance of the complaint and pursuant to the Respondent's request, the Regional Attorney for Region 32 extended the date for submission of an answer to the complaint to the close of business on 24 November 1986. On 25 November 1986 the Regional Office received from the Respondent a one-paragraph "mailgram" that had been sent the previous day at 6:03 p.m. and which purported to deny "all charges set forth in the above-referenced case." The document failed to specifically admit, deny, or explain each of the facts alleged in the complaint, and there was no indication that copies of the document had been served on the other parties to the proceeding. On 31 December 1986 the Regional Office sent the Respondent a certified letter advising that its answer was procedurally defective since it did not meet the specificity and service requirements of Sections 102.20 and 102.21 of the Board's Rules and Regulations. The letter further stated that unless an answer in compliance with the Rules was received by 9 January 1987, the Regional Office would file a Motion for Summary Judgment with the Board. Additionally it is undisputed that the Regional Office, inter alia, advised the Respondent by telephone that its mailgram answer was procedurally defective and that summary judgment would be sought unless a satisfactory answer was received by the end of the week. Notwithstanding such notification, the Respondent has failed to submit a timely and proper answer to the complaint.

On 28 January 1987 the General Counsel filed a Motion for Summary Judgment, with exhibits attached. On 30 January 1987 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response to the Notice to Show Cause. Thereafter the General Counsel filed both a response to the Respondent's response to the Notice to Show Cause and a motion to accept the General Counsel's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board." Further, the allegations in the Motion for Summary Judgment disclose that the Regional Office, by letter dated 31 December 1986, and by telephone conversation on 6 January 1987, notified the Respondent's counsel that the mailgram did not comply with the Board's Rules and that unless an answer which conformed to the Rules was forthcoming, a Motion for Summary Judgment would be filed. No such answer has been filed.

In its response to the Notice to Show Cause, the Respondent contends that from 27 October until 24 November 1986 its principal owner Charles Koffler was not present in the State and was therefore unavailable to meet with counsel to prepare an answer to the complaint. The Respondent maintains, however, that during this time its counsel M. Franklin Nichols III had several discussions with the Regional Office regarding his intent generally and specifically to deny each allegation of the complaint on behalf of his client. The Respondent also contends that after its 24 November request for additional time to file an answer was denied by the Regional Attorney, Nichols prepared the mailgram based on facts obtained from representatives of the Respondent, including some of the named parties. Finally, the Respondent contends that under all these circumstances the mailgram answer constitutes sufficient compliance with the Board's Rules and Regulations.

The Respondent also submitted the declarations of Koffler and Nichols in response to the Notice to Show Cause. Koffler stated that from 15 October through 30 November 1986 he was outside the State of California and unable to meet with his attorney and that, to the best of his knowledge, none of the other named Respondents or principals of the Company had knowledge of any matters men-

tioned in the complaint. Nichols essentially reiterated the contentions made in the Respondent's response and further stated that, except for the complaint, no notices or documents sent by the Board by certified mail regarding this case had been received by his office. In this regard, Nichols' declaration requested that the General Counsel produce "any such alleged registered notices."[1]

The Respondent's mailgram answer does not meet the specificity and service requirements of Sections 102.20 and 102.21 of the Board's Rules. Moreover, the Respondent's assertion that it sufficiently complied with the Board's Rules in view of the fact that its principal owner was not available in November 1986 fails to explain why the Respondent failed to file an adequate answer by 9 January 1987 and therefore does not constitute good cause within the meaning of Section 102.20 of the Board's Rules. See *Electro-Mechanical Industries*, 261 NLRB 467, 468 (1982).

Accordingly, in view of the Respondent's failure to file an answer that comports with the Board's Rules, and in the absence of good cause being shown for the failure to file a timely and proper answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California partnership with an office and place of business in San Leandro, California, has been engaged in the sale and repair of electrical motors and pumps. During the year preceding the issuance of the complaint, a representative period, the Respondent, in the course and conduct of its business operations, purchased and received goods or services valued in excess of $50,000 directly from suppliers located outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Working Foremen, Shop Journeymen "AA," Trouble Shooters, Shop Journeymen "A," Shop Journeymen "B," Tool Storeroom Keeper, Shop Coil Winder and Fractional Horsepower Motor Repairmen, Shop Laborers, Shop Helpers, Apprentices, M & F Journeymen "A," M & F Journeymen "B," M & F Journeymen "C," M & F Coil Winder "A," M & F Coil Winder "B," M & F Coil Winder "C," M & F Laborers "A," M & F Laborers "B," and M & F Laborers "C" employed by Respondent at its San Leandro, California facility; excluding all other employees, including clerical employees, supervisors, and guards, as defined in the Act.

Since at least 1978 and at all times material herein the Union has been the designated exclusive collective-bargaining representative of the Respondent's employees in the unit described above, and the Union has been recognized as such representative by the Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective for the period 1 May 1984 to 30 April 1986.

Since at least 22 February 1986 and continuing to date the Respondent has failed and refused to make monthly contributions to various trust funds on behalf of unit employees, as required by the collective-bargaining agreement. The Respondent has engaged in such conduct during the term of the agreement and without prior notice to the Union, without having afforded the Union an opportunity to bargain as the exclusive representative of unit employees with respect to the conduct and its effects, and without the consent of the Union. Additionally, about 28 February 1986 the Respondent withdrew recognition from the Union as the collective-bargaining representative of the unit employees.

Based on the above, we find that the Respondent has, since 22 February 1986, refused to bargain collectively and in good faith with the Union as the exclusive representative of the unit employees in violation of Section 8(a)(5) and (1) of the Act.

[1] In the General Counsel's response to the Respondent's response to the Notice to Show Cause, the General Counsel submitted a photocopy of an envelope sent by certified mail from the Regional Office to the Respondent's counsel Nichols on 31 December 1986. The envelope indicates that on at least two occasions—2 and 7 January 1987—the Postal Service notified Nichols that a certified letter had been sent to him, and that the letter was subsequently returned to the Regional Office as unclaimed. In light of the Respondent's request for production of the Board documents sent by certified mail, we grant the General Counsel's unopposed motion to accept the response to the Respondent's response only to the extent of this submission. In any event, we note that the Respondent in its response to the Notice to Show Cause does not dispute the occurrence or substance of the 6 January 1987 telephone conversation with the Regional Office.

CONCLUSIONS OF LAW

1. By unilaterally failing and refusing to make monthly contributions to various trust funds, as required by the collective-bargaining agreement, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

2. By withdrawing recognition from the Union as the collective-bargaining representative of employees in the unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

3. By the aforesaid conduct, the Respondent has interfered with, restrained, and coerced the unit employees in the exercise of the rights guaranteed them by Section 7 of the Act and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make whole the unit employees by paying contributions to the trust funds, as provided in the collective-bargaining agreement, which have not been paid,[2] and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make such required payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). We also shall order the Respondent to bargain on request with the Union as the exclusive representative of the unit employees on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Charles Koffler, Lari Koffler, Steve Ferriea, Wilbert Boepple, Ben Gantt and Frank Wong, A Partnership, d/b/a Benkiser Electric, San Leandro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally failing and refusing to make monthly contributions to various trust funds on behalf of unit employees as required by the collective-bargaining agreement.

(b) Withdrawing recognition from International Brotherhood of Electrical Workers, Local 595 as the collective-bargaining representative of employees in the unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make its employees whole by paying all trust fund contributions, as provided in the collective-bargaining agreement, which have not been paid, and by reimbursing unit employees for any expenses ensuing from the Respondent's unlawful failure to make such payments, in the manner set forth in the remedy section of this decision.

(b) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All Working Foremen, Shop Journeymen "AA," Trouble Shooters, Shop Journeymen "A," Shop Journeymen "B," Tool Storeroom Keeper, Shop Coil Winder and Fractional Horsepower Motor Repairmen, Shop Laborers, Shop Helpers, Apprentices, M & F Journeymen "A," M & F Journeymen "B," M & F Journeymen "C," M & F Coil Winder "A," M & F Coil Winder "B," M & F Coil Winder "C," M & F Laborers "A," M & F Laborers "B," and M & F Laborers "C" employed by Respondent at its San Leandro, California facility; excluding all other employees, including clerical employees, supervisors, and guards, as defined in the Act.

[2] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We therefore leave to further proceedings the question of any additional amount the Respondent must pay into the benefit fund in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[3] The General Counsel has requested the inclusion of a visitatorial clause in the Order. A visitatorial clause authorizes the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Board's Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

(c) Post at its facility in San Leandro, California, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally fail and refuse to make monthly contributions to various trust funds on behalf of unit employees as required by our collective-bargaining agreement.

WE WILL NOT withdraw recognition from International Brotherhood of Electrical Workers, Local 595 as the collective-bargaining representative of employees in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make our employees whole by paying all trust fund contributions, as provided in the collective-bargaining agreement effective 1 May 1984 through 30 April 1986, which have not been paid, and by reimbursing our unit employees, plus interest, for any expenses ensuing from our unlawful failure to make such required payments.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All Working Foremen, Shop Journeymen "AA," Trouble Shooters, Shop Journeymen "A," Shop Journeymen "B," Tool Storeroom Keeper, Shop Coil Winder and Fractional Horsepower Motor Repairmen, Shop Laborers, Shop Helpers, Apprentices, M & F Journeymen "A," M & F Journeymen "B," M & F Journeymen "C," M & F Coil Winder "A," M & F Coil Winder "B," M & F Coil Winder "C," M & F Laborers "A," M & F Laborers "B," and M & F Laborers "C" employed by us at our San Leandro, California facility; excluding all other employees, including clerical employees, supervisors, and guards, as defined in the Act.

CHARLES KOFFLER, LARI KOFFLER, STEVE FERRIEA, WILBERT BOEPPLE, BEN GANTT AND FRANK WONG, A PARTNERSHIP, D/B/A BENKISER ELECTRIC

Frank Chervan, Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC. Case 5–CA–17608

28 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 27 October 1986 Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Frank Chervan, Inc., Bedford, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) of the Act by refusing to provide to the Charging Party the requested information, we rely solely on his finding that the information was relevant and necessary to the Charging Party's duties as the collective-bargaining representative in grievance proceedings and that the Union's request was not burdensome. We find it unnecessary to reach the first and second issues noted by the judge; specifically, whether the matter in dispute was settled and, if settled, whether the contractual "conference" requirements were complied with. The parties have agreed on a method for dispute resolution that is embodied in the collective-bargaining agreement. We note that the parties have waived contractual time limitations for arbitration. An arbitrator can better decide these issues thereby avoiding any bifurcation of the arbitration hearing, should the Union decide to pursue the grievance after receiving the information.

Steven E. Nail, Esq., for the General Counsel.
Edward G. Kemp, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This case was litigated before me at Lynchburg, Virginia, on 12 August 1986 pursuant to charges filed by Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC (the Union) on 4 November 1985 and complaint issued 31 December 1985. The complaint, as amended at hearing, alleges that Frank Chervan, Inc. (Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to furnish the Union with information necessary and relevant to its performance as employee representative.

Respondent denies the commission of an unfair labor practice and contends the grievance was disposed of by binding settlement between the parties during a second step meeting; the information requested is not necessary and relevant; and it would be overly burdensome to supply the information. Respondent agrees in its posttrial brief, and I find, that the refusal-to-furnish information allegation should not be deferred to contractual grievance-arbitration procedures, *United Technologies Corp.*, 274 NLRB 504 (1985).

On the record before me, and after considering the able posttrial briefs of the parties, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is engaged in the manufacture and nonretail distribution of wooden furniture and related products at its Bedford, Virginia facility. During the 12 months preceding the issuance of the complaint, a representative period, Respondent sold and shipped more than $50,000 worth of its products, goods, and materials directly from its Bedford, Virginia facility to points located outside the State of Virginia. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Relevant Facts*

There is little dispute about the relevant facts. It is the conclusions to be drawn therefrom that are at issue. Respondent and the Union have had an amicable bargaining relationship for some 25 years. The latest collective-bargaining agreement between them is effective from 1 April 1985 to 1 April 1988, and contains a grievance procedure reading, in pertinent part, as follows:

> *Section 2.* An alleged grievance, in order to receive consideration, must be based on some claimed violation of the rights of employees as established by this Agreement and must be presented within five (5) working days of the occurrence of the act which gives rise thereto.
>
> *Section 3.* Should grievance arise, an earnest effort shall be made to settle them immediately by the following procedure, each enumerated method to be exhausted before resorting to the next enumerated method.
>
> (a) By conference between the employee involved and his immediate supervisor and a Union representative if his presence is requested. The su

pervisor shall give a definite answer within twenty-four (24) hours. In the event the agreement is not reached, the aggrieved employee shall then notify the Chairman of the Union Committee, and if the Chairman deems the complaint justified, the employee shall reduce it to writing and it shall be presented to the Company within five (5) working days after the occurrence giving rise to the grievance; it being understood that if the written grievance is not submitted to the Company within said five (5) day period, the grievance will be barred and will be deemed completely disposed of from the standpoint of the Company, the Union, and the employee involved.

(b) Within three (3) working days after the written grievance is submitted, by conference between the employee involved, the Chairman of the Committee, the Plant Superintendent, steward and foreman.

(c) Within ten (10) working days thereafter (or such time as shall be mutually acceptable, by conference between the Grievance Committee, a representative of the International Union, the Plant Manager, steward, foreman and the employee involved.

(d) If any grievance cannot be settled by the parties as set forth above, it may be referred to arbitration at the request of the Union, and in this event, the Union, within fifteen (15) days after the final decision of the Company upon the grievance has been made known, shall notify the Company in writing of its desire to have the matter arbitrated. If the grievance is not appealed to arbitration within such fifteen day period, it shall be deemed to have been satisfactorily settled. If the grievance is appealed to arbitration . . . . [t]he decision of the arbitrator shall be final and binding on both parties. . . .

Respondent assigned Chester Hickman to perform some rush work on Louis XV chair legs on 19 September 1985,[1] asserting that Hickman was superior to others at performing that work. Gerald Saunders had more seniority than Hickman, but was placed on laid-off status for 19 September because there was no work available for him. Saunders filed a grievance on 23 September protesting that Hickman was allowed to work in his place even though Hickman had less seniority and skill. Both employees are members of the bargaining unit covered by the collective-bargaining agreement.[2] The provision of the agreement relevant to the grievance reads, in pertinent part, as follows:

ARTICLE VII

Seniority

Section 1. Seniority on a departmental basis shall prevail at all times.

. . . .

Section 5.

(a) In effecting promotions, transfers, demotions, layoffs and recalls, the following factors will be given full consideration:

(i) Knowledge, skill and efficiency.
(ii) Physical fitness for the job.
(iii) Length of service.

When factors (i) and (ii) are relatively equal, factor (iii) shall govern. The Company shall determine the qualifications under factors (i) and (ii), but any employee who considers himself aggrieved as a result of the Company's determination shall have the right to file a grievance.

Robert McKinney, plant superintendent, and Lester Miller, supervisor of Hickman and Saunders, met with Saunders and union steward Charles Cooper on 30 September to discuss the grievance. The meeting was requested by Cooper. McKinney is the only one of the four who testified. His uncontroverted recitation of what occurred at the meeting is credited. He explained Respondent's reasons for selecting Hickman rather than Saunders to do the work. Cooper remarked that he had surmised that was the case and that was what he had told Saunders. Saunders stated that was good enough for him and, as far as he was concerned, that ended the matter. No one mentioned that Vernon Craig, the Union's local president and chairman of the grievance committee was not present. Craig is normally notified by management of conferences to be held at the second step of the grievance procedure.[3] He was not notified of the 30 September meeting by the Company or Charles Cooper.

Subsequent to the 30 September meeting, Philip Pope, the Union's international representative, requested a third-step grievance meeting with Respondent on the written grievance of 23 September that he had received in the mail. When Pope received the grievance, he called Craig and asked if the grievance had been settled. Craig told him there had been no meeting with him at the second step of the grievance procedure and the grievance had not been settled. Pope credibly testified that it is the practice to take up the grievance at the third step when there is no second-step meeting because a failure to meet at the second step is construed as an automatic denial of the grievance. A meeting with Pope was scheduled and held on 16 October.

The 16 October meeting was attended by Pope, Craig, Cooper, Saunders, Hickman, McKinney, Miller, and G. Dennis Snell, Respondent's general manager. The meeting opened. Snell said that he did not know why they were meeting because the Company thought the grievance was settled. Pope took the position that it had not been settled, and testified before me that Craig and Saunders did not agree at the meeting that it had been settled. According to McKinney, there was no statement from Saunders or Cooper that the grievance had not been set-

[1] All dates are 1985.

[2] The bargaining unit is:
All production and maintenance employees, but excluding salaried and clerical employees, guards, watchmen, assistant foremen, foremen and supervisors.

[3] There is no evidence the grievance was first discussed with the employees' immediate supervisor as the first step provides.

tled. Noting that Pope also testified that the company representatives were the only ones at the meeting who said anything about the grievance being settled, I conclude that Saunders and Cooper neither agreed nor disagreed at this meeting that the grievance had been settled. In the course of the meeting, Pope requested certain information from Respondent, which he deemed relevant to the grievance. Snell told him to put his request in writing.

The following day, 17 October, Pope submitted the following written request to Snell:

> A discussion was held on the above mentioned grievance on October 16, 1985. During our discussion the Company stated Chester Hickman was *more* qualified to do the work but did not deny the grievants ability was *relatively equal.*
>
> The Company claimed it needed Chester to run a special order, 15857 Spindle and Wheel. During our discussion I asked how many rejects Chester and the grievant each had accumulated while running the 15857 job. I also asked what other work Chester performed on September 19, 1985. The Company could not immediately answer these questions, apparently because records were not readily accessible. Therefore, the Union requests the following information which is relevant to the Union investigation of this grievance.
>
> 1. Copies of Company records indicating the number of pieces run on the 15857 Spindle and Wheel job for each employee in the Sanding Department for the preceding twelve months, the performance level of each employee running this job and the total number of rejects for each employee on this job.
> 2. Copies of Chester Hickman's production sheets or any other records indicating the jobs which Chester Hickman performed on September 18, 1985.

On 22 October, Snell replied by letter reading:

> This will respond to your letter of 10–17–85 and comments relating to your conclusion of our 10–16–85 meeting on the above mentioned grievance.
>
> You were informed that the grievant, Mr. Saunders did not work on a specific job on the day in question as he did not possess the skill level required to do the job without having to have the job "reworked" or deemed not useable.
>
> The company's position and reasons for taking the action it did was fully explained to the grievant, Mr. Saunders, and the steward, Mr. Cooper in a meeting held with our Area Manager, Mr. McKinney on 9–30–85. All parties agreed at this meeting that the matter was understood and closed.
>
> The company still considers the matter closed and sees no need to forward information as requested in your letter of 10–17–85.

Pope wrote Snell another letter on 5 November reading as follows:

> Upon further investigation of the above mentioned grievance the Union has found that this grievance was "not closed" by the Union at any meeting between the parties. The fact that the grievant understood management's position and reasoning on September 30, 1985, in no way closed the grievance.
>
> Further, after a grievance is put in writing, it becomes the property of the Union and a meeting is supposed to be held which includes the chairman of the grievance committee. In the Gerald Saunders grievance, the chairman was not included in any meeting until I discussed this grievance with the Company on October 10, 1985. Accordingly, Mr. McKinney's meeting was not a formal step of the grievance and should be disregarded as a formal hearing.
>
> Previously the Union requested certain information from the Company pertaining to this grievance (letter dated 10–17–85). I am renewing the request and further intend to ask the National Labor Relations Board [for] enforcement of the Union's request.
>
> The Union requests an extention of time to file for arbitration on this grievance pending the National Labor Relations Board's investigation of this alleged violation of Section 8-A-5.
>
> If the Company denies an extension of time, please consider this a notice of intent to arbitrate this grievance.

Respondent has not furnished the requested information, and the parties have agreed to an extension of time to file for arbitration until such time as the instant case is resolved.

B. *Contentions and Conclusions*

The complaint, as amended by the General Counsel's motion to strike a portion thereof at hearing, which was granted, alleges Respondent has improperly refused to furnish the following information:

> (1) Copies of Company records indicating the number of pieces run on the 15857 Spindle and Wheel job for each employee in the Sanding Department for the preceding twelve months, the performance level of each employee running this job and the total number of rejects for each employee on this job.
>
> (2) Copies of Chester Hickman's production sheets or any other records indicating the jobs which Chester Hickman performed on September 19, 1985.

The issues are (1) whether the grievance was settled at the meeting of Cooper and Saunders with McKinney, (2) whether that settlement is binding on the Union, and, therefore, excuses Respondent from furnishing information relevant to the grievance, (3) whether the information requested is relevant to the Union's performance as exclusive collective-bargaining representative of Respondent's employees, and (4) whether it is overly burdensome on Respondent to furnish the information sought.

I am persuaded the participants in the 30 September meeting believed the grievance was settled and finally disposed of. This is not, however, dispositive of the issue. Article V, section 3 provides that an earnest effort shall be made to settle grievances at each step of the grievance procedure, but also specifically provides that a complaint shall be reduced to writing by the aggrieved employee if the "Chairman of the Union Committee" deems the complaint justified, and further provides that settlement efforts after a written grievance is submitted *shall* be made at a "conference between the employee involved, the Chairman of the Committee, the Plant Superintendent, steward and foreman." This is a mandatory provision. Vernon Craig was the "Chairman of the Committee." He received no notification of the grievance or the meeting and was not present at the 30 September meeting. The meeting was therefore not a "conference between the employee involved, the Chairman of the Committee, the Plant Superintendent, steward and foreman" as article V, section 3(b) of the contract requires. There is no evidence the Union waived the necessity of the "Chairman of the Committee['s]" presence at such a conference, nor is there any contractual provision providing for such a waiver, or any showing Cooper was acting as the "Chairman." Indeed, if he was there would then have been no steward present. For these reasons I conclude that the 30 September meeting was not a "conference" as contemplated by article V, section 3(b) of the collective-bargaining agreement, and the 30 September "settlement" is not binding on the Union. Accordingly, I further find that, notwithstanding the agreement of Cooper and Saunders that the matter was settled, Pope acted properly in pursuing the matter at the next step of the procedure described in article V, section 3(c).

It is well settled that the employer is required to furnish the exclusive bargaining representative of its employees with information relevant and necessary to the Union's performance of its duties in discharging its role as employee representative in grievance proceedings.[4] The contract plainly provides at article VII, section 5 that "Knowledge, skill and efficiency" is a controlling factor in determining layoffs, and an employee who considers himself aggrieved by the Respondent's determination of that factor has the right to file a grievance. Saunders was the senior employee, and he was laid off on 19 September while Hickman performed work that Saunders claims he is capable of performing. The Union is entitled to information in Respondent's control that is relevant to the grievance. Without the relevant information the Union is severely disabled in its efforts to evaluate and process Saunders' grievance. The information must be produced if there is only a probability it is relevant and useful to the Union in processing and assessing the merit of the grievance.[5] The question is "whether the information . . . is helpful in evaluating the merits of the grievance and the propriety of pursuing the grievance to arbitration."[6] The answer, I believe, is that it is. Pope persuasively explained that the information sought regarding all employee performance on work of the type in question was necessary for an evaluation of the relative qualifications of Saunders and Hickman with respect to each and with respect to all employees performing that work. That the relative past performance of Saunders and Hickman is relevant to the issue of relative qualifications to do the same work on 19 September is obvious. Moreover, I agree with Pope that inasmuch as the contract refers to "relatively equal" knowledge, skill, and efficiency, the average performance of all employees working on the particular job provides a measuring point from which to ascertain whether, and by how much, the performance of Saunders and Hickman deviated from that norm. If there be but a slight variance from the average by both, it might be argued that their performance and this knowledge, skill, and efficiency, is relatively equal. On the other hand, a much better than average performance by one would overshadow an average or less than average performance by the other and tend to show differences in knowledge, skill, and efficiency, as would a barely average performance contrasted against a far below average one. There are other possible variations, but it suffices to note that these examples illustrate the usefulness of the information sought to the grievance evaluation process. The Union is therefore entitled to the records showing the information regarding the 15857 Spindle and Wheel job that it requested in its 17 October letter. There is some indication in the record that reject records are not kept and therefore cannot be produced. Whether or not reject records exist is, however, a matter best left to the compliance stage of these proceedings. As to paragraph 2 of the Union's request letter, what Hickman produced on 19 September is relevant to the question of whether his allegedly special abilities were really needed and for how long on that date. Hickman's special qualifications are the primary asserted reason given for Saunders layoff on 19 September. If Hickman did not in fact perform the work denied Saunders on a relative qualifications basis, the information is probably dispositive of the grievance. If Hickman did perform the work, but only for a few minutes or hours, the layoff of Saunders for the entire day is placed in question. There are, as always in these situations, other variations that may be conjured up to support or defeat the grievance, but, whatever the ultimate determination of the grievance on its merits, the records reflecting Hickman's performance on 19 September are clearly relevant.

Respondent's affirmative defense that it is overly burdensome to require the production of the above records is not impressive. Respondent maintains weekly computer printouts of individual employee production according to Pope, who is credited in the absence of persuasive countervailing evidence, and the production of the 19 September work record of Hickman would seem to require little effort by Respondent. Apart from its bare contention, Respondent adduced no reasonable modicum of supporting evidence for any theory of excessive burden, and therefore has not met its burden of proving it was faced with an unreasonable burden if it complied

[4] See, e.g., *Postal Service*, 276 NLRB 1282, 1285 (1985), and cases cited therein.

[5] *NLRB v. Pfizer, Inc.*, 763 F. 2d 887 (7th Cir. 1985), enfg. 268 NLRB 916 (1984); *WL Molding Co.*, 272 NLRB 1239 (1984).

[6] *United Technologies Corp.*, 274 NLRB 504, 506 (1985).

with the request. Accordingly, the defense that to require the production of the requested data would be overly burdensome is denied.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to furnish the Union with information requested in connection with the grievance of Gerald Saunders, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Frank Chervan, Inc., Bedford, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC, as the exclusive bargaining representative of the employees in the following bargaining unit by refusing to furnish it with information it requests that is relevant and reasonably necessary to the processing of employee grievances:

> All production and maintenance employees, but excluding salaried and clerical employees, guards, watchmen, assistant foremen, foremen and supervisors.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately furnish the Union with the information it requested by letter of 17 October 1985 in connection with the grievance of Gerald Saunders.

(b) Post at its facility in Bedford, Virginia, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.[9]

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[9] The circumstances of this case do not warrant the inclusion of a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from Respondent under the Federal Rules of Civil Procedure under the supervision of any United States court of appeals enforcing this Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC, as the exclusive bargaining representative of our employees in an appropriate unit, by refusing, on request, to furnish it with information relevant and reasonably necessary to the processing of unit employee grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL immediately furnish the Union with the information it requested by letter of 17 October 1985 in connection with the grievance of Gerald Saunders.

FRANK CHERVAN, INC.

Jewish Day School of Greater Washington, Inc. ***and*** **American Federation of Teachers, Local 3648, AFL–CIO, Petitioner.** Case 5–RC–11219

29 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN, BABSON, AND STEPHENS

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held on 2, 16, and 19 June 1980, before Hearing Officer Kenneth Henley. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, the Regional Director for Region 5 transferred this case to the Board for decision. The Employer and the Petitioner filed briefs.

The Board affirms the Hearing Officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

The Union seeks to represent a unit of teachers[1] at the Jewish Day School (the Employer). The Jewish Day School is a private, nonprofit corporation established in 1972 pursuant to the recommendation of a study prepared by the American Association for Jewish Education. The study examined Jewish education in the Washington, D.C. area, and recommended the establishment of a broadly based community day school extending from kindergarten through high school. That recommendation was adopted by the United Jewish Appeal Federation of Greater Washington, Inc. (UJAF).[2] At the request of UJAF, a new facility for the school was constructed in Rockville, Maryland, with funds from the Greater Washington Jewish Community Foundation.[3] Under the terms of a 99-year lease, the Employer rents the facility from the Foundation for $1 per year, plus utilities and maintenance costs.

The Employer's bylaws provide for a 25-member board of governors and a 33-member board of directors. Fifteen members of the board of governors are elected by the board of directors, and the remaining 10, who are elected by the board of governors in office at the time of the election, must be "active in community affairs, including the United Jewish Appeal and the Board of Jewish Education." The responsibilities of the board of governors include maintaining a liaison with a UJAF, the Board of Jewish Education, and other Jewish community organizations.

The board of directors consists of 33 voting members[4] as well as the president and the executive vice president of the UJAF. At the time of the hearing all members of the board of directors were Jewish and three were rabbis. The board of directors determines the Employer's policies, and manages and is ultimately responsible for the affairs of the Employer.[5]

The bylaws also establish an education committee ranging from 8 to 35 members. Subject to the ratification of the board of directors, the education committee is responsible for determining the school's educational policies, recommending an annual educational operating budget, determining admission requirements, and establishing, reviewing, and revising the curriculum. The bylaws provide that the education committee "generally shall include religious and secular educators who are professionally trained, and other individuals experienced in education." At the time of the hearing there were three rabbis on the education committee.

The Employer's budget at the time of the hearing was $1.5 million, and it had projected a budget of $1.8 million for the following year. Although predominantly funded by tuition, the Employer receives approximately 20 percent of its funds from the UJAF,[6] and it has also received annual individual contributions in excess of $100,000.

[1] The unit description is as follows:

All full time and part time teachers, including physical education teachers, athletic director, art teachers, music teachers, special education teachers, and teachers aides, guidance counselors and professional librarians employed by the employer at its Rockville, Maryland facility, but excluding administrators, nonprofessional librarians, the consulting psychologist, clerical employees, maintenance employees, volunteers, guards and supervisors, as defined in the Act.

The record establishes that the librarian is also an English teacher, and that the athletic director is also a science teacher. Teacher aides provide individual remedial instruction to students and administrative assistance to teachers. Guidance counselors administer standardized testing and work with teachers to deal with the students' psychological adjustment problems.

[2] Bernard White, the president of the Jewish Day School, indicated that the UJAF's primary purpose is to raise funds for the general welfare of Jewish people in the United States and abroad. White also testified that on the local level the UJAF is involved in the details of planning for the Jewish community.

[3] The Greater Washington Jewish Community Foundation was formed in 1965 for the purpose of buying land and constructing new buildings for Jewish social welfare agencies such as the Jewish Community Center, the Jewish Social Service Agency, and the Hebrew Home of Greater Washington.

[4] The board of directors consists of 16 members elected by the members in office at the time of the election, 12 members elected by the parents of the school's students, the chairman of the board of governors, the president of the PTA, and the school's 3 immediate past presidents.

[5] Responsibility for all decisions and programs of the board of directors rests with two of the Employer's officers, the chairman of the board of governors, and the president. The other officers are a vice president and one or more secretaries and treasurers.

[6] The UJAF requires the Employer to submit its budget for review, and the school is prohibited from engaging in new programs, or cancelling existing ones, without the UJAF's permission. White testified that the UJAF does not control the hiring of staff, administrators, or teachers, and does not comment on the curriculum unless the Employer seeks to implement a completely new project.

best copy available

The Employer's articles of incorporation state that its purposes are, inter alia:

> (b) To establish, operate and maintain a synagogue or synagogues for religious worship and to provide for and conduct religious services in the Jewish faith in said synagogue or synagogues.
>
> (c) To establish, operate and maintain an institution or institutions of learning in both religious and secular subjects, which institution or institutions shall be subject to the following provisions and limitations:
>
> (i) Religious subjects shall be taught in accordance with the principles of the Jewish faith with the purpose of giving each student a thorough Jewish education;
>
> (ii) Secular subjects shall meet the requirements of the local school system for comparable grades . . . .

The Jewish Day School has also prepared a recruitment manual for parents of prospective students, which states that:

> . . . the school seeks to create an atmosphere to satisfy the needs of all its students. The children are exposed to a wide spectrum of religious thought and interpretation. Each child, regardless of religious background, is encouraged to enrich his or her understanding of Judaism and to identify with the Jewish people. There is no attempt to impose any particular religious philosophy.

According to the Employer's president, White, the manual's statement that there is "no attempt to impose any particular religious philosophy" means that students are exposed to the conservative, orthodox, reform, and reconstruction branches of Judaism, and that there is no attempt to favor the teachings of one over another. Although the admission policy of Jewish Day School permits students who are not of the Jewish faith to attend, the Employer's assistant principal for Judaic studies, Dr. Richard Wagner, testified that all students at Jewish Day School are Jewish.

The chairman of the education committee, Baruch Fellner, testified that the committee's philosophy is to promote "an intense Jewish religious education."[7] According to Fellner, the Employer's policy is to "inculcate Jewish ideas" within the children and "to inculcate . . . the performance of commandments which are derived directly from the five books of Moses." Fellner also testified that the school is designed to make the spectrum of Jewish religious observance appealing so that when the children become adults "they will choose an intense Judaic identity."

The Jewish Day School offers religious subjects in its Judaic studies program and secular subjects in its general studies program. Religious instruction is mandatory in both the lower school, which extends from kindergarten through grade 6, and in the upper school, which encompasses grades 7 through 12. A child spends 40 percent of his school day in Judaic studies courses and 60 percent in general studies courses.

According to Assistant Principal Wagner, Judaic studies teachers in the lower school are responsible for teaching basic Hebrew language and literature, elementary Bible instruction, elementary instruction in basic elements of Jewish history, and elementary instruction in the basic skills of Jewish life and law. Religious instruction is departmentalized in the upper school, and individual Judaic studies teachers specialize in, for example, the Bible, Rabbinic literature, Hebrew language, or Jewish history. The Employer attempts to teach all Judaic studies courses in Hebrew, depending on the qualifications of the teacher and the skill level of the students.

The record further establishes that the Employer seeks to integrate the Judaic studies and general studies programs. Fellner testified that there is no "line of demarcation" between the two, and that "the teaching of Judaism in all its elements is inextricably woven" into the secular courses. Wagner testified that the integration of the program is a "central feature" of the school,[8] and that teachers from each program sometimes teach courses in conjunction.[9]

The Employer also conducts separate orthodox, conservative, and reform prayer services in Hebrew each morning. Students are required to attend one of the services, and 1-day suspensions and other forms of discipline have been imposed on students who do not attend.[10] Full-time teachers

[7] We note that Jeralyn Epstein, a teacher, generally denied perceiving an "intense" religious atmosphere at the school.

[8] To illustrate the integration of the programs, Wagner noted that third-grade teachers in both programs worked together to teach archaeology, with the Judaic studies teacher focusing on an archaeological site in Israel and the general studies teacher focusing on a site in Colorado. Wagner also noted that a general studies music teacher will frequently use examples of Jewish music to teach basic elements of music, and that a general studies history teacher discussed the progressive era in American history with an emphasis on Jewish immigration to America occurring at the same time.

[9] One teacher at the school, Jeralyn Epstein, denied that her foreign language classes were integrated with religious studies, but she conceded that other language teachers seek to promote such integration. Another teacher, Carole Powers, conceded that to some extent she integrates Judaic studies into her general studies history class.

[10] Fellner testified that the services are "well attended," but a teacher asserted that they were poorly attended. The teacher also testified that attendance was not well enforced but she did not deny that discipline had been imposed on some occasions. Wagner testified that more than 10, 1-day suspensions have been imposed.

who are present at school during the first period of the day are also required to attend, and Wagner testified that the Employer "remind[s] them of their responsibilities" if they fail to do so.[11] The meals for students in the upper school begin and conclude with a benediction.

The school also requires that teachers, staff, and students observe Jewish dietary restrictions. Students who bring nonkosher food to school have been penalized, and the school has contacted the parents of such students to remind them of its dietary policies. The parents' manual notifies parents that the school observes "strict standards" with respect to dietary laws, and it outlines the types of food which parents may bring to school for classroom parties or holiday celebrations.

Students also study various Jewish holidays and festivals. Prior to a holiday, students learn to perform the rituals and practices appropriate to the holiday. Wagner noted, for example, that the school conducts a "model Seder" before Passover. In addition, Wagner testified that the school seeks to enforce rules of modesty in dress, and he noted specifically that boys are required to wear a cap.[12]

The Employer contends that the Board is precluded from exercising its jurisdiction by the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Union contends that *Catholic Bishop* is not controlling. For the reasons below we agree with the Employer.

In *Catholic Bishop*, the Board had certified a labor organization to represent a unit of lay teachers in each of two groups of precollege educational institutions. One group of schools was operated by the Catholic Bishop of Chicago, a corporation sole. Those schools offered special religious instruction as well as the same college-preparatory curriculum offered in public secondary schools. The other group of schools was operated by the Diocese of Ft. Wayne-South Bend, Inc., and also provided a secular education accompanied by mandatory religious training.

The central issue confronting the Supreme Court was "[w]hether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act."[13] The Court stated that if it were to construe the Act to grant jurisdiction, it would then be required to decide whether that grant of jurisdiction was constitutionally permissible under the religion clauses of the first amendment to the United States Constitution.[14] Consequently, the Court first considered "whether Congress intended the Board to have jurisdiction" over such teachers,[15] and it in turn approached that inquiry in two steps. The Court found it necessary first to determine whether the Board's exercise of jurisdiction "would give rise to serious constitutional questions."[16] If such questions were raised, in the Court's view, it would then have to identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act granted the Board jurisdiction over teachers in church-operated schools.[17]

The Court reviewed its decisions in cases involving aid to parochial schools to determine whether "serious constitutional questions" were raised.[18] It noted that in those cases it had recognized "the critical and unique role of the teachers in fulfilling the mission of a church-operated school."[19] The teacher's key role, the Court observed, had been "the predicate" for its conclusion in those cases that "governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools."[20] Relying on one such decision, *Lemon v. Kurtzman*,[21] the Court noted that a teacher in such a school potentially could incorporate "some aspect of faith or morals *in secular subjects*."[22] The Court emphasized "the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education," and it recognized that such a "conflict of functions" is in-

[11] One teacher acknowledged that the attendance of teachers is required, but she asserted that "very few" actually attend.

[12] Two teachers, Epstein and Powers, testified that modesty restrictions are not enforced. However, the parents' manual states that students "should dress in a way that shows respect for the academic and religious environment of the school," and that "[b]oys are required to wear *kippot* at all times except for gym."

[13] 440 U.S. at 491.

[14] Id. at 499.

[15] Id. at 500. The Court followed the principle that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." Id.

[16] Id. at 501. The Court also described this issue as "a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed." Id. at 502.

[17] Id. at 500, quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963).

[18] The Court distinguished the issue of whether "serious constitutional questions" were raised from the actual constitutional issue of whether "excessive entanglement" has arisen between Government and religion. It stated that "at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue." Id. at 502. On the contrary, the Court indicated that it was making "a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed." Ibid.

[19] Id. at 501.

[20] Id. at 501.

[21] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[22] 440 U.S. at 501, quoting 403 U.S. at 617.

herent in the teacher's situation.[23] In the Court's view, the Government's "[g]ood intentions" could not avoid entanglement with the "religious mission" of the school.[24]

The Court then noted two ways in which Board processes may run afoul of the first amendment. When a school argues that its alleged unfair labor practices were actually motivated by its religious creed, the Court observed that the Board may impinge on constitutional guarantees by inquiring whether the school's position was asserted in "good faith," and by examining the relationship of the school's position to its "religious mission."[25] In addition, in the Court's view, the Board's responsibility to determine mandatory subjects of bargaining would impact on church-operated schools. The Court stated that in a school "nearly everything" affects teachers, and therefore arguably would be a term and condition of employment,[26] and concluded that the Board's inquiry into these matters would inevitably "implicate sensitive issues."[27]

The Court quoted its statement in *Lemon* that parochial schools involve "substantial religious activity and purpose," and that the "substantial religious character of those church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid."[28] The Court also noted the observation of Justice Douglas in his concurring opinion in *Lemon* that "the *raison d'etre* of parochial schools is the propagation of a religious faith."[29] Recognizing a distinction between the "church-teacher relationship" and the "employment relationship in a public or other nonreligious school," the Court concluded that the Board's exercise of jurisdiction over teachers in parochial schools would raise serious constitutional questions.[30]

Having reached this conclusion, the Court then found "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act."[31] The Court stated that in the absence of such an intention, it would "decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive" constitutional questions.[32]

The Board interpreted *Catholic Bishop* in *Bishop Ford Central Catholic High School*, 243 NLRB 49 (1979), enf. denied 623 F.2d 818 (2d Cir. 1980). In that case, where a union represented a unit of lay faculty members, the Board exercised its jurisdiction after concluding that Bishop Ford Central was not a "church-operated" school within the meaning of *Catholic Bishop*. The Board noted that the schools in *Catholic Bishop* were operated either by the Archbishop of Chicago or the Diocese of Ft. Wayne-South Bend. In contrast, the Board emphasized, the operation of Bishop Ford Central had been transferred from a corporation organized by the Roman Catholic Diocese of Brooklyn to an independent lay board of trustees. The Board noted that the Diocese did not control the operation of the school, did not exercise influence over hiring and policymaking decisions, and had no representatives on the board of trustees. The Board concluded that the school was "an entity separate and distinct from the church," that there would be no danger of entanglement by asserting jurisdiction, and that there was "no special church-teacher employment relationship" which the Supreme Court had identified in *Catholic Bishop* as giving rise to first amendment questions.[33]

The Board found in essence that the school was not "church-operated" because it was not directly operated by a religious organization. The Board therefore concluded that its assertion of jurisdiction would not raise "serious constitutional questions" within the meaning of *Catholic Bishop*. After a careful review of this issue, we have decided to overrule *Bishop Ford Central Catholic High School* because we have concluded that it places an overly restrictive interpretation on *Catholic Bishop*.

Although the Court in *Catholic Bishop* often used the term "church-operated schools," its analysis did not focus on the schools' direct affiliation with religious organizations. On the contrary, the Court's conclusion that "serious constitutional questions" would be raised was grounded in its analysis of the purpose of the school, the role of the teacher in effectuating that purpose, and the potential effects of the Board's exercise of jurisdiction.

We first note that the Court's analysis repeatedly emphasized a school's religious purpose rather than its affiliation with religious organizations. The Court observed that parochial schools involve

[23] Id. at 501, quoting 403 U.S. at 617. The Court also quoted its observation in *Meek v. Pittenger*, 412 U.S. 349, 370 (1975), that regardless of the subject matter being taught, "a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."

[24] 440 U.S. at 502.

[25] Id. at 502.

[26] Id. at 503, quoting *Springfield Education Assn. v. Springfield School Dist. No. 19*, 24 Ore. App. 751, 759, 547 P.2d 647, 650 (1976).

[27] Id. at 503.

[28] Id. quoting 403 U.S. at 616.

[29] Id. quoting 403 U.S. at 628.

[30] Id. at 504.

[31] Id. at 504. The Court reviewed the legislative history of the Act and its amendments in reaching this conclusion.

[32] Id. at 507.

[33] 243 NLRB at 50–51. In *NLRB v. Bishop Ford Central Catholic High School*, supra, the United States Court of Appeals for the Second Circuit reversed the Board's decision and concluded that *Catholic Bishop* precluded the Board from exercising jurisdiction.

"substantial religious activity and purpose,"[34] that church-related schools have a "substantial religious character,"[35] and that "the *raison d'etre* of parochial schools is the propagation of a religious faith."[36] The Court also referred to the "religious mission" of a school in discussing both the impact of the Board's unfair labor practice proceedings[37] and the inability of Government to avoid entanglement even when motivated by "good intentions."[38] In light of this discussion, we think it reasonable to infer that the Court simply intended the term "church-operated schools" to be a shorthand description of schools whose purpose and function in substantial part are to propagate a religious faith. We note in this connection that a school's affiliation with a religious organization may be one factor to consider in determining its purpose, but nowhere did the Court indicate that a school's religious purpose ends with the severance of that affiliation.[39]

The Court's analysis also focused on the teacher's role in effectuating a school's religious purpose. We note the Court's emphasis on "the critical and unique role of the teacher in fulfilling the mission of a church-operated school,"[40] and its recognition that the teacher's "key role" was "the predicate" for its holdings in cases involving aid to parochial schools.[41] The Court also reaffirmed its statement that a teacher in such a school poses a danger to "the separation of the religious from the purely secular aspects of pre-college education."[42] The Court further stated that a teacher's "conflict of functions inheres in the situation,"[43] thereby suggesting that its observations are applicable in virtually all cases involving teachers in schools whose purpose and function in substantial part is the propagation of a religious faith.

As we read *Catholic Bishop*, the Court further concluded that the source of the significant risk of constitutional infringement is the potential impact of the Board's processes on the relationship between school and teacher. In this connection, the Court specifically observed that the Board would inject itself into disputes concerning the motive behind a school's conduct and the subjects affecting teachers about which a school must bargain.[44] It also emphasized that the "church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school."[45] In view of the foregoing considerations, we overrule *Bishop Ford Central Catholic High School*, and we conclude that *Catholic Bishop* precludes the Board from exercising its jurisdiction where a union seeks to represent[46] a unit of teachers in a school whose purpose and function in substantial[47] part are to propagate a religious faith.[48]

Applying our interpretation of *Catholic Bishop* to the instant case, we find abundant evidence that the Employer's purpose and function in substantial part is the propagation of a religious faith. As noted above, its articles of incorporation state that among its central aims are to teach religious subjects "in accordance with the principles of the Jewish faith with the purpose of giving each student a thorough Jewish education," and to establish a synagogue "for religious services in the Jewish faith." The Employer's recruitment manual indicates that each child is encouraged "to identify with the Jewish people," a statement corroborated by Fellner's testimony that the school is designed to encourage a child to "choose an intense Judaic identity" upon reaching adulthood. Fellner also testified that the education committee seeks to promote "an intense Jewish religious education."

We especially emphasize that these principles are effectuated by the substantial suffusion of religion into the curriculum.[49] Religious instruction is mandatory at all grade levels, and the Judaic studies program encompasses an array of courses, including instruction in the Hebrew language, the Bible, Rabbinic literature, and Jewish history, life, and

[34] 440 U.S. at 503, quoting 403 U.S. at 616

[35] Id. at 503, quoting 403 U.S. at 616.

[36] Id. at 503, quoting 403 U.S. at 628.

[37] Id. at 502.

[38] Ibid.

[39] We note that in *NLRB v. Bishop Ford Central Catholic High School*, supra, the Second Circuit found that "the religious mission of Ford Central was not terminated by its severance from the Diocese." 623 F.2d at 822.

[40] 440 U.S. at 501.

[41] Ibid.

[42] Id. at 501, quoting 403 U.S. at 617.

[43] Id. at 501, quoting 403 U.S. at 617.

[44] Id. at 502-503.

[45] Id. at 504.

[46] Although this case has arisen in a representation context, we think it clear that *Catholic Bishop* would also apply in cases where teachers are alleged to be the object of unfair labor practices.

[47] We have utilized the word "substantial" in light of the Supreme Court's recognition that parochial schools involve "substantial" religious activity and purpose and "substantial" religious character. 440 U.S. at 503, quoting 403 U.S. at 616. In this connection we are mindful of the Second Circuit's statement that "there may be an issue in some cases as to how much religious orientation is required to characterize a school as religious." 623 F.2d at 823.

[48] Our decision is limited to teachers in educational institutions whose purpose and function in substantial part is the propagation of a religious faith. We need not consider here whether the Board's exercise of jurisdiction with respect to other employee classifications in such institutions would raise serious constitutional questions.

[49] We note in *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d at 823, the Second Circuit stressed the importance of the religious nature of the curriculum:

> It is the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed which create the conflict with the Religion Clauses . . . .

law. A child devotes 40 percent of his school day to religious study, and there is evidence that the Employer as a policy matter promotes the integration of the Judaic studies and general studies programs. The Employer's religious purpose is also highlighted by its mandatory morning prayer services, its adherence to Jewish dietary laws, and its attempt to observe at least some traditional Jewish dress restrictions.[50]

In light of all of the above, we find that our assertion of jurisdiction here would create the same significant risk of constitutional infringement that the Supreme Court foresaw in *Catholic Bishop*. Consequently, we find that we are precluded from asserting jurisdiction, and we shall dismiss the petition.

ORDER

The petition is dismissed.

MEMBER JOHANSEN, dissenting.

I do not agree with my colleagues' extension of *Catholic Bishop*, 440 U.S. 490 (1979), to a school operated by a predominantly lay board of directors and a lay administration. The Jewish Day School is a nonprofit corporation founded under the auspices of the United Jewish Appeal to respond to the needs of the Jewish community in Washington, D.C. Eligibility for service on the board of directors is limited only by the requirement that 10 members of the board of governors must be "active in community affairs, including the United Jewish Appeal and the Board of Jewish Education." Eligibility for service on the curriculum committee is circumscribed only by the guideline in the corporate bylaws that members "generally shall include religious and secular educators who are professionally trained, and other individuals experienced in education." A very small minority of the board of directors and the curriculum committee are rabbis, and there are no clergy-administrators.

Contrary to my colleagues, I am unable to conclude that the reliance of the Court in *Catholic Bishop* on the critical role of teachers, and its emphasis on the importance of the religious mission of the school, can be divorced from the Court's awareness that the schools at issue were operated by a religious institution. The Court posed the issue before it as whether teachers "in schools operated by a church" are subject to Board jurisdiction. Id. at 491. It found the danger of constitutional infringement in the possibility of Board inquiry into the good faith of "clergy-administrators." Id. at 502. Finally, the Court summarized the factual underpinning of its conclusion that serious first amendment questions could arise from Board jurisdiction by stressing that the "church-teacher" relationship in a church-operated school differs from the employment relationship in public or other nonreligious schools. Id. at 504.

In my view, the extreme sensitivity the Court exhibited to first amendment concerns in *Catholic Bishop* sprang from the essential fact that the schools were operated by the church itself. Here, the record does not support a finding that Jewish Day School is operated by a religious institution. Accordingly, I would not find *Catholic Bishop* controlling, and would assert jurisdiction in this case.

[50] In view of the abundant evidence of the Employer's religious purpose, we find it unnecessary to consider the Employer's ties to the UJAF and other Jewish community organizations.

Nazareth Regional High School *and* Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO. Cases 29-CA-9978, 29-CA-9978-2, and 29-CA-10012

29 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 21 May 1985 Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief to the Board.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that because the Respondent is operated by an independent, predominantly lay board of trustees, over which the Diocese of Brooklyn has virtually no control, the Board should assert jurisdiction over the Respondent based on the Board's decision in *Roman Catholic Diocese of Brooklyn*, 243 NLRB 49 (1979), enf. denied sub nom. *Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980), cert. denied 450 U.S. 996 (1981). We disagree with the judge for the following reasons.

The facts, as set out more fully by the judge, include the following. The Respondent's predecessor, Nazareth High School, was one of nine high schools operated by the Roman Catholic Diocese of Brooklyn until about 1971.[1] In 1972, because of rising costs, the Brooklyn Diocese organized the Henry M. Hald High School Association as an educational corporation for the purpose of operating the diocesan high schools. The diocese continued to own and control the schools, and the Bishop of Brooklyn and other churchmen of the diocese were trustees of the Hald Association.

On 16 August 1974 title to the Nazareth High School property was transferred to a newly formed independent educational corporation, Nazareth Regional High School (the Respondent), which was to operate Nazareth as a regional high school. The Respondent was granted the property to have and to hold so long as it "continues the operation of a Roman Catholic high school . . . upon the cessation of which, title and interest . . . shall revert to the [diocese]."

The Respondent derives most of its operating funds from tuition; it receives no funds from the diocese. The Respondent's policies are set by a 15-member board of trustees, the majority of whom are lay persons whose children attend or have attended the school. At the time of the hearing, two board members were members of Catholic religious orders: the Respondent's principal, who is a Xaverian brother, and a Franciscan brother. Generally, new board members are nominated and voted on by current board members. The Bishop of Brooklyn, however, can appoint one or two board members as his observers. The Respondent's principal reports to the board.

The Respondent does not require its students to be Catholic, although the Respondent's principal "guessed" that 75 percent of the students are Catholic. The Respondent's principal also "guessed" that over 90 percent of the faculty are Catholic.[2] Only 4 of the approximately 65 faculty members are members of religious orders, including the principal and an assistant principal. The Respondent's principal has the responsibility for hiring and firing the faculty, and he does so without consulting with the Bishop, except when hiring a priest. When hiring faculty, the principal asks candidates if they are willing to teach Catholic doctrine.

Students are required to take a religion course in each of their 4 school years. Students study the Old Testament in their first year; the New Testament in their second year; morality in their third year; and marriage in their fourth year, all with an emphasis on traditional Catholic views. Although the Respondent's religion department is composed entirely of lay teachers, the Respondent's principal testified that he depends on the lay teachers to transmit the values of the Catholic Church to the students. Moreover, the principal testified that teachers who teach courses other than religion also have a responsibility to impart and develop Catholic moral values; for example, when sex is taught in a biology class or a health class, the teacher should also discuss the moral aspects of sex.

The Respondent's faculty handbook states that it is "a private Catholic preparatory school [which, in] emphasizing the traditional study of arts and sciences, defines itself in the attempt to transmit the teachings of Jesus Christ and His Church." The

[1] The full-time permanent lay teachers at the nine schools have been represented by the Union since 1966. In *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), enfd. 535 F.2d 1387 (2d Cir. 1976), the Board found that the respondent's predecessor violated Sec. 8(a)(5) and (1) by refusing to bargain with the union and violated Sec. 8(a)(3) and (1) by refusing to hire an individual for discriminatory reasons.

[2] The judge incorrectly stated that the Respondent estimated that 70 percent of the faculty are Catholic.

Respondent's student handbook states that the students "belong to a Christian community and . . . are expected to be a sign of the values which Jesus taught."

The outward indicia that the Respondent is a Catholic school include the fact that there is a crucifix in each classroom; mass is celebrated daily in the school's third-floor chapel; each day one of the religion classes is assigned to attend and participate in the mass; meat is not served on Fridays during Lent; and a prayer is read over the public address system each morning. Secondary indicia that the Respondent is a Catholic school include its participation in an athletic league composed of diocesan high schools; its being listed in various publications of the Diocese of Brooklyn as a Catholic high school; and its voluntary membership in the National Catholic Educational Association.

The Respondent uses the services of the superintendent of schools of the Diocese of Brooklyn, who is appointed by the Bishop, to keep abreast of various secular educational requirements and developments. The principals of the area Catholic high schools, including the Respondent, meet with the superintendent regularly, and they receive communications from him approximately once a week. The Respondent also refers the curriculum of the religion department to a representative of the Bishop for review after the start of the school year, although there is no formal requirement that it must do so. Rather, the Respondent appears to be continuing a practice used by its predecessor, the diocesan Nazareth High School.

The Respondent employs a chaplain who is appointed by the diocese. The diocese directs the Respondent concerning what the chaplain is to be paid. The chaplain is part of the Respondent's guidance department and is available to the students for consultation on religious matters.

The amended complaint in the instant case alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging two employees because of their strike activity and violated Section 8(a)(5) and (1) by having established the position of debating coach and having set the salary and other terms of that position without having bargained with the Union. The Respondent's answer, as amended at the hearing, admitted virtually all the allegations of the amended complaint except for the issue of whether the Board could assert jurisdiction over the Respondent.

In *Roman Catholic Diocese of Brooklyn*, 243 NLRB 49 (1979), enf. denied sub nom. *Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980), cert. denied 450 U.S. 996 (1981), the Board asserted jurisdiction over the respondent, finding that it was not "church operated" within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).[3] In contrast to the schools in *Catholic Bishop*, which were operated by either the Archbishop of Chicago or the Diocese of Ft. Wayne-South Bend, the school in *Bishop Ford* was operated by an independent lay board of trustees over which the diocese had no control. The diocese in *Bishop Ford* had no representatives on the board of trustees, did not control the school's operation, and did not exercise any influence over hiring and policymaking decisions. The Board concluded that the school was an entity separate and distinct from the Church, and that therefore jurisdiction should be asserted over the school.

The judge in the instant case noted that the prehearing stipulation signed by the parties, as well as the overall record, established that the facts and issues presented here were virtually identical to those in *Bishop Ford*, above. Following the Board's decision in *Bishop Ford*, the judge concluded that there was no impediment to the Board's assertion of jurisdiction in the instant case. The judge then expressed his views about the positions of the parties in this case. He found, in sum, that jurisdiction could be asserted because the Diocese of Brooklyn did not fund or control the Respondent, and because there was no evidence that the alleged unfair labor practices affected the rights guaranteed by the religion clausess of the U.S. Constitution.

The Board's decision, issued this day, in *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987), involved a school that, like the schools in *Bishop Ford* and the instant case, was operated by a predominantly lay board of directors. In *Jewish Day School*, the Board overruled its decision in Bishop Ford, finding that Bishop Ford interpreted *Catholic Bishop* in an overly restrictive manner by holding that a school that was not directly operated by a religious organization was not "church operated." The Board in *Jewish Day School* explained that the analysis in *Catholic Bishop* did not focus on a school's direct affiliation with religious organizations, but rather focused on a school's religious purpose, the teacher's role in effectuating that purpose, and the potential effects of the Board's exercise of jurisdiction. The Board concluded that

[3] In *Catholic Bishop*, the Supreme Court held that teachers in church-operated schools were not within the Board's jurisdiction because the Board's exercise of jurisdiction in such a situation "would give rise to serious constitutional questions," 440 U.S. at 501, by potentially interfering with the school's religious mission and character. The Court found that church-operated schools involved "substantial religious activity and purpose" and that the "substantial religious character of these church-related schools gives rise to the entangling church-state relationships of the kind the Religion clauses sought to avoid." Id. at 503, quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Catholic Bishop precludes the Board from exercising jurisdiction when a union seeks to represent a unit of teachers in a school whose "purpose and function in substantial part are to propagate a religious faith." *Jewish Day School*, supra at 761. Applying this standard, the Board held that it was precluded from asserting jurisdiction over the Jewish Day School, and it accordingly dismissed the election petition filed by the Union.

We find that *Jewish Day School*, which overruled the Board's decision in Bishop Ford and thereby eliminated the underpinnings of the judge's decision in the instant case,[4] controls our decision here. As in *Jewish Day School*, we find that the Respondent's purpose and function in substantial part are to propagate a religious faith. As noted above, the Respondent defines itself in its faculty handbook by its "attempt to transmit the teachings of Jesus Christ and His Church," and in its student handbook states that students are "expected to be a sign of the values which Jesus taught." The Respondent's principal asks applicants for teaching positions if they are willing to teach Catholic doctrine. Teachers of both religion and nonreligion courses are expected to impart the values of the Catholic Church to the students. Furthermore, religion classes are mandatory at all grade levels. The Respondent's religious purpose is also highlighted by the fact that mass is celebrated daily in the school's third-floor chapel, that each day a religion class is assigned to attend and participate in that mass, and that a prayer is read over the public address system each morning. Thus, we find applicable here the following statement by the Second Circuit in *Bishop Ford*:

> It is the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed which create the conflict with the Religion clauses and not the vesting of legal title or the responsibility of operation. [623 F.2d at 823.]

Moreover, the physical plant of the Respondent is subject to a right of reverter to the diocese, conditioned on the Respondent's continued operation as a Catholic school.[5]

In view of the foregoing, we find that our assertion of jurisdiction here would create the same significant risk of constitutional infringement that the Supreme Court foresaw in *Catholic Bishop*. Accordingly, we conclude that the Board is precluded from asserting jurisdiction, and we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Elliot J. Mandel, Esq., for the General Counsel.
Kevin J. McGill, Esq. (Clifton, Budd, Burke & DeMaria), of New York, New York, for Nazareth Regional High School.
Robert M. Gordon, Esq. (Gordon & Librie), of New York, New York, for Lay Faculty Association, Local 1261, American Federation of Teachers, AFL–CIO.

DECISION

Statement of the Case

James F. Morton, Administrative Law Judge. The only issues raised by the pleadings, as amended at the hearing, are whether or not Nazareth Regional High School (Respondent) is an employer within the meaning of Section 2(6) and (7) of the National Labor Relations Board (the Act), and whether assertion of the Board's jurisdiction over Respondent would violate the religion clauses of the first amendment to the Constitution of the United States.

The consolidated complaint in these cases, as amended at the hearing, alleges that Respondent is an employer within the meaning of Section 2(6) and (7) of the Act and that Respondent has violated Section 8(a)(1), (3), and (5) of the Act. In particular, Respondent is alleged to have violated Section 8(a)(1) and (3) by discharging two employees (and not reinstating them until the next day) because they had been on strike and to have violated Section 8(a)(1) and (5) by having established the position of debating coach and set the salary and other terms of employment therefor without having bargained collectively thereon with Lay Faculty Association, Local 1261, American Federation of Teachers, AFL–CIO (the Union).[1]

Respondent's answer, as amended at the hearing, admitted virtually all allegations of the amended complaint but framed the jurisdictional issues set out above.

The hearing was held before me on September 24 and 25, 1984.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after full consideration of the briefs filed by the General Counsel and Respondent, I make the following

[4] As noted above, the parties stipulated that the facts and issues in the instant case were virtually identical to those in *Bishop Ford*.

[5] This right of reverter is the same as that used by the diocese in *Bishop Ford*, which prompted the Second Circuit to state that the school was "only conditionally separated from the Diocese and the condition imposed is its continuing allegiance and loyalty to the Church." 623 F.2d at 824.

[1] Other unfair labor practice allegations were withdrawn at the hearing.

[2] After the hearing closed, Respondent filed a motion to supplement the record to receive in evidence an affidavit of one of its witnesses. The Union objected. Respondent's motion is denied. I note that Jt. Exh. 1 already contains some of the data referred to in the affidavit annexed to Respondent's motion. The other matters in that affidavit cannot be considered newly discovered evidence and, in any event, would constitute cumulative evidence that would not warrant a re opening of the hearing.

FINDINGS OF FACT

JURISDICTION

The facts set out below are contained in reported Board decisions and in the transcript, including exhibits, of the hearing before me.

A. *Background*

The Roman Catholic Diocese of Brooklyn encompasses the boroughs of Brooklyn and Queens in New York. Up until about 1971, it operated nine diocesan high schools. One of these was Nazareth High School.

Since 1966, the full-time permanent lay teachers at those nine schools have been represented by the Union for purposes of collective bargaining.

In 1971, the Bishop of Brooklyn, because of rising costs, appointed a task force to make recommendations concerning the future of those schools. The task force recommended that "the Diocese withdraw completely from the sponsorship of high schools by closing four of them outright . . . others . . . to be offered to Religious Communities who would assume full responsibility for operating them and still other schools were to be turned over to regional boards who would assume full fiscal responsibility." The Bishop adopted certain of those recommendations. As to Nazareth High School, he determined that it will continue as a diocesan high school as its principal "agreed to [operate] the school without asking for any diocesan subsidy [and that he would] explore the feasibility of establishing a board to assume full responsibility."

In 1972, the Brooklyn Diocese organized the Henry M. Hald High School Association as an educational corporation, under the laws of the State of New York, for the purpose of operating the diocesan high schools. The Bishop and other churchmen of the Brooklyn Diocese were the trustees of the Hald Association. The Diocese owned the schools and retained control over them.

The Hald Association entered into a collective-bargaining agreement with the Union covering "all full time, permanent lay teachers employed in the member schools of the Association."

One of the school members of the Hald Association was Bishop Kearney High School. On September 13, 1973, proprietorship of that school was transferred to a religious community, the Sisters of St. Joseph. That religious organization was held to be the successor to the Hald Association and to have violated Section 8(a)(1) and (5) of the Act by having failed and refused to recognize the Union as bargaining agent for its lay faculty. The General Counsel had contended that the Diocese, the Hald Association, and the Sisters of St. Joseph were all alter egos of each other. The Board held that, while the Diocese and the Hald Association were alter egos, the Sisters of St. Joseph exercised sufficient independence in operating the school to obviate the operation of the alter ego doctrine as to them but they were found to be Hald's successor, as noted above. The complaint was dismissed as to the Hald Association. Incidentally, the Board noted that, in the absence of exceptions, it adopted pro forma the finding that the school's operations affected commerce within the meaning of Section 2(2), (6), and (7) of the Act and the conclusion that the Board should assert jurisdiction. See *Henry M. Hald High School Assn.*, 213 NLRB 415 (1974).

B. *Respondent as Successor*

By letter dated December 10, 1973, the Union was informed that, effective August 31, 1974, operation and control over Nazareth High School would be transferred from the Hald Association "to a neighborhood community group which would operate Nazareth as a regional high school."

On August 16, 1974, title to the school property operated as Nazareth High School was transferred to a newly formed educational corporation, Nazareth Regional High School, for it to have and to hold so long as it "continues the operation of a Roman Catholic high school . . . upon the cessation of which, title and interest . . . shall revert to the [Diocese]."

The Union sought information concerning the planned change. The Board found that the Hald Association and also Respondent, as Hald's successor, had violated Section 8(a)(1) and (5) by having refused to furnish the requested data, Respondent also had violated Section 8(a)(1) and (3) of the Act. See *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976).

C. *The Bishop Ford Case*

Another of the nine schools that were members of the Hald Association was severed therefrom and was operated thereafter under an independent board of trustees. Respecting that school, the Board found that the new entity was a successor to Hald as to lay faculty employed at the school and that the separate refusals to bargain by the Hald Association and by the school itself were each violative of the Act. See *Roman Catholic Diocese of Brooklyn*, 236 NLRB 1 (1978). The cited case and a supplemental decision thereon, discussed further below, are referred to herein as the *Bishop Ford* case.

D. *How the Jurisdictional Issue Was Raised*

No issue had been raised in any of the foregoing cases concerning the Board's jurisdiction over high schools operated by the Brooklyn Diocese.

On March 21, 1979, the U.S. Supreme Court decided *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490. It affirmed the holding of the U.S. Court of Appeals for the Seventh Circuit reported at 559 F.2d 1112 (1977). The Seventh Circuit had determined that the Board's order (requiring diocesan high schools to bargain collectively with a certified labor organization) infringed on the authority of the bishops of the Roman Catholic Church to maintain those parochial institutions in accordance with ecclesiastical concern and the Board thereby had improperly curtailed the rights of the bishops under the religion clauses of the first amendment. The Seventh Circuit stated that the very hearing on which the Board predicated its findings was itself insensitive to the principles of the religion clauses. The Court also touched on the "parochaid" issue, always a factor in first amendment cases in this area and it considered other factors. The

Seventh Circuit observed finally that a church that chose to educate its people without financial aid from the Government should be equally free from the inhibitions of the Act. The Supreme Court, in reviewing the Seventh Circuit's opinion, consciously sought to avoid the constitutional issues and stated that it would make a narrow inquiry as to whether the exercise of the Board's jurisdiction over church-operated high schools presents a significant risk that the religion clauses of the first amendment will be infringed. The high schools involved in that case were operated by the Roman Catholic Dioceses in Chicago and in Fort Wayne-South Bend. The court stated that it would first consider whether the exercise of the Board's jurisdiction posed a significant risk of such an infringement. It discussed various aspects of the case and noted, among other things, that the Board's very process of inquiry into the religious concerns of those schools may impinge on rights protected by the religion clauses. The Court then determined that serious first amendment questions would follow the Board's assertion of jurisdiction over church-operated schools. The Court next observed that precedent required it to seek to avoid the constitutional issue. On that premise, it proceeded to focus its attention on whether Congress had intended that the Board assert jurisdiction over church-operated schools. After noting that Congress had not clearly expressed an affirmative intention that the Board assert such jurisdiction, the Court concluded that it could avoid the constitutional issue by affirming the lower court's conclusion that church-operated schools were exempt from the Act's coverage.

The Board's order in the *Bishop Ford* case, discussed above, was brought before the United States Court of Appeals for the Second Circuit, which remanded the case for the purpose, inter alia, of reconsidering the Board's jurisdiction over Bishop Ford Central Catholic High School. The Board reviewed the record in that case and determined that Bishop Ford was being operated as a separate institution, was governed by an independent lay board of trustees over which the Brooklyn Diocese had no control, and that Bishop Ford High School "was clearly beyond the definition of a 'church-operated' school." The Board held further that as Bishop Ford High School "was an entity separate and distinct from the church, [t]here would be no danger, in asserting jurisdiction, of entanglement of the Government with the church." The Board thus concluded that there was no impediment to its asserting jurisdiction over Bishop Ford High School and reaffirmed its original Decision and Order regarding that respondent. See *Roman Catholic Diocese of Brooklyn*, 243 NLRB 49 (1979).

The Board applied to the U.S. Court of Appeals, Second Circuit, for enforcement of its supplemental decision in *Bishop Ford*. The court denied enforcement, holding that the Board lacked jurisdiction. The court there reasoned that, if the Board were correct, then Bishop Ford would be entitled to financial aid from the Government. It observed that the commitment of the school's faculty to religious values and their obligation to propagate those values provide the risk of entanglement sufficient to deprive the Board of jurisdiction. See *NLRB v. Bishop Ford Catholic High School*, 623 F.2d 818 (2d Cir. 1980). The Union's petition for a writ of certiorari was denied.[3]

E. *The Instant Case*

After the initial pleadings in this case were filed, Respondent moved for summary judgment concerning jurisdiction. The parties entered into a factual stipulation and joined in a request that the Board transfer the case directly to itself for consideration. On January 5, 1984, the case was transferred to the Board. On April 26, 1984, the Board denied Respondent's motion and remanded the matter for a hearing; the Board noted that the stipulation of facts presented to it did not specifically address Respondent's funding or the relationship and control, if any, over Respondent's board of trustees by the Diocese of Brooklyn.

In the late 1960s, 34 members of the Brothers of St. Francis Xavier (Xaverian brothers) were teaching at Respondent's predecessor diocesan school, Nazareth High School. At the time of the hearing in this case, there was only one left, Respondent's principal.

Respondent operates a 4-year school. It has 1080 students and 65 faculty. Tuition is $1940 annually including expenses. Respondent derives virtually all of its operating moneys from tuition. The Diocese of Brooklyn does not subsidize it with any monetary contribution. Respondent's policies are set by a 15-member board of trustees, most of whom are laypersons whose children attend school there. Another board member is a non-Catholic clergyman, several others are honorary members, and the remaining are members of Roman Catholic religious orders (i.e., Respondent's principal and a Franciscan brother). The Bishop of Brooklyn appoints two board members as his observers.

Respondent's president has sole responsibility for hiring all faculty and he reports to the independent board of trustees. Respondent's brief notes that the president can be removed by the Bishop of Brooklyn inasmuch as he is a member of a religious order. I do not view this as an element of direct control of Respondent by the Bishop inasmuch as the independent board of trustees could designate a lay replacement. Realistically, as Respondent's president testified, the emphasis in recent years has been towards placing more and more responsibility and, correspondingly, authority, in the hands of the laity whereas in the past, the clergy dominated.

Respondent does not require its students to be Catholic nor are they asked if they are. Its president "guesses" that 75 percent of the students are Catholic. The same observation applies to faculty except that Respondent estimates that 70 percent of the faculty are Catholic.

The outward indicia that Respondent is a Catholic school include the fact that a crucifix is in each of the classrooms, that mass is celebrated at the school daily, that one of the religion classes is assigned each day to attend and participate in the daily mass, and that a prayer, excerpted from the daily mass, is read over the public address system at the start of each schoolday.

---

[3] 450 U.S. 996.

Religion courses are required for all students on a 5-day-a-week basis for each of the 4 school years. first year students study the Old Testament; second year students study the New Testament; third year students are given courses in morality; and fourth year students study marriage, all with emphasis on traditional Catholic views, including those on abortion.

Respondent uses the services of the superintendent of schools of the Diocese of Brooklyn to keep abreast of various secular requirements and developments and refers its religion department curriculum to the superintendent's office for review. There does not appear to be any formal requirement that Respondent must consult with the Diocese office in that regard. Rather, Respondent seems to be continuing a practice used by its predecessor, the diocesan Nazareth High School. In Respondent's brief, there is the statement that the Diocese "oversees the religious curriculum at [Respondent]" and Respondent premises that statement in part on the testimony of Respondent's principal that "he is under obligation to participate with the Superintendent [of Schools for the Diocese of Brooklyn]." Concerning those assertions, I again note that there is no independent evidence that Respondent is obligated to clear its curriculum in its religion department with the Diocesan office. Rather that "obligation" is based on continuing a prior practice and on the personal sense of responsibility that guides Respondent's president as a member of a Catholic religious order. That is not to suggest that the obligation is less. Indeed, as it would spring from conviction rather than a written rule, the commitment may well be greater.

Secondary indicia as to Respondent's being a "Catholic" school include its participation in athletic activities in a league comprised of diocesan high schools, its being listed in various publications of the Diocese of Brooklyn as a Catholic high school, and its voluntary membership in the National Catholic Educational Association.

Respondent has published a faculty handbook that states that it is "a private Catholic preparatory school [which, in] emphasizing the traditional study of the arts and sciences, defines itself in the attempt to transmit the teachings of Jesus Christ and His Church."

The handbook issued to Respondent's students informs them that they "belong to a Christian community and . . . are expected to be a sign of the values which Jesus taught."

Respondent employs a chaplain whose services are obtained from the Diocese. The chaplain is available to the students for consultation in religious matters. The brief submitted by Respondent states that "[u]ndoubtedly, this chaplain would report to the Bishop [unsatisfactory events]." That comment is based on speculation and I give it no weight.

Finally, I note that the parties joined in a stipulation that the jurisdictional facts in *Bishop Ford Catholic High School*, supra, are substantially similar to those in the instant case.

F. *Recent Case Law Development*

The General Counsel and Respondent had filed briefs that carefully analyzed the opinions in the cases discussed above and also in the cases cited and discussed in those opinions. Subsequent to the filing of these briefs, two cases were decided that bear on the jurisdictional issues before me. These parties were given leave to, and did, file supplemental briefs concerning those recent cases.

In *Universidad Central de Bayamon*, 273 NLRB 1110 (1984), the Board rejected a contention that the university was a religious institution exempt from the coverage of the Act under the rationale of *Catholic Bishop of Chicago*, supra. The Board, in rejecting that contention, noted that the university is not owned, financed, or controlled by the Roman Catholic Church or the Dominican Order and that the university's academic mission is secular. The Board, however, did revise the scope of its order to relieve the university from bargaining concerning the terms and conditions of employment of its instructors in its CEDOC program as that program's primary objective remained the training of priests for the ministry.

In a non-Board case decided this year by the U.S. Court of Appeals for the Second Circuit, the court held that the N.Y. State Labor Relations Board had jurisdiction over diocesan high schools operated by the Roman Catholic Archdiocese of New York. See *Catholic High School Assn. of the Archdiocese of New York v. Edward R. Culbert*, 753 F.2d 1161 (2d Cir. 1985). The court noted that delicate constitutional issues were presented in addressing the difficult and sensitive question left open by the Supreme Court in *Catholic Bishop*, supra. The same constitutional questions considered by the Seventh Circuit in *Catholic Bishop* were analyzed. The Second Circuit "decline[d] to follow the Seventh Circuit down [the] slippery slope" whereby the Seventh Circuit had found that collective bargaining inevitably would enmesh the State with the rights guaranteed under the religion clauses of the first amendment. The Second Circuit quoted the Fifth Circuit's statement, "that faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiatical concern." The court then weighed other factors. Ultimately, it concluded that the State of New York had a compelling interest to protect and that the exercise of the state board's jurisdiction is justified as it would have indirect and incidental effect on decisions on parochial schools involving religious issues. The court also noted that the National Labor Relations Board did not have jurisdiction of the diocesan schools involved, in view of the holding in *Catholic Bishop*.

G. *Analysis*

The stipulation signed by the parties prior to the opening of the hearing and the overall record in this case establish that the essential facts and issues are virtually identical with those considered by the Board in its supplemental decision in *Bishop Ford*, supra (243 NLRB 49). As I am obligated to follow Board precedent unless and until it is reversed by the U.S. Supreme Court, I find, as did the Board in the second *Bishop Ford* case, that there is no impediment to the Board's assertion of jurisdiction

over Respondent in the case before me. That determination effectively decides the issues in this case, at least for my purposes. Still, I may well have the obligation to submit to the Board my views as to the respective positions of the parties, each of whom candidly acknowledges that the merits of their respective claims will be pressed on appeal. Further, the Board's remand order of April 26, 1984, permits the parties to renew their contentions before me and, presumably, I am to make recommendations thereon. I turn then to the consideration of those matters.

There is no evidence that Respondent's board of trustees has acted under the direction of the Diocese of Brooklyn, nor is there evidence that the Diocese has ever sought to influence the board of trustees by indirection. Further, Respondent has voluntarily availed itself of the various services offered by the diocesan superintendent of schools. In all matters involving labor relations policies, Respondent has sole control. In financial matters, Respondent bears sole responsibility.

The evidence bearing directly on religious considerations in this case are to some extent equivocal. Thus, although school begins with a prayer and while classes are regularly scheduled to attend religious services with attendance compulsory, Respondent consciously hires faculty and enrolls on a nonreligious basis. Its president is of the opinion that the great majority of its faculty and its students profess to be Roman Catholics.

I do not view it as my function to determine how "religious" or how "Catholic" Respondent's curriculum is, especially as "there is some question whether the Board has the authority to rule on the constitutionality of the Act itself." See *Mid American Health Services*, 247 NLRB 752 (1980). Rather, my responsibility is discharged by weighing the evidence as to the extent, if any, the Brooklyn Diocese controls or funds Respondent and by ascertaining obvious problem areas that have developed or could develop by reason of the impact of labor relations policies on religious endeavors. On this last point, I note that the labor relations history of Respondent and its predecessors discloses no obvious problems that impacted adversely on the rights guaranteed by the religion clauses. The unfair labor practice allegations in this case and in prior cases, insofar as they affected first amendment rights, could just as easily have involved any commercial enterprise and could just as routinely be resolved by the Board. I do not mean to minimize Respondent's contention by making that observation. Rather, I do so in order to underline what appears to be the crucial aspect of this case insofar as the issue of the Board's jurisdiction ultimately is concerned.

The sole concern of the Board should be whether or not its assertion of jurisdiction could adversely impact on any rights Respondent may have under the religion clauses. The answer, dictated by practical experience in past cases involving Respondent and by the absence of any evidential basis demonstrating an actual conflict, is simply that there is no demonstrable impediment to the assertion of jurisdiction. As a corollary, it may be fairly said that, if any such impediment exists, it could readily be removed simply by Respondent's surrendering its independence from the Diocese and then enveloping itself with the protection accorded diocesan schools under *Catholic Bishop of Chicago*.

I have alluded to matters that are the real areas of concern in cases involving the religion clauses. From my reading of those cases, it seems obvious that decisions of the Courts, bearing on issues involving the Board's jurisdiction and rights guaranteed by those clauses, disclose that the relevant and significant factors they take into account are much broader in scope than those considered by the Board. This appears to be because the Courts address a broader spectrum of policy issues than does the Board, in evaluating the merits of a claim of undue governmental interference with rights guaranteed by the religion clauses. Thus, as is obvious from a reading of the cases discussed above, the Courts have (a) posed and considered hypothetical conflicts, (b) expressed in various ways no little concern that "parochaid" as it is termed may be fostered by permitting the Board to assert its jurisdiction, and (c) weighed matters outside the Board's area of expertise.[4] The Court decisions make it clear that the Board's function is relatively limited. In fact the Courts have observed that the Board's inquiry is to be restricted to so limited an area that the very inquiry into the jurisdictional issues does not unduly impinge on the rights protected by the religion clauses. Obviously, some inquiry is to be made. The proper scope of the Board's inquiry should be limited to three areas: that is, funding, control of labor relations policies, and whether the Board's inquiry itself would probably (not hypothetically) impinge on the rights protected by the religion clauses. The test used by the Board in the second *Bishop Ford* case properly limits the scope of the inquiry for the Board purposes.

In short, jurisdiction should be asserted over Respondent as the Diocese of Brooklyn does not fund or control Respondent and as there is no evidence that the unfair labor practice issues herein improperly impacted on the rights guaranteed by the religion clauses.[5] As I read *Universidad Central de Bayamon*, supra, the Board's holding "that the University's academic mission is secular" is, in context, a finding that the assertion of jurisdiction would not impinge on the rights protected by the religion clauses. I am hesitant about making an overall evaluation as to Respondent's mission in the instant case, especially as the Supreme Court in *Catholic Bishop* cautioned against the prospect that such an inquiry might itself be impermissible by reason of the first amendment. The courts of appeals themselves do not hesitate to make such evaluations but, for the reasons set forth above, the

[4] Thus, in *Archdiocese of New York*, supra, the Second Circuit took into account the contents of papal encyclicals; the Seventh Circuit in *Chicago Bishops*, supra, quoted secondary authority having to do with the "true scripture . . . Americanism . . . and [the making of] loyal Roman Catholics"; the Second Circuit in *Bishop Ford II* observed that "the tenets of Roman Catholicism do not emanate from the Bishop of Brooklyn with all deference to that prelate." The Board's area of inquiry, in my view, is not so expansive as to authorize it to weigh considerations such as those.

[5] The opinion of the Second Circuit in *Archdiocese of New York*, supra, contains, in my view, an exemplary approach in evaluating whether the unfair labor practices in the instant case unduly impinged on first amendment rights.

Courts seem to fulfill a broader role than that allocated to the Board.

Respondent separately contends that the assertion of jurisdiction by the Board in this case would violate the equal protection component of the Fifth amendment to the Constitution of the United States. Respondent argues that it would be denied the protection accorded diocesan schools, although it is pervasively religious in character, solely because it is not owned by the hierarchy of the Roman Catholic Church. The difficulty I have with this argument is that it begs the very question to be answered. If the U.S. Supreme Court were to have held that an independent school (operated by a lay board of trustees to teach, inter alia, certain religious beliefs) is not subject to the Board's jurisdiction, Respondent may well have a valid point. The precedent controlling my decision, however, does not support Respondent's equal protection view.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act and it will effectuate the policies of the Act to assert jurisdiction.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. By having discharged Steven Monroe and Arthur Weyranch and by not reinstating them to full employment until the next day, because of their activities on behalf of the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

4. By having failed and refused to bargain collectively with the Union as to the duties, salary, and other employment terms and conditions of its debating coach, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The violations described above in paragraphs 3 and 4 constitute unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall be ordered to make whole Steven Monroe and Arthur Weyranch for all moneys they lost, with interest as a result of their unlawful discharge; the amounts to be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]

F. E. Wray, Inc. d/b/a Roto Rooter *and* Warehouse, Mail Order and Retail Employees and Wholesale Liquor Salespersons, Local 853, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 32–CA–6880 and 32–CA–6943

29 April 1987

DECISION AND ORDER REMANDING

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 9 June 1986 Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employees Lionel Myles and Steve Martinez following their participation in a strike protected by Section 7 of the Act. The sole issue before the judge was whether Myles and Martinez had engaged in misconduct during the strike sufficiently egregious to deprive them of their right to recall as economic strikers who had made unconditional offers to return to work. We find merit in the Respondent's exceptions to the judge's findings concerning Myles. Additionally, we shall remand this proceeding to the judge for credibility determinations regarding the conduct of Martinez and further analysis of the complaint allegations concerning him.

The judge recognized the authority of *Clear Pine Mouldings*, 268 NLRB 1044 (1984), in which the Board "reject[ed] the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts," and adopted an objective test: "whether the misconduct is such that, under circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." Id. at 1046; see also Id. at 1048.

With respect to Myles, the judge examined separately his alleged misconduct on five different occasions. First, the judge found that Myles, while on picket duty, spoke for about 2 minutes to nonstriking employee Guy Akana, who was driving his truck from the Respondent's premises. During this incident, Myles told Akana to tell "Don A" that Myles was going to "break his legs." Since Myles held no weapon and "Don A" was not present or even known to Akana, the judge concluded, without condoning Myles' language, that the threat was "remote" and thus insufficient to warrant denial of reinstatement.

A second series of incidents involving Myles took place when he picketed a worksite to which nonstriking employee John Sales had been dispatched. The judge found that Myles, in addition to making taunting comments about Sales' competence, threatened to "kick [Sales'] fucking ass," "break [his] bones," and "break [him] up." Myles further told Sales that his threats were not a "union scare tactic but between you and I [sic], pal." Myles also joined several other picketers in pounding on Sales' truck and shouting, "I'm going to get you" as Sales drove from the worksite following his completion of the job.

The judge characterized Myles' conduct toward Sales as "simply a vociferous and boisterous needling of a non-striker" by stressing his findings that Myles never displayed a weapon, that Sales did not consider the verbal threats to be very serious because he did not seek help, and that the truck pounding incident was not a physical threat because Myles refrained from any direct assault during the times Sales was working outside his truck. The judge concluded that these acts did not rise to a level of misconduct entitling the Respondent to deny reinstatement to Myles.[2]

On yet another occasion during the strike, Myles parked his personal truck across the Respondent's driveway, thus blocking that access to its facility. The Respondent's president testified that he asked Myles to move the truck and that Myles refused. Myles testified that it was the Respondent's general manager who asked him to move his truck and he thereupon did so. The judge found no evidence regarding the length of time the truck remained in the driveway and no evidence to contradict Myles' testimony that he promptly moved it when requested. The judge further relied on evidence that an adjacent driveway belonging to a neighboring busi-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge also considered Sales' testimony that on a separate occasion about a week before the strike ended in late November 1984, Myles told him that he would return in a week and "take care" of Sales at that time. However, the judge credited Myles' denial that this encounter took place.

ness, one regularly used by the Respondent's employees, did at all times provide access to the Respondent's property. He concluded that this incident by itself did not warrant denying reinstatement to Myles.

Finally, in addition to the encounters involving employees Akana and Sales, Myles was involved in another incident with a nonstriking employee. Myles followed employee Scott Johnson as he left the Respondent's facility in a company truck. Myles intended to picket at Johnson's worksite. However, Johnson did not go to work but instead went home for lunch. After Johnson arrived at his home, Myles stood about 60 feet from Johnson's home and, without entering onto his property, called Johnson a "fucking scab" and threatened to follow him "until he died." The judge found the latter alleged threat to be ambiguous and susceptible to the interpretation that Myles only intended to adhere tenaciously to the strike by continuing his practice of lawfully picketing the Respondent's worksites. The judge concluded that the remark was not intended to be taken literally and was therefore not a threat of bodily harm. The judge once again evaluated this incident in isolation from Myles' other activities and concluded that it did not entitle the Respondent to deny reinstatement to Myles.

Our first disagreement with the judge's analysis concerns his reliance, in part, on a subjective test rather than the objective standard mandated by *Clear Pine Mouldings*. With respect to the import of Myles' encounters with nonstriking employees Akana, Sales, and Johnson, the judge, rather than evaluating any reasonable tendency to coerce or intimidate, chose to analyze what he understood to be Myles' intentions and the employees' reactions. The judge found that when Myles told Akana to deliver personally to a third employee a threat to "break his legs," Akana "was not particularly concerned" because he did not know the named employee and because Myles had no weapon or immediate opportunity to effectuate the threat. Concerning Sales, the judge inferred that Sales did not take Myles' threats of bodily harm "seriously" because Sales did not seek help from others. The judge further inferred that Myles himself did not intend the threats to be taken seriously because, though he had the opportunity, he did not follow through on them. With respect to Myles' following of Johnson to his home, the judge found Johnson's fear to be "beyond reasonableness" because the alleged threat was ambiguous and the Union was entitled to engage in ambulatory picketing.

In addition to his departures from the *Clear Pine Mouldings* test, the judge failed to consider the totality of Myles' behavior, choosing instead to evaluate each incident in isolation from the others. Concerning one of these incidents, we agree with the judge that there is insufficient evidence to show that Myles' parking of his truck on the Respondent's driveway constituted any significant interference with the conduct of the Respondent's business. And, as indicated above, we also adopt the judge's credibility finding that the alleged encounter between Myles and Sales in late November did not take place. However, with respect to the remaining three incidents, we find that Myles did engage in a pattern of behavior by threatening Sales directly with bodily harm and shortly thereafter pounding on his truck, by telling Akana to deliver an even more explicit threat to another nonstriking employee, and by following Johnson to his home and threatening to follow him "until he died."[3]

Contrary to the judge, we find that, taken as a whole, Myles' encounters with three employees in which they and a fourth employee were threatened either directly or indirectly with serious bodily harm or with picketing away from their worksites because they exercised their Section 7 right to refrain from striking, reasonably tended to coerce or intimidate them. Regardless of the striking employees' subjective reaction to these series of threatening remarks, the reasonable, indeed the clear, tendency of such repeated threats is to coerce or intimidate employees. In reaching this conclusion, we emphasize that Myles' misconduct was neither an isolated outburst nor were his remarks, in most instances, amenable to a noncoercive interpretation. Under these circumstances, we find that the Respondent's failure to reinstate Myles did not violate the Act and we will dismiss that portion of the complaint.

However, a different result is required concerning employee Steve Martinez. In determining whether Martinez engaged in misconduct during the strike sufficiently serious to deprive him of his right to recall, the judge considered both his testimony and that of employee Steve Penney. Penney testified that while driving a company van he stopped at a stoplight on a busy highway. Martinez, in his own truck and accompanied by a friend, was in the adjacent lane to the right. According to

[3] We agree with the judge that the circumstances surrrounding Myles' conduct at Johnson's home are less coercive than those in *Georgia Kraft Co.*, 275 NLRB 636 (1985), given that here there is no evidence that other members of Johnson's family overheard the shouted threat. However, in our view, Myles crossed any permissible line.

Because the Union had a right to engage in ambulatory picketing that reasonably required following nonstriking employees, Member Johansen does not regard Myles' following Johnson home in itself to be an element of Myles' misconduct.

Penney, Martinez tried to cut in front of him as the light changed while shouting that he was going to "kick his ass." Penney also testified that Martinez spat at his van and threw ice from a paper cup. Martinez, on the other hand, denied the alleged attempt to interfere with the path of Penney's van and the alleged threat, spitting, and ice throwing. He stated that he had merely pulled up alongside the Respondent's van and then proceeded on his way in a normal fashion when the light changed.

The judge in crediting Penney's testimony, "for the sake of analysis" concluded that Penney was neither in any actual danger nor did he reasonably believe he was in danger. The judge found that the incident lasted only a few moments, the vehicles were moving, at most, about 5 miles per hour, and Penney was at all times protected from Martinez' alleged nonverbal abuse by the van itself. The judge concluded that it seemed "unlikely" to him that Penney was "actually intimidated." On this basis he found that the Respondent's refusal to reinstate Martinez was not justified and therefore violated Section 8(a)(3) and (1) of the Act.

We find, however, that the judge undercut his own analysis in two ways. First he utilized, as he did with the behavior of Myles, the same subjective test rejected in *Clear Pine Mouldings*. Secondly, the judge employed a most equivocal procedure for resolving the conflicting testimony regarding what actually happened at the highway stoplight. For while he credited Penney "for the sake of analysis," he also found Martinez' version to be more credible "in some respects." The judge found it "unlikely" that Martinez would have involved his friend by instigating a "near violent" situation in the middle of traffic. The judge's avoidance of a clear credibility resolution deprives us of the necessary factual basis to determine whether any misconduct occurred and, if it did, whether it was sufficiently serious to deprive Martinez of the protection of the Act. In addition, the judge failed to apply the *Clear Pine Mouldings* test in an appropriate manner. We will therefore remand this portion of the proceeding to the judge to make definite credibility findings on the alleged strike misconduct and to apply the *Clear Pine Mouldings* objective test.

ORDER

The complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employee Lionel Myles is dismissed.

IT IS FURTHER ORDERED that this proceeding is remanded to Judge Kennedy for the purpose of making credibility resolutions on all testimony concerning the alleged strike misconduct of employee Steve Martinez and for recommendations whether his conduct justified, under the standard of *Clear Pine Mouldings*, 268 NLRB 1044 (1984), the denial of his right as an economic striker to return to work.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth the resolution of such credibility issues and findings and conclusions with respect thereto. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules shall be applicable.

Raoul Thorbourne, for the General Counsel.
Harry Finkle and *Neil M. Gerstner (Finkle & Stroup)*, Walnut Creek, California, for the Respondent.

DECISION

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Oakland, California, on January 22, 1986. It is based on a consolidated complaint issued by the Acting Regional Director for Region 32 of the National Labor Relations Board on January 31, 1985. The complaint is based on charges filed by Warehouse, Mail Order and Retail Employees and Wholesale Liquor Salespersons, Local 853, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) on November 1 and December 4, 1984.[1] Prior to the hearing, the General Counsel, Respondent, and the Charging Party reached a partial settlement in which paragraphs 7, 8, 9, and 10 were resolved. In addition, the General Counsel moved to dismiss those portions of paragraphs 13 and 14 respecting an individual named Lister. The motion was granted. The complaint now alleges that F. E. Wray, Inc. d/b/a Roto Rooter (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act).

Issue

As modified, the complaint leaves for resolution only the question of whether Respondent unlawfully refused to recall two individuals after the cessation of a strike. The parties have stipulated that the two individuals in question, Lionel Myles and Steve Martinez, were participants in a strike that commenced on November 1 and ended about December 3. The only question for resolution is whether Myles and Martinez engaged in misconduct sufficient to deprive them of their right to reinstatement. Respondent contends that they did; the General Counsel contends they did not.

Based on the stipulation of facts and the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following:

[1] All dates are 1984 unless otherwise noted.

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits, and I find, that it has been at all material times a California corporation with an office and place of business in San Leandro where it is engaged in the business of providing sewer and drain cleaning services as well as plumbing services, on both retail and nonretail bases to residential and commercial customers. It further admits that during the past 12 months its gross revenues exceeded $500,000 and that it purchased and received goods and services valued in excess of $5,000, which originated outside California. Accordingly, it admits and I find that it has been at all material times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is and has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The parties stipulated that on November 1, 1984, certain of Respondent's San Leandro employees went on strike, that its employees Lionel Myles and Steve Martinez were among the strikers, and that the strike was an activity protected by Section 7 of the Act. The parties further stipulated that on December 3, 1984, both Myles and Martinez made unconditional offers to return to work but reinstatement was denied them because Respondent believed they had engaged in certain strike misconduct. Finally, the parties have stipulated that had Respondent not held that belief, it would have reinstated both of them to their former jobs.

A. *Lionel Myles*

Respondent points to approximately five "incidents" to support its decision not to reinstate Myles. The first occurred in early November, approximately a week after the strike began. Myles and two other stikers, Mark Forbes and John Greer, were picketing Respondent's San Leandro yard, which is located on Washington Boulevard, a major thoroughfare in San Leandro. The three pickets were patrolling the sidewalk across the driveway. A nonstriker, Guy Akana, began to exit the parking lot via the driveway. Myles stood momentarily in front of Akana's company truck and brought it to a stop at the sidewalk. Akana agrees that he would have had to stop at that point anyway in order to abide by the traffic laws and in order to await a traffic opening. While he was stopped, Greer and Forbes engaged Akana in a short, friendly conversation lasting no more than 2 minutes. Akana testified that he could have left at any time the traffic permitted him to do so, but that he chose to listen to what the pickets had to say. After hearing them out, he entered Washington Boulevard and proceeded to his job.

With respect to the conversation itself, Akana testified that Forbes asked him to turn in his company keys, but he replied that he could not. He said that Myles then came over and told him: "Tell Don A that I am going to break his legs." Akana did not know who Don A was although he later learned it was an individual named Don Atkins.

Myles denied that he ever blocked Akana's truck from leaving the facility. In addition, he specifically denied making any remark about "Don A" and generally denied threatening anyone during the strike.

In both early and late November, Myles had confrontations with nonstriker John Sales. During the strike many of the strikers followed nonstrikers to worksites and picketed near those workmen. Late one morning in early November Myles observed Sales leave Respondent's yard on Washington Boulevard for a clean-out job located at the Eden Lodge residential complex also located on Washington Boulevard and only a few hundred feet from Respondent's yard. Myles and another striker, Tim Shantin, followed Sales there and began to picket. Sales had some difficulty with his winch, which apparently had broken, and he was unable to remove his equipment from the truck. Taking advantage of the incident, the pickets taunted Sales by shouting in the presence of the complex's manager that Sales was inexperienced and incompetent. Myles testified that except for telling Sales he was incompetent he said nothing else to Sales. Sales disagrees, asserting that Myles told him he was going to "kick [Sales'] fucking ass and break his bones." Later, Sales says, Myles said he would "bust [Sales] up," amplifying that it was not a union scare tactic but "between you and i, pal."

Unable to unload his equipment with the broken winch, Sales returned to Respondent's yard where he repaired it. The pickets followed him to the yard. When he returned to Eden Lodge they followed him again. Myles testified he said nothing to Sales when he returned to the Lodge. Sales testified, however, that when he returned Myles told him he was going to "bust him up" and "kick his ass." Sales then testified that after he had finished the job, the pickets surrounded his van as he began to leave and Myles and others began to pound on it. He says Myles was shouting angrily, "I'm going to get you." Myles denied pounding on the van or making any of the remarks. During this incident it appears that Sales' van suffered two flat tires. It is unclear whether the tires were punctures or were simply deflated. Either way there is no evidence connecting Myles to the tire incident. Respondent concedes that it cannot prove that Myles had anything to do with the flat tires but points to the incident as part of the atmosphere of the strike. When Sales realized his tires were flat, he got out of the vehicle to inspect them. Neither Myles nor any other picket made any move to carry out the alleged threats.

In late November, according to Sales, Myles remarked to him in the presence of two other pickets in front of the San Leandro yard that he was going to be coming back to work the following week. Sales said Myles told him, "I'm going to get you then. I'm going to get your ass then." Sales says he asked Myles to repeat what he had said and Myles obliged saying, "I'll be back next week and I'll get your ass." Sales responded by saying

that if Myles attempted to do so he would file assault charges against him.

Respondent also alleges that Myles at one point parked his car in such a manner as to block the driveway into the yard. According to the testimony there are two driveway entrances, one on Respondent's property and another on the U-Haul establishment's property next door. Respondent's employees regularly used the U-Haul driveway as well as their own. Myles remembers that on one occasion he was going to use the telephone booth located approximately 10 feet inside Respondent's driveway and that he parked his small truck nearby to do so. He says that when Guy Davenport, Respondent's general manager, asked him to move it he did. Davenport could not remember the incident, but Rodney Wray, Respondent's president, asserts that it was he who had asked Myles to move his car. He says when he did Myles replied. "No way," and refused. Wray asserts that Myles' vehicle was parked horizontally across the driveway, thereby blocking it. Neither he nor anyone testified that any other vehicle actually attempted to use the driveway while Myles was parked there. Indeed, Wray has no idea when the vehicle was actually moved, for he simply walked away and did not pursue the matter further. In any event, there continued to be access to the yard through the U-Haul driveway only a few feet away.

The last episode involving Myles occurred about November 20. Nonstriker Scott Johnson, shortly before lunchtime, left the yard in a company truck. Myles and striker Will Lister, believing that Johnson was going out on a call, decided to follow him for the purpose of picketing the jobsite. Johnson took evasive action and attempted to lose them in traffic, adding credence to their belief that he was on his way to a call. Instead of going to a job, however, Johnson went to his home in Fremont to get his lunch. Johnson testified that as he was entering his house Myles and Lister pulled up. He was about 60 feet away from them when they began calling him a "fucking scab." Lister told Johnson that he had no right working for the Company and would never have any rights if he continued to work for it. Johnson says additional words were exchanged and at that point he heard Myles say he was going to harass and follow Johnson "until he died." As a result of that remark Johnson decided to call the police.

Myles testified that when he and Lister arrived in front of Johnson's house, Johnson got out of his vehicle and began "hollering" at them. Johnson shouted at the strikers that they did not want to have a job and did not want to work, but could have a job at Roto Rooter if they wanted to work. Myles referred to a court order, of which he had a copy, which had refused to prohibit strikers from following nonstrikers to jobs and picketing them there. When the police arrived Myles showed the court order to the policeman. Apparently the only thing the policeman did was to detain Myles and Lister long enough to permit Johnson to leave without being followed.

B. *Steve Martinez*

Respondent asserts that striker Steve Martinez engaged in misconduct 1 day on Hesperian Boulevard in San Leandro. The street is a busy six-lane divided thoroughfare.

About November 13, Martinez was driving his own truck down Hesperian Boulevard when he encountered a Roto Rooter van driven by Steve Penney, which was stopped at a stoplight. Penney had previously worked at Roto Rooter but had been brought back during the strike. Both vehicles were stopped in adjacent traffic lanes, about 15 car lenghts from the intersection. Penney says Martinez attempted to force his way in front of his van and that while Martinez was doing so he yelled at Penney saying he was going to "kick his ass." Penney says Martinez then spit at the van and threw ice at it from a fast-food chain's paper cup. Penney concedes, however, that his van was never in any real danger and that Martinez did not actually block him from proceeding. The entire incident occurred while the stoplight was changing from red to green as the traffic slowly began to move forward. At no time did Penney's vehicle ever exceed 5 miles per hour nor was Martinez driving any differently from that of an individual attempting to change lanes in a traffic jam.

Martinez denies the entire matter. He says he noticed the van, remarked on it to a friend who was driving with him, and then proceeded on his way. He specifically denies saying anything to the driver (whom he did not seek to identify), denies throwing ice or spitting, and denies attempting to cut the van off by changing lanes.

IV. ANALYSIS AND CONCLUSIONS

In its decision in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), the Board reconsidered its traditional rule with respect to the reinstatement of strikers accused of misconduct. Prior to this decision the Board had held that a striker's verbal threats that were unaccompanied by any physical act or gesture would not constitute serious strike misconduct justifying an employer's denial of reinstatement. It had also held that verbal threats that were accompanied by physical movements or contacts, such as hitting cars, did constitute serious misconduct. Its rule, as set forth in *Coronet Casuals*, 207 NLRB 304 (1973), was that absent violence a striker was not to be disqualified for reinstatement despite having made abusive threats against nonstrikers.

However, in *Clear Pine Mouldings*, a Board plurality disagreed with the standard because it was inconsistent with other sections of the Act. It looked to the decision of the Court of Appeals for the Third Circuit in *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 (1977) and to the decision of the First Circuit in *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1977). Those courts had disagreed with the *Coronet Casuals* approach. In *Clear Pine Moulding*, the Board adopted these courts' analysis stating that it rejected that per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts. Instead, the Board said, it now agreed with those courts that a serious threat may draw credibility from the surrounding circumstances and

not from the physical gestures of the speaker, moreover, an employer need not countenance conduct that amounts to intimidation and threats of bodily harm. Specifically, the Board adopted the *McQuaide* test, which it characterized as an "objective" test, that the Board should look to "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, supra at 1046, quoting *McQuaide*, supra at 528.

Accordingly, it is now the obligation of the Board to look at all the surrounding circumstances to determine whether or not the strikers' acts may reasonably be seen to have a coercive or intimidating effect on the employees who are also exercising a Section 7 right, the right not to engage in a strike.

Since its decision in *Clear Pine Mouldings*, the Board has decided a number of cases applying that rule. A certain amount of name-calling and posturing conduct has passed muster. See, for example, *MGM Grand Hotel*, 275 NLRB 1015 (1985) in which strikers called nonstrikers "scabs." Similarly, in *Shalom Nursing Home*, 276 NLRB 1123, 1135–1136 (1985), even racist name-calling and taunting were deemed to be insufficient to warrant the denial of reinstatement. Yet, in *Georgia Kraft Co.*, 275 NLRB 636 (1985), when strikers visited a nonstriker's home and threatened to "take care of" the nonstriker in the presence of his pregnant wife and young child, the Board deemed that verbal threat sufficient to warrant the denial of reinstatement. In *Clear Pine Mouldings* itself, the Board found that a striker who swung a 2-foot club at a nonstriking motorcyclist and used the club to beat on the vehicles of other nonstrikers was properly denied reinstatement. The surrounding circumstances included other strikers carrying other weapons, such as tire irons, baseball bats, and ax handles, as well as being accompanied by dogs. Also unprotected was a verbal threat to kill a nonstriker when the individual making the threat was equipped with a weapon that he had been using, as was a statement to a nonstriker while crossing the picket line that she was taking her life in her hands by crossing the line and would live to regret it. Likewise unprotected was a threat to burn down the residence of a nonstriker.

As I view the cases, it seems to me that a striker's possession of a weapon while simultaneously making the threat will clearly warrant the refusal to reinstate. Also, justifying the denial of reinstatement would be a threat to burn a nonstriker's home. This sort of threat seems to fall in the same category as the threat accompanied by a weapon because the act is so horrible that fire itself becomes a weapon.

However, a threat made while at an individual's home, unaccompanied by any weapon, seems to fall into a less clear category. In *Georgia Kraft*, supra, the threat was made in the presence of the nonstriker's pregnant wife and child. That circumstance seems to have made the threat more immediate and real. Would the result be different if the threat was more vague, was shouted from some distance while simultaneously respecting the property line, and in the absence of any especially vulnerable family member?

Similarly, if no weapon is present when a nonstriker's car crosses the picket line, but the strikers nonetheless pound on the vehicle with their hands without damaging the vehicle, can it be said that the conduct is intimidating? After all the persons inside the vehicle are not likely to be harmed for they are physically shielded by the auto itself. This is not to say that the din created might not cause apprehension in reasonable individuals. Yet can it be said that the strikers by such boisterous conduct have done anything so serious as to warrant loss of employment? Hopefully, the surrounding circumstances test will be helpful here.

A. *Lionel Myles*

Turning to the facts before me, I should observe that for the most part all of the witnesses seem reasonably credible in the presentation of their perception of what happened. It is true that Lionel Myles exhibited some areas of inconsistency, but on the other side it seemed to me that John Sales had some problems as well, including a failure to fully observe what was happening around him. Nonetheless, assuming what Sales had to say was true, it appears that Myles said that he was going to kick Sales' fucking ass and break his bones, followed later by a similar threat that Myles was going to bust Sales up and that it was not simply a union scare tactic, but "between you and I, pal." Even so, at no time did Myles approach Sales while Sales was out of his vehicle and at no time did Myles ever display a weapon. Sales was not even sufficiently concerned to complain to the apartment manager or to return to the company office. It seems to me that Sales' own conduct here demonstrates that he did not consider the verbal threats to be very serious. I reach this conclusion despite Sales' testimony that Myles was shouting and gritting his teeth and Sales' assertion that he had taken the threats seriously. Had he done so, he would have sought immediate help for he was outnumbered by the pickets. Despite his current testimony, he was so unconcerned when he went back to the yard to fix his winch that he said nothing about it, and then returned to the job.

Similarly, when he entered the vehicle to return to the yard after the job was completed, Sales accused Myles of repeating the threats and of pounding on the company truck with his hands. He agrees that other pickets were making similar remarks and also pounding on the vehicle. He was so unafraid he got out to check the tires. When he did so nothing happened to him. It was not until he discovered that the truck had suffered the flat tires that he even bothered to report the incident to the Company.

I am of the view that this incident is not so serious as to warrant denying Myles reinstatement. While the incident is not to be condoned, nonetheless it appears that the entire incident, except for the flat tires (to which Myles is not in any way connected) was simply a vociferous and boisterous needling of a nonstriker. Sales did not take the threats seriously because they were not made in a serious vein. Similarly, the pounding on the truck did not actually amount to a physical threat to him. Had the pickets or Myles wished to actually strike

Sales, they could easily have done so when he exited his vehicle to discover flat tires. Yet they refrained from any physical contact whatsoever. I conclude, therefore, that the incident at the Eden Lodge is not sufficient to warrant denying reinstatement to Myles.

Similarly, Sales testified that in late November, about a week before the strike ended, Myles said that he was going to return in a week and would "take care of" Sales then. Myles denies this incident in its entirety. Adding credence to his denial is his statement that he did not know when the strike was to end so he wouldn't have said that he was going to return in a week. In any event this is a threat that was unaccompanied by any gesture or deeds suggesting that it had credence. Here I accept Myles's denial.

With respect to Myles allegedly blocking Akana, it seems to me that the incident speaks for itself. Akana had to stop at the sidewalk for traffic anyway, chose to listen to the pickets, and then proceeded without further delay. He testified that he could have left at any time and that the pickets did not block his exit. Accordingly, I conclude that neither Myles nor anyone else actually blocked Akana's egress. Connected to that incident, however, is Akana's testimony that Myles told him to tell "Don A" that Myles intended to break his legs. Akana didn't even know who Don A was at the time. Even so, Myles had no weapon and no immediate apparent ability to carry out the threat. Don A was not to be seen. Again, while I do not condone his language, Akana was not particularly concerned with it and proceeded on his way. The threat appears remote and not sufficient to warrant denying reinstatement.

Similarly, I am unimpressed with the evidence tending to show that Myles blocked the driveway with his vehicle. Even accepting Wray's version that Myles parked his pickup truck horizontally across the driveway, it appears that there was still sufficient space for another vehicle to have passed; in any event the second driveway was not blocked. Furthermore, even though Myles may have told Wray that he wasn't going to move his car, Myles testified that he did so and Respondent has presented no evidence to the contrary. Aside from Myles' testimony that the truck was parked there only briefly, there is no evidence regarding the length of time the truck remained in the driveway. Finally, there is no evidence that anyone actually attempted to enter the driveway during that period. This incident certainly would not warrant denying Myles reinstatement.

Finally, Respondent points to the incident involving Myles and nonstriker Scott Johnson. The fact that Myles and another striker followed Johnson to his home is of little significance. Certainly Myles intended to picket Johnson at a repair site. He did not know that Johnson was going home to get his lunch. There is no evidence that Myles entered Johnson's property or did anything other than to shout at him from the street. Johnson, however, was understandably upset that he had been followed to his home. Undoubtedly Johnson believed, as do most people, that his home was safe from the labor dispute. Yet Johnson inadvertently carried the labor dispute to his house when he drove the company truck there. The Union did have the right to engage in ambulatory picketing and was merely attempting to exercise that right. Johnson's fear, because he was followed, is magnified beyond reasonableness. Respondent, however, points to Myles' alleged remark that he would follow Johnson "until he died." Frankly, I find the language to be ambiguous. It may simply have been hyperbole on Myles' part, asserting that he intended to engage in ambulatory picketing until Johnson was tired of it. On the other hand it could mean that Myles literally intended to dog Johnson's trail until he became physically exhausted and died. The latter version seems to be most unlikely given the Union's desire to engage in lawful ambulatory picketing. Accordingly, I conclude that Myles' alleged threat here was not a threat at all, but simply a statement made to advise Johnson that he and the Union were tenaciously adhering to the strike. Moreover, the statement was made to Johnson who was a party to the labor dispute, not to his family as in *Georgia Kraft Co.*, supra. I conclude that this incident does not justify denying Myles reinstatement.

B. *Steve Martinez*

The last incident involves Steve Penney's version of what Steve Martinez allegedly did and said at the stoplight on Hesperian Boulevard. Frankly, even crediting Penney's version, it seems to me that nothing untoward happened. Assuming that Martinez edged his vehicle in front of Penney's, spit at the van, threw ice at it, and threatened to "kick Penney's ass," nothing really significant happened. Penney was never in any danger and did not reasonably believe himself to be in any danger. At the most, his vehicle was moving only 5 miles an hour and he was well protected by the vehicle itself. Martinez never left his vehicle and he did not even attempt to harm Penney's person. The incident lasted only a few moments and it seems unlikely to me that Penney was in any way actually intimidated.

I should say here that although I have credited Penney's version for the sake of analysis, in some respects I find Martinez to be the more credible of the two. Martinez was driving his own personal vehicle, was not following Penney but happened on him by chance, and it seems unlikely he would have drawn his passenger friend into a near-violent situation in the middle of traffic. Moreover, as the light changed Martinez did nothing to continue the encounter, but proceeded on his way. In any event, I find that the incident did not reasonably tend to coerce or intimidate Penney in any manner. Accordingly, I would not deny Martinez reinstatement based on this incident.

In conclusion, I find that Respondent has not sustained its burden of proof that either Myles or Martinez engaged in a serious act of misconduct such as to disqualify either of them from reinstatement. Accordingly, I conclude that when Respondent denied reinstatement to Myles and Martinez at the end of the strike, it did so on the basis that they engaged in the strike, conduct clearly protected by the Act. The denial of reinstatement constitutes a violation of Section 8(a)(3) and (1) of the Act.

V. THE REMEDY

Having found that Respondent has engaged in certain violations of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In this regard, Respondent shall be ordered immediately to reinstate Lionel Myles and Steve Martinez to their former jobs, dismissing if necessary any replacements, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges and to make them whole with interest for loss of earnings as described by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) and *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). In addition, Respondent shall be required to remove from its records any reference to the unlawful discharges and shall provide each of them with written notice of such removal and to inform each that the discharges will not be used as a basis for further personnel actions concerning him.

On the foregoing findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Respondent F. E. Wray, Inc. d/b/a Roto Rooter is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Warehouse, Mail Order and Retail Employees and Wholesale Liquor Salespersons, Local 853, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act on December 3, 1984 by refusing to reinstate strikers Lionel Myles and Steve Martinez to their former positions of employment because they had engaged in a protected strike.

[Recommended Order omitted from publication.]

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Of America, Local Union No. 328 (Blount Brothers Corporation) *and* **Kenneth W. Quinnell Sr.** Case 30–CB–2126

29 April 1987

ORDER DENYING MOTION

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 20 March 1985 the National Labor Relations Board issued a Decision and Order in this proceeding.[1]

On 18 September 1986 the Respondent filed with the Board a motion to reconsider and a brief in support of the motion. Thereafter, the General Counsel and the Charging Party filed replies.

The Board has considered the Respondent's motion and brief and the General Counsel's and the Charging Party's replies and has decided to deny the Respondent's motion to reconsider for the following reasons.

In the decision reported at 274 NLRB 1053, the Board adopted the judge's findings that the Respondent had violated Section 8(b)(1)(A) and (2) in operating its hiring hall in a discriminatory manner. The Board ordered the Respondent to make whole the named Charging Party, Kenneth Quinnell Sr., as well as "all other job applicants similarly situated for any loss of earnings they may have suffered . . . by reason of the discrimination practiced against them." The Respondent, in its motion to reconsider, requests the Board to reconsider its decision in this case and to delete from its Decision and Order the make-whole relief for "all other job applicants similarly situated." In support of its motion, the Respondent relies on recent Board decisions in *Laborers Local 426 (Building Contractors)*, 280 NLRB 610 (1986), and *Laborers Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100 (1986). In their replies to the Respondent's motion, the General Counsel and the Charging Party agree with the Respondent that the language of the Board's Order should be narrowed and they request that the Board grant the Respondent's motion.

The judge in his decision in the underlying case initially rejected the Respondent's argument that the make-whole remedy should be limited only to the named Charging Party. In so doing, the judge found that the broad language of the complaint had placed the Respondent on notice concerning an allegation of unlawful discrimination against the Charging Party and other employees; that the matter had been fully and fairly litigated at the hearing; and that the evidence showed the Respondent had engaged in discrimination against the Charging Party and other applicants for referral because of the length of their union membership, or because of other arbitrary reasons not based on objective criteria and standards, and that the Respondent had failed to use objective consistent criteria not based on union membership in the referral of applicants. On these facts and findings, the judge thus found that an order, as sought by the General Counsel extending make-whole relief to the Charging Party and other similarly situated employees, was appropriate in light of Board precedent, including *Plumbers Local 198 (Jacobs/Wiese)*, 268 NLRB 1312 (1984). He also found this case, on these same findings and facts, distinguishable from cases where the Board had granted a limited make-whole remedy. See, e.g., *Longshoremen ILA Local 851 (West Gulf Maritime Assn.)*, 194 NLRB 1027 (1972).

In *Building Contractors*, the Board, relying on *West Gulf Maritime Assn.*, found that a broad remedy providing make-whole relief to "applicants who were similarly discriminated against," in addition to the charging party, was inappropriate, in the absence of evidence that any employee other than the charging party had applied for work through the hiring hall and was denied referral, or was otherwise discriminated against in such a way as to have suffered a loss of earnings. The Board thus limited the remedy there to the charging party. The instant case is distinguishable from *West Gulf Maritime Assn.*, and thus distinguishable from *Building Contractors*, because here the Board, in the underlying proceeding, adopted the judge's conclusion that there is evidence that other employees sought referrals and "were subjected by the Respondent to an evaluation of an arbitrary and unlawful criteria." 274 NLRB at 1060.

In *Contractors of Pennsylvania*, the Board adopted the judge's recommendation that certain individuals named in the complaint and found to have been discriminated against because of their intraunion political and protected concerted activities be granted a make-whole remedy. However, the Board found the judge's inclusion in the make-whole order of unnamed individuals who "may have been discriminated against" to be overly broad and deleted that portion of the remedy. In so doing, the Board noted that it has ordered remedial relief to unnamed individuals similarly situated to named discriminatees in situations where there is evidence of discrimination against a defined and easily identified class. Noting the difficulties of establishing what constitutes a political dissident

[1] 274 NLRB 1053 (1985).

within a union, the Board found that the discriminatees in *Contractors of Pennsylvania* did not establish a class of individuals or that discrimination on a classwide basis had occurred. The Board thus found there that it was necessary to establish evidence of discrimination against each individual and that, in the absence of such evidence, a broad make-whole order was inappropriate.

By contrast, in the instant case, the judge found there was evidence that a number of individuals had applied to the hiring hall and were subjected to discriminatory criteria regarding referral. Thus, unlike *Contractors of Pennsylvania*, the judge's findings showed discrimination, together with the existence of identifiable employees who were discriminatorily treated. Thus, this case is distinguishable from *Contractors of Pennsylvania*. As there is no basis for deleting the language regarding similarly situated employees from the Board's original Decision and Order, the Respondent's motion to reconsider is denied.[2] Accordingly,

IT IS ORDERED that the Respondent's motion to reconsider is denied.

[2] The concerns raised by the General Counsel in she reply are properly a matter for compliance. Thus, if the General Counsel is unable to identify any particular individuals other than the Charging Party who have suffered a loss of earnings as a result of discrimination by the Respondent, she may close the case once the Charging Party has been made whole and the requirements of subpars. 2(b) through (f) of the Order have been satisfied.

Long Stretch Youth Home, Inc. *and* **Maryland State Employees Council 92, AFSCME, AFL-CIO.** Case 5-CA-16242

29 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

Upon a charge filed by the Union 12 March 1984 and an amended charge filed 11 April 1984, the General Counsel of the National Labor Relations Board issued a complaint 21 October 1986 against the Company, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served copies of the charges and complaint, the Company has failed to file an answer.[1]

On 26 February 1987 the General Counsel filed a Motion for Summary Judgment. On 2 March 1987 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed unless good cause is shown. The complaint states that unless an answer is filed "all the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Regional Office, by letters dated 10 November 1986 and 28 January 1987 and sent by certified mail, notified the Company that unless an answer was received immediately, a Motion for Summary Judgment would be filed.[2]

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Maryland nonprofit corporation, operates a residential facility for teenaged boys in Frostburg, Maryland, where it annually derives gross revenues in excess of $250,000. We take official notice of the Board's previous assertion of jurisdiction with respect to the Company.[3] We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all times material, William Platter has been the Respondent's excutive director. As such, Platter is a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

About 6 November 1983 Platter attempted to discourage employees' activities on behalf of the Union by suggesting they resign, threatening them with discharge, telling them they were to blame for the poor financial condition of the Respondent, and telling them they were irreligious because of their union activities. About 10 November 1983 Platter threatened employees with reduction of their benefits and services for clients and possible furloughs because of their union activities. About 27 October 1983 the Respondent discharged employee Terry Galica and about 1 December 1983 discharged employee John Footen because they joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Based on the above, we find that Platter's statements to employees relating to their union activities violated Section 8(a)(1) of the Act. We further find that the Respondent violated Section 8(a)(3) and (1) by discharging employees Galica and Footen for their union and protected concerted activities.

CONCLUSIONS OF LAW

1. By coercively suggesting to employees that they resign, threatening employees with discharge, telling employees they were to blame for the Respondent's poor financial condition, telling employ-

[1] On 30 October 1986 the complaint, which was served by certified mail, was returned to the Regional Office by the Postal Service. The unopened envelope containing the complaint indicated that delivery had been refused.

[2] The Respondent refused delivery of these letters. In addition, a Board agent visited the residence of the Respondent's executive director, William Platter, and, receiving no response at the door, affixed to the door a copy of the Regional Office's 28 January 1987 letter to the Respondent. The Regional Office received no response to this service.

[3] 280 NLRB 678 (1986) (Chairman Dotson dissenting).

The Respondent's refusal to accept delivery of certified mail should not serve to defeat the purposes of the Act. *Michigan Expediting Service*, 282 NLRB 210 (1986).

ees they were irreligious because of their union activities, and threatening employees with reduction of their benefits and services for clients and possible furloughs, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discriminatorily discharging employees Terry Galica about 27 October 1983 and John Footen about 1 December 1983, the Company violated Section 8(a)(3) and (1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged two employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date of a proper offer of reinstatement, less any net earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). We deny as unnecessary the General Counsel's request for a visitatorial provision.

ORDER

The National Labor Relations Board orders that the Respondent, Long Stretch Youth Home, Inc., Frostburg, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in union activity or concerted activity for the purpose of collective bargaining or other mutual aid or protection.

(b) Coercively suggesting to employees that they resign, threatening employees with discharge, telling employees they are to blame for the Company's poor financial condition, telling employees they are irreligious because of their union activities, and threatening employees with reduction of their benefits and services for clients and possible furloughs.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Terry Galica and John Footen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Frostburg, Maryland, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN DOTSON, dissenting.

In accord with my dissent in *Long Stretch Youth Home*, 280 NLRB 678 (1986), I would not exercise the Board's jurisdiction over the Respondent.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for your activities on behalf of Maryland State Employees Council 92,

AFSCME, AFL–CIO, or any other union, or for your concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT coercively suggest that you resign, threaten you with discharge, tell you that you are to blame for the Company's poor financial condition, tell you that you are irreligious because of your union activities, or threaten you with reduction of your benefits and services for clients and possible furloughs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Terry Galica and John Footen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their discharge and that the discharge will not be used against them in any way.

LONG STRETCH YOUTH HOME, INC.

Commercial Contracting Company of San Antonio, Inc. *and* Alfred Atkins. Case 10–CA–21930

29 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 2 February 1987 Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Commercial Contracting Company of San Antonio, Inc., Maryville, Tennessee, its officers agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

E. Walter Bowman III, Esq., for the General Counsel.
Courtney N. Pearre, Esq. (Heiskell, Donelson, Bearman, Adams, Williams & Kirsch), of Knoxville, Tennessee, for the Respondent.
Alfred Atkins, pro se.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This case was tried at Knoxville, Tennessee, on 3 December 1986.[1] The charge was filed by Alfred Atkins (Atkins) 11 August, and the complaint was issued 15 October alleging that Commercial Contracting Company of San Antonio, Inc. (Respondent or the Company) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), by laying off and thereafter failing and refusing to reinstate Atkins allegedly because of his union or protected concerted activity. The primary issue presented is whether Respondent selected Atkins for layoff in order to avoid his appointment to the position of union steward. I find that it did.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Texas corporation with an office and place of business located at Maryville, Tennessee, where it is engaged in business as a construction contractor. Respondent, during the calendar year preceding issuance of the complaint, purchased and received at its Maryville, Tennessee facility materials and supplies valued in excess of $50,000 directly from suppliers located outside the State of Tennessee. The complaint alleges, Respondent in its answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

The complaint further alleges, Respondent also admits, and I further find that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 519 (the Union) is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Material Facts*

Respondent at the time of the hearing performed construction work at the Aluminum Company of America plant at Alcoa, Tennessee. Respondent has maintained a work presence at this particular site since about 1977 except for 9 months during 1983. The various craft employees utilized by Respondent on its jobs are represented by local craft unions affiliated with the Knoxville Building and Construction Trades Council and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 519 (Local 519).

Respondent is signatory to a collective-bargaining agreement with the Trades Council and Local 519 effective from 3 July 1984 through 30 June 1989. The agreement provides for an exclusive hiring hall requiring that Respondent secure new employees from the respective craft unions and only when the unions are unable to supply qualified applicants within 48 hours of Respondent's request may Respondent then secure employees from any other source. Further, the agreement specifically provides at article 18.12 that seniority shall not be recognized or applied to employees working on projects under the agreement. A final provision pertinent to the case sub judice is found at article 16 relating to union representation. Thus, article 16.2 provides for the appointment of union stewards on the job as the unions' representatives while article 16.5 provides that, "when employees are laid off, the job steward will be the last

[1] All dates are in 1986 unless otherwise indicated.

man laid off provided he is capable of satisfactorily performing the work remaining."

Atkins is, and has been since May 1973, a member of Local 519. From Respondent's records, it appears that Atkins was initially employed by Respondent 2 weeks in 1978. He was subsequently employed by Respondent on three separate occasions with the last period of employment beginning on 1 November 1985.[2] During his last period of employment, Atkins worked as a truckdriver hauling construction materials and personnel around the jobsite. For most of this period, he was one of only two such drivers, the other being Carl Johnson, the designated steward for Local 519.

Atkins testified that he was told by Johnson in December 1985 that Johnson was contemplating retiring in February. Atkins looking toward his own retirement and pension eligibility some 9 years down the road, and seeking to enhance his job security by the privileges extended stewards under the bargaining agreement to be laid off last from a job, expressed his interest in the steward's position to Ted Porter, Local 519's business agent, in February. According to Atkins, Porter agreed to designating Atkins as the steward on Johnson's retirement.

Johnson continued to work past his contemplated February retirement, however, and Atkins likewise continued to work. In the meantime, in late April Atkins complained to Johnson about some of the other crafts doing some of the truckdriving, and asserted that Johnson was not able to perform his share of the work so that Respondent needed to hire an additional driver. Johnson, according to Atkins, agreed to take the matter up with Project Manager Moore. A few hours later, Moore approached Atkins on the jobsite and stated that he had heard Atkins had been "bitching and complaining." Atkins related what he had told Johnson and added that Johnson was about "75 percent dead" in performing his duties. Further, Atkins testified he told Moore that he had been offered the steward's job "as quick as Johnson retired" and when he became steward he "would look after those type of things more than Carl did." Atkins testified that although Moore made no response to Atkins' assertion about becoming a steward, he had a "very unpleasant look on his face."

Respondent did hire an additional driver, Melvin R. Owens, on 13 May contemporaneous with Respondent's startup of a second shift. However, Atkins was assigned to that second shift. Atkins complained that his assignment interfered with certain of his nonjob-related commitments, and after a few days he was restored to the day shift with Owens taking the second shift.

On 9 July, Atkins was the only driver laid off in a reduction in force. Shocked over his selection and Owens' retention, Atkins telephoned Moore and asked to leave work early so that he could consult with Local 519 about his layoff. Moore granted him permission to leave. The record does not reflect what, if any, complaints Atkins made to the Union after leaving work early. In any event, however, Atkins telephoned Moore at Moore's home on Saturday, 12 July. Atkins testified that he asked Moore why he was laid off and Moore complained about Atkins' attitude saying Atkins would have to change it. However, still according to Atkins, Moore never explained the attitude complaint, and instead stated that when "you didn't want somebody to become steward you laid them off before they made steward." Further, Moore added twice that he knew it was dirty the way "we done you."

Following Atkins' layoff Respondent on 19 August hired two new employees through the Union, Randall Stooksbury and Jess O'Dell. Respondent also requested the referral by name of an additional employee, Thomas Vanosdale. The General Counsel relies on Business Agent Porter's testimony to argue that the July layoff was unnecessary and therefore pretextual because Respondent requested Vanosdale's referral within a week of Atkins' layoff. However, I view Porter's testimony as too vague to establish exactly when Respondent asked that Vanosdale be referred. It is clear that when Vanosdale was initially referred, the referral was withdrawn when Porter learned of it and insisted that a referral could not be made by name request. However, Vanosdale was subsequently employed by Respondent later on 22 August after it appeared that there were no other qualified drivers on the referral list ahead of him. Respondent's records reflect that Johnson retired on 29 August. Owens became the steward. Based on Moore's testimony, at least two additional drivers, Calloway and Zachery, were referred to Respondent by the Union at some point in time after Atkins' layoff. The record does not reflect, however, exactly when they were hired.

B. *Respondent's Position*

Respondent's position on Atkins' layoff was related primarily through Moore who was supported by the testimony of Respondent's project superintendent Darryl Humpke and Ironworker General Foreman Herbert Minton. Moore testified that most of Respondent's major contract work had been completed on the job by early July, and alleged additional work on the job was being acquired sporadically, Respondent's need for drivers was reduced at the time of Atkin's layoff. Moreover, Moore related that around 9 July he noticed on various occasions a driver or two sitting around idle. Moore discussed what he observed with Humpke, Minton, and Bill Bert, another superintendent on the job, who recommended that they lay off one teamster. Respondent was not bound by seniority so Moore elected to lay off Atkins rather than Owens. Atkins was selected, Moore testified, because he had gotten somewhat "cranky." Moore explained that when asked to do something, Atkins would ask where Owens was or if Johnson could not do the job. Atkins would also complain that Johnson was not carrying his share of the load. Minton testified that he recommended Atkins be laid off because he felt Owens was better qualified and because Atkins, when told to do something, would inquire where the other driver was. Further, Atkins would question ironworkers under Minton about who issued the order when they

[2] The testimony of Respondent's project manager James Sidney Moore indicates that following the initial period of employment, Atkins was referred to his employment with Respondent by Local 519 after Moore requested him by name.

would ask him to do something. Humpke's testimony was generally in accord with that of Moore and Minton.

Minton and Humpke specifically denied the union activity of Atkins was a consideration in their respective recommendation of his selection for layoff. Humpke testified further that Atkins had never complained to him about a violation of work rules or bias on the part of Respondent against the Union. No evidence was presented to reflect that Atkins was a chronic grievance filer or that he had filed any grievances in the past.

Moore acknowledged that he had a lengthy telephone conversation initiated by Atkins on 12 July. Moore testified, however, that in that conversation he only told Atkins he had been selected for layoff because he had become cranky and ornery and was not doing the work as well as Owens. Moore could not recall any reference to the steward's position in the conversation. Moore conceded on cross-examination that he did not particularly want Atkins back. He further conceded that during one referral request, he asked the union representative, whose name was not specified, what Atkin's status was and he was told that Atkins was far enough down the list that he would not be referred at that time.

C. *Conclusions*

The General Counsel argues that the 9 July layoff was pretextual and not economicaly motivated. I find the record does not suggest that Respondent's decision to have a layoff of a driver was based on any consideration unlawful under the Act. The testimony of Moore on the status of Respondent's work at the time of the layoff was not contradicted. And I have already found the evidence insufficient to establish a request by Respondent for Vanosdale's referral was made anytime near the layoff. That Respondent did not need three drivers at the time of the layoff is supported circumstantially by the fact that it apparently operated between 9 July and 19 August with only two drivers. Accordingly, I conclude the decision for a layoff was not pretextual and only Respondent's selection of Atkins for the layoff is in issue, and only if this selection was based on reasons prohibited by the Act can it be said that Respondent violated the Act.

It is undisputed that Respondent had the right under the collective-bargaining agreement to ignore seniority in making its layoff selection. It was therefore entitled to make a selection on the basis of any lawful criteria such as job qualifications or past job performance. It could not under the Act, however, make a selection based on any anticipation that Atkins would be designated a union steward, for the occupation of the position of union steward and the proper performance of stewards' duties is protected under the Act as a legitimate union activity. Discrimination based on designation as a steward is a violation of Section 8(a)(1) and (3) of the Act. See *John P. Bell & Sons, Inc.*, 266 NLRB 607 (1983). Union animus is inherent in such discrimination.

In cases such as the instant one turning on employer motivation in actions adversely affecting employees, it is incumbent on the General Counsel to establish a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's action. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Once a prima facie case is established, the burden shifts to the employer to demonstrate that the same actions would have taken place even in the absence of the protected conduct. In the instant case, evidence of Respondent's unlawful motivation is found in Atkins' testimony of Moore's telephone remarks on 12 July. If Atkins is credited, the General Counsel's prima facie case is established.

As a witness, Atkins appeared smug and almost arrogant. His responses to questions were frequently expansive and sometimes indirect, particularly on cross-examination. However, his testimony regarding the remarks attributed to Moore was deliberate, emphatic, and consistent with his written statement given the Board during the investigation of the case. I could detect no insincerity in him. Moore's testimony was delivered in a calm manner and he displayed no outward manifestations of prevarication. His recollection, however, of the remarks in the conversation with Atkins on 12 July was abbreviated although he admitted the conversation was a lengthy one. What is most significant, however, is that Moore did not specifically deny the remarks Atkins attributed to him and only generally testified that he could not recall anything in reference to the steward's position.[3] In view of this absence of specific denial, I find the testimony of Atkins fully credible on Moore's 12 July remarks.

The accuracy of Atkins' testimony and the absence of a legitimate basis for his layoff selection is circumstantially supported by the failure or inability of Respondent's witnesses to detail specific deficiencies in Atkins' job performance or identify specific instances of Atkins' attempts to avoid work assignments. For the most part, the testimony of Moore, Humpke, and Minton on Atkins' performance was vague, generalized, and conclusionary. Moreover, there is no evidence that any warnings or reprimands were ever issued to Atkins or any other disciplinary action taken against him in connection with any of the work deficiencies or attitude problems now claimed by Respondent. Humpke did specify one instance in 1985 when he talked to Atkins for 45 minutes in the cab of his truck due to Atkins not wanting to take the "semi" to get a trailer in the absence of a direct order from Humpke. The incident fails to be convincing as a consideration in Atkins' layoff selection because it occurred more than 7 months prior to the layoff without any evidence of a repetition of the incident. Moreover, and in any event, Atkins on rebuttal emphatically and, I find, credibly denied Humpke's testimony on this matter.

Crediting Atkins' testimony establishes the General Counsel's prima facie case that Respondent selected Atkins for layoff because of his anticipated future designation as a job steward for Local 519. In view of Respondent's failure to establish Atkins' claimed job deficiencies and in light of Owens' comparative inexperience

[3] Moore had expressed this lack of recall earlier in a letter of position to the Board investigator dated 10 September in which he stated, "Furthermore, I do not recall making a statement to that effect that [Atkins] was let go before he became a union steward."

as a truckdriver in the construction industry,[4] it cannot be said that Respondent has proved that Atkins would have been selected for layoff even in the absence of his anticipated designation as union steward. Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act as alleged in the selection of Atkins for layoff on 9 July.

CONCLUSIONS OF LAW

1. Commercial Contracting Company of San Antonio, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 519 is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off its employee Alfred Atkins on 9 July 1986 because of his anticipated future designation as the union steward for Local 519, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The unfair labor practice set forth in paragraph 3 above affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily laid off Alfred Atkins, it must offer him reinstatement and make whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of layoff to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[5] Consistent with the Board's decision in *Sterling Sugars*, 261 NLRB 472 (1982), it will also be recommended that Respondent be required to remove from its records and files any reference to the unlawful layoff of Atkins and notify him in writing that this has been done and that evidence of the unlawful layoff will not be used in connection with future personnel action against him.[6]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Commercial Contracting Company of San Antonio, Inc., Maryville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against any employee due to his or her anticipated designation as union steward by Intenational Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 519, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Alfred Atkins immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful layoff of Atkins and notify him in writing that this has been done and that the layoff will not be used against him in future personnel actions.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Maryville, Tennesse, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[4] Porter testified that Owens had only a few weeks of construction site driving experience prior to his referral by the Union to Respondent. Porter stated the difference between an over-the-road freight driver and a construction driver was equivalent to the "difference in day and night." However, although Porter conceded that he could not say that Owens was not qualified for Respondent's driving work, he related that he could not be more qualified than Atkins or any other driver employed by Respondent.

[5] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[6] The General Counsel's brief contains a request for a visitatorial provision in the remedy. However, no specific circumstances warranting the inclusion of such a provision on the facts of this case were cited. Accordingly, and because the Board does not include such provisions in the absence of specific justification (see, e.g., *O. L. Willis, Inc.*, 278 NLRB 203 (1986)), I shall not recommend the inclusion of such a provision here.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT layoff or otherwise discriminate against any of you in anticipation of your selection or designation as a union steward by International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local Union No. 519, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Alfred Atkins immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

COMMERCIAL CONTRACTING COMPANY OF
SAN ANTONIO, INC.

Greenwood Trucking, Inc. *and* George C. Hartsell.
Case 17–CA–12976

29 April 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 13 January 1987 Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Greenwood Trucking, Inc., Greenwood, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Johansen, who did not participate in *Meyers Industries*, 281 NLRB 882 (1986), agrees with the result.

Lyn R. Buckley, Esq., for the General Counsel
William C. Martucci, Esq. (Spencer, Fane, Britt & Browne), of Kansas City, Missouri, for the Respondent.

DECISION

BERNARD RIES, Administrative Law Judge. This matter was tried in Kansas City, Kansas, on 8 September 1986,[1] on a charge filed on 16 May and a complaint issued on 27 June. The complaint alleges that Respondent violated Section 8(a)(1) of the Act about 28 April by refusing to continue the employment of Charging Party George C. Hartsell and his wife Dorothy. The answer denies material allegations of the complaint.

Briefs have been filed by the General Counsel and the Respondent. Having carefully considered the transcript of proceedings, the exhibits, the briefs, and my recollection of the demeanor of the witnesses, I make the following findings of fact, conclusions of law, and recommendations.

[1] All dates hereafter refer to 1986.

I. THE FACTS

Greenwood Trucking, Inc. is located in Greenwood, Missouri, where its trucks and drivers haul loads of materials for other businesses. The firm was formed in February 1984 by David E. Pemberton, who also runs a truck repair business and has other employment, and Herbert L. Wagner. In the spring of 1986, the two decided to terminate their relationship, which at that time nominally owned 10 trucks (1 of which was not operational).

Two of Greenwood's drivers at the time were George C. Hartsell, the senior employee of the concern, and his wife Dorothy, who began driving as a team with George around the end of February. The record shows that some runs were driven by teams and others by single drivers, but does not show precisely how many drivers were teamed and how many not. We know, for example, that the Peterbilt truck was driven by the Hartsells, who were succeeded by the Jordans, also a married couple; and Respondent Exhibit 4 shows that, like the Hartsells and the Jordans, drivers Paddock and Alsup together made the run from Lenexa, Kansas, to Reno, Nevada, and back. On the other hand, the two trucks used to fulfill the Bones Transportation contract were driven by single drivers.

The Hartsells drove a regular weekly run from Lenexa to Reno, carrying J.C. Penney goods under contract with National Transportation and Delivery Service (NTDS), a Georgia firm; four other Greenwood trucks, presumably driven by two drivers each, made the same 3200-mile run every week.

The first oral divorce agreement between Pemberton and Wagner provided for a 50–50 division of the equipment (and the drivers), and the agreement was so announced to most of the employees in March or early April, along with an invitation to the drivers to go to work for whichever ex-partner "you want to work with." When Hartsell was informed of this on the following day, having just returned from a trip, he told Pemberton and Wagner, in the words of the former, that "him and Herb had built a good friendship and he hoped there was no hard feelings and he wanted to go with Herb." Pemberton responded, "Fine, no problem whatsoever."[2]

When Wagner and Pemberton delved into the financial realities, however, they ultimately agreed, on 20 April, to what the record refers to as a 70–30 split, with Pemberton on the long end. Actually, Wagner got only two operable trucks and one truck "too old to put out on the road," and he took the two drivers who, having been qualified by the Bones Company to drive dump trucks, had been operating those trucks under the Bones contract. Because Wagner did not need the Hartsells' services, accordingly, and because Pemberton required a driver team to operate the run that the Hartsells had been driving, the obviously logical arrangement would have been for the Hartsells to continue driving the Peterbilt from Lenexa to Reno and back, working for Pember-

[2] Hartsell gave a somewhat different, but not here importantly so, account of the meeting.

ton instead of the preferred Wagner. Matters did not so eventuate; on 28 April, the Hartsells were denied further employment by Pemberton, who continued operating as Greenwood Trucking, Inc.

This case puts in issue the motivation for that denial. The General Counsel contends that it was provoked by the Hartsells' engagement in concerted activity protected by Section 7 of the Act. Respondent argues that Pemberton simply believed that Hartsell did not care to work for him, and was not told otherwise by Hartsell until he had already hired replacement drivers for the Hartsells.

The relevant background follows. In the early part of 1986, some of the salary checks paid to drivers by Greenwood were returned for insufficient funds. The dissatisfied drivers, Hartsell testified, discussed the problem with one another. On 11 April, Hartsell deposited four salary checks for him and his wife and, while in Reno, received a call from his daughter in Missouri that three of the checks had again bounced. He talked the problem over with his wife and then called Pemberton's wife, who served as the Company's payroll clerk; she told him that Greenwood was not receiving payments on time from NTDS, which accounted for the insufficient funds. After further discussion with Dorothy, Hartsell called his attorney in Kansas, who offered little immediate relief. Then the Hartsells decided that he should call Lamar Jones, the NTDS traffic manager in Atlanta, a man he often contacted while on the road about routine problems. He repeated to Jones what Pemberton's wife had asserted, and Jones denied that NTDS was behind in its payments to Greenwood. Hartsell also told Jones that there were "some other problems" at Greenwood as well,[3] and when Jones said that NTDS was considering changing contractors, Hartsell made a pitch to shift NTDS' business to Wagner.

This call was made on 18 April; the Hartsells returned to Kansas on Sunday, 20 April. He testified that he did not visit or contact the dispatching office before he left again for Reno on 22 April, because he was "pre-dispatched," as usual, to leave Lenexa at 3 p.m. on that date from the J. C. Penney warehouse, and it was not uncommon, unless the driver needed to pick up a paycheck or anything else, to simply keep the truck with him. Pemberton challenged this testimony, saying that the Hartsells reported in as usual to present their bills prior to leaving again for Reno.[4]

According to Hartsell, it was approximately 19 April (probably 20 or 21 April) that he learned from other drivers that the split was to be 70–30, and not 50–50, but he admittedly made no effort to ask Pemberton while in Kansas between 20–22 April if the latter intended to employ him, he simply assumed that there "would be a reevaluation and people would be reassigned to a truck," with him, the senior driver, and his wife presumably continuing to drive the Peterbilt for Pemberton. The Hartsells loaded the truck on Tuesday, 22 April, drove to Reno, and did not return to Kansas until the evening of Sunday, 27 April, having stayed over a day in Reno. The following morning, Hartsell received a call at home to bring the truck into the shop to get an oil sample analyzed before they left town again.

When Hartsell arrived, however, Pemberton told him to remove his equipment from the truck. Hartsell quotes himself as saying that, the split not having gone 50–50, "I still need a job." Pemberton allegedly replied that he did not have a "damn thing" for the Hartsells, and went on to say, "I am not happy with the events of the last few days and you calling Lamar at NTDS and telling them that my checks were no good." Pemberton then handed Hartsell a cashier's check payable to both Hartsells in the full amount he owed them, including the trip they had just finished.

The record shows that on 17 April, a married couple named Jordan filed applications with Pemberton as a driving team. They were not, however, hired on that date. Pemberton testified that he often received applications for positions and that he kept these applications on file; the evidence suggests that Respondent experiences a good deal of turnover, in that three drivers who worked for Greenwood no longer were employed at the time they testified. The record also shows that in his direct testimony, Pemberton stated that on the morning of 21 April, he received a call from one Chuck Davis of NTDS, who said that "the drivers had been calling and saying that our checks were bouncing and wanted to know what the problem was"; he could not recall for sure that Davis had named any particular driver; rather, "he said all of them had been calling." On cross-examination, however, Pemberton conceded that he "knew that George Hartsell had called NTDS regarding back [sic] checks," and, expanding on his testimony on direct,[5] he agreed that, on 28 April, he had referred to the fact that Hartsell had "called NTDS about loads for Chris and about the insufficient funds checks." As one of the two affidavits in evidence given by Pemberton show, he had learned of this call from speaking to Lamar Jones, not Chuck Davis.

The basic thrust of the affidavits is that Pemberton had just assumed, after the 70–30 split came about, that Hartsell would not be working for him because "George did

[3] Hartsell did not elaborate on this at the hearing, but he evidently made reference here to "hot loads," discussed briefly infra.

[4] This conflict is potentially material. I was not particularly impressed by either Hartsell or Pemberton at the hearing. Hartsell testified that it was not unusual for a driver to take the truck home and not check in with the office if he was predispatched. Pemberton did not quite absolutely refute this: "Well, *usually* he *always*, brought the truck to the house and picked up their check—or, you know, brought the truck by and said they [sic] was nothing to do to it, we'd tell them to take it on home if there was nothing to do to it." Sound business practice would seem to suggest that the drivers would turn in their bills weekly, instead of waiting until they felt like it. On the other hand, as we shall see, after the following weekend, Pemberton called Hartsell at home to have him bring the truck in before it "leaves town again," which indicates that Hartsell might have been anticipated to do so without making contact with the office. Giving Respondent the benefit of the doubt, because it bases an argument on the issue, I would credit Pemberton.

[5] There, Pemberton had simply said that when Hartsell stated that he would like to work for Pemberton, the reply was that Pemberton had "thought you wasn't going to work for me, you've indicated to the other drivers and me and everybody that you absolutely didn't want to work for me," and that he had, consequently, hired replacements for the Hartsells. He had not referred on direct, as he did on cross, to any conversation with Hartsell on 28 April about his talk with Lamar Jones.

not like me and did not want to drive for me." Despite Hartsell's testimony at the hearing that he had thought of Pemberton as a "friend," one senses that this was not so, and that Hartsell, like most of the other drivers, would have preferred employment with Wagner.[6] Nonetheless, Pemberton's affidavit of 9 June states, "the call to Lamar on the checks *made no difference*, it *just put the icing on the cake*" (and subsequently again states that "the call on the checks *just put the icing on the cake*").

Other witnesses for the General Counsel indicated that Pemberton considered the call to weigh even more heavily. Former co-owner Wagner quoted Pemberton as having said, on 25 April, that "*NTDS had called and said that George called them and said they had been getting some bad payroll checks. And as far as he was concerned he didn't need George any more.* Asked me if I wanted to get rid of him. I told Dave that I no longer had any decision over what his trucks done."[7]

Wagner also testified to another conversation, of uncertain date but after the corporate breakup, in which Pemberton had said, "[I]f George had kept his mouth shut, he'd probably still have his job." Hartsell denied only by implication, but not directly, that these two conversations had occurred.

Daniel Paddock, who left Respondent's employment prior to the hearing, testified in like vein. He said that soon after the Hartsells were let go, Pemberton told him that "he just could not see keeping [Hartsell] after what they had done, calling Atlanta and telling them about the loads and bad checks."[8] About 2 weeks later, Pemberton raised the issue with Paddock again, saying that "he couldn't keep [Hartsell], just couldn't see keeping him after what they had done . . . [c]alling to Atlanta and talking to Lamar about the hot loads and bad checks." Paddock further testified that he and others who had received worthless checks had also called Lamar Jones or possibly Chuck Davis at NTDS, a procedure that was not at all unusual for the drivers.

Robert Alsup had more along this line to contribute. A driver who had quit employment with Pemberton 2 months prior to the hearing because he did not like Pemberton "as an employer," Alsup said that he was present in the shop on Hartsell's last day when Pemberton told Hartsell "that he just didn't want George there anymore, couldn't use him, he was untrustworthy and he shouldn't have called Atlanta about the checks and gave him his last paycheck." Thereafter, in a conversation with Alsup (and in the presence of Alsup's wife), Pemberton stated that Hartsell "didn't do the right thing in calling Atlanta about the bad checks and he couldn't use George because of that reason, he was untrustworthy."

Finally, a fourth witness no longer in Greenwood's employ testified as to two conversations with Pemberton about a day apart, and while the Hartsells were still working there. In the first, according to Orlando Stroud, while he, Pemberton, and an auto mechanic were working in the shop, Pemberton said that "he was going to have to let George go because he felt like George had stabbed him in the back by calling Atlanta and telling Atlanta what he did, about the bad checks and all." A day or so later, he overheard Pemberton tell Wagner that "he was going to let George and Dorothy—let George go because of what he had done by calling Atlanta, talking to Atlanta about the checks."

With regard to the issue of the role played in Pemberton's dismissal of the Hartsells by the complaint to Atlanta about bad checks, the foregoing evidence is pretty potent stuff. The theme of Pemberton's defense is that he did not retain the Hartsells because he was sure that George Hartsell did not want to work for him.

His awareness of this attitude first arose after the announcement of the 50–50 split in March, when Hartsell gave up the opportunity to continue driving Respondent's "newest and finest piece of equipment" (Hartsell's words) in opting to work for Wagner. Further evidence of this dislike of Pemberton was, the latter asserts, disclosed in March when, disregarding Pemberton's standing orders, Hartsell had his truck washed on the road at a cost of $25.[9] The compensation of Hartsell for his $25 expense at least implies that Pemberton was not enraged by this expenditure, and for him to classify it as another expression by Hartsell of the latter's disdain for Pemberton seems to be stretching things quite a bit.

Pemberton also testified that after Hartsell had, in March, signified his preference for working for Wagner, he heard from drivers "that he wasn't going to work for me." Pemberton, after giving this testimony, specified only one such instance, in a less positive exposition of Hartsell's sentiments: "[L]ike Charla and Pat, they come and told me what he said out there, you know, that he didn't want to work for me, that he wasn't taking no off me [sic], and that he wanted to work with Herb." Charla Farmer, who with her husband drove one of the trucks,

[6] Orlando Stroud, a witness for the General Counsel, testified on cross-examination that Hartsell "wasn't fond of working for Mr. Pemberton . . . because he started getting the bad checks, none of us were," but I suspect that the dislike arose earlier.

[7] Pemberton testified that sometime around 24–26 April, he asked Wagner "if it was alright to go ahead and put the [Jordans] in the truck whenever they got back in" (the Jordans were, evidently, temporarily not in town) and that Wagner said it made no difference to him. On recall, Wagner denied that Pemberton had ever talked to him about the Jordans. I doubt that Pemberton spoke to Wagner about the Jordans because the division of the corporation, if not already consummated by then, was on the brink of happening.

[8] The "loads" referred to by Paddock, also later characterized by him as "hot loads," is basically an "unauthorized load by NTDS," although Paddock "couldn't tell you what those loads were, because I never hauled any of them."

[9] This is a rather complicated matter. Hartsell testified that he and Pemberton had agreed that if he drove "illegal" through Wyoming—that is, purchased only a one-way license—he could use the saving of $23.59 to have the truck washed, and that he did so. Respondent, however, put in evidence documents that appear to show that the Hartsells paid for Wyoming permits both ways on a 3/19–24/86 (R. Exh. R-1A) trip to Reno, and that they also had the truck washed on that trip.

There is, however, room for contention that the documents are patched together, the Wyoming-to-Utah permit being dated perhaps "3/10/86" instead of 3/20 (as Respondent claims) coupled with a return voucher dated 3/22 from the trip on which the truck was washed. It is true that a "Travel Expense Report" for this trip shows that the Hartsells paid for Wyoming licenses both ways, but that was probably such a standard entry that it would have seemed strange to deviate from it, especially if this report was submitted to NTDS. Moreover, Respondent in fact reimbursed Hartsell for the $25 for the wash job despite the claim that he violated instructions by having it done. It would seem surprising that he would be reimbursed had he so defiantly violated Pemberton's instructions.

testified that she and her husband had a discussion with Hartsell soon after the announcement of the *original* split in which he said that he "didn't like working with Dave" and "they were going to go with Herb." The Farmers thereafter talked to Pemberton about the split, but, with respect to Hartsell, she merely testified that Pemberton had "told us that George had also told him that he was going with Herb." Thus, Farmer failed to support any claim that drivers told Pemberton bluntly that the Hartsells were not "going to work for me."

The Jordans, who applied for work on 17 April, had been referred by the Farmers. Pemberton testified that he told them that he "could not let them know anything until I knew for sure what was going to go on in the split." This explanation seems vulnerable. At the time, if Pemberton believed that the Hartsells would not work for him under any circumstances, then no matter how the breakup went (except in the most improbable case that Wagner, whose financial condition had led to the split, wound up with a larger share of the firm than Pemberton), he would need someone to take the Hartsells' place if he truly believed that they would not work for him. And indeed, when the final change in the split was agreed to on 20 April and the final papers were signed, according to Wagner on 23 or 24 April,[10] there is no evidence that Pemberton had made any effort to contact the Jordans to prepare to commence work on 28 April. This suggests not only that it was not until sometime in the last week in April that Pemberton heard from Lamar Jones about Hartsell's call to Jones (as earlier noted, it was on Friday, 25 April, that Pemberton told Wagner about the NTDS having called, and "as far as he was concerned he didn't need George any more"), but also that this call was a key ingredient in the last-moment decision to hire the Jordans.[11]

Respondent argues that if Pemberton was really upset about Hartsell's call to Atlanta, he could have let him go when (as I have, *dubitante*, found above), Hartsell reported to work prior to departing for his 22 April run. That argument ignores, however, that it does not appear that Pemberton heard about the telephone call until later in the week.

Perhaps the most difficult aspect of the case, from the General Counsel's point of view, arises from the question of why Pemberton should be so determinedly angry with the Hartsells about their inquiry to Atlanta when, according to the testimony, other drivers had also contacted Atlanta about the bad checks. Paddock said that he spoke to Lamar Jones about the rubber checks and, in a piece of hearsay testimony unobjected to, stated, "[W]e all did." Pemberton testified that on 21 April he received a call from Davis of NTDS in Atlanta that "all of [the drivers] had been calling" about the bad checks.

It could be, however, that Davis did not say to Pemberton, and Paddock did not know, that literally "all" the drivers had called (Pemberton could not remember whether Davis had identified "any particular driver"); or, possibly, a call to Davis was not as significant to Pemberton as a call to Lamar Jones. However, this distinction in treatment might be explained, what cannot be explained away is that Pemberton himself conceded at the hearing that the call to Jones "was just one of the many things that [Hartsell] had done that showed me that he didn't want to work for me," and his pretrial affidavit indicates that he spoke of the telephone call, and *only* the call, in his termination discussion with Hartsell on 28 April (". . . I do not think you done me right . . . you in [sic] and you asked about the loads for Chris, about the insufficient checks, trying to get NTDS contract with Herb."). It is thus apparent that the telephone call played a major role in the decision not to retain the Hartsells, and the credible testimony of Wagner, Paddock, Alsup, and Stroud all confirm this conclusion.[12]

The question of whether the refusal to continue the employment of the Hartsells constituted a violation of the Act depends on the application of two doctrines. The first concerns whether Hartsell's call to Lamar Jones constituted concerted protected activity within the meaning of Section 7 of the Act, according to the broad outlines articulated by the Board in *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, and *Meyers Industries*, 268 NLRB 493 (1984) *(Meyers I)*, remanded by the Court of Appeals for the District of Columbia Circuit in *Prill v. NLRB*, 755 F.2d 941 (1985). In *Meyers I*, at 497, the Board held that an employee will be found to have acted concertedly when he or she "acts with or on the authority of other employees," and, embracing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), in *Meyers II*, the Board held that a conversation is statutorily concerted if it has "some relation to group action in the interest of employees." In the present case, we need go no further than the fact that in calling Jones to complain about the worthless checks, Hartsell was doing so both on his own behalf and, as Pemberton knew, on behalf of and "with" his wife, a fellow employee. *Consumers Power Co.*, 282 NLRB 130 (1986).[13]

Moreover, the record makes it clear that the drivers, as would be expected, shared a common concern. the commonality of which each was undoubtedly aware, about the worthless checks. See *Every Woman's Place*, 282 NLRB 413 (1986), in which the Board found a matrix of "concerted activity" despite the fact, as Chair-

[10] Pemberton agreed with the 20 April date, but said that the signing took place on 30 April. The papers were not offered, and I have no way to choose between their recollections on this point.

[11] I do not accept Pemberton's testimony that, after 20 April, he was "under the impression" that the Hartsells were going to work for Wagner. He knew that Wagner was getting only three trucks out of the deal, that one of them was inoperative, and that the remaining two were being currently driven by drivers who had been qualified by the Bones Company as dump truck drivers.

[12] Although I had varying reactions to the trustworthiness of these four witnesses, I did not feel that any of them was lying; two of them, Wagner and Paddock, made particularly good impressions; and Pemberton did not directly deny any of their allegations about the inculpatory conversations to which they testified.

[13] Paddock testified that Pemberton told him "that he couldn't keep him, just couldn't be keeping him after what they had done." Stroud overheard Pemberton say to Wagner that he "was going to let *George and Dorothy*—let George go because of what he had done by talking to Atlanta about the checks." As the Board put it in *Consumers Power Co.*, supra, I find "the conclusion inescapable" that when an employee complains about receipt of bad checks, a problem similarly experienced by his co-employee spouse, the employer knows that the two are acting in concert.

man Dotson pointed out in dissent, that the record was silent as to whether employee inquiries about overtime compensation had been made individually by employees to the supervisors or made jointly by them. Paddock demonstrated that mutual awareness when he testified that he knew that Hartsell had called about the paychecks and that "we all did. We was trying to find out what was going on." And, as noted above, Pemberton testified that Davis of NTDS had told him that the "drivers had been calling . . . and wanted to know what the problem is." It seems reasonable to infer, against such a background, that Pemberton understood that Hartsell's call was action taken to resolve a problem of joint and mutual concern to all the drivers, about which they undoubtedly had conferred on the receipt of the worthless wage payments.

Accordingly, I conclude that Hartsell's telephone call to Jones constituted concerted activity for the purpose of mutual aid, as delineated in Section 7 of the Act, both because it represented, as Pemberton knew, a complaint on behalf of George and Dorothy Hartsell and, in addition, a manifestation of the unhappiness unquestionably and vocally shared by other drivers in being deprived of their most valuable benefit.[14]

The second question is whether, having found that the call was a "motivating factor" in Pemberton's decision not to retain the Hartsells, the Respondent has satisfied the opportunity provided by *Wright Line*, 251 NLRB 1083, 1089 (1980), to "demonstrate that the same action would have taken place even in the absence of the protected conduct."[15] As explained in *Centre Property Management*, 277 NLRB 1376, 1377 (1985), the burden entails "persuasion" by the employer of this hypothetical premise "by a preponderance of the evidence." I find nothing in this record, including the matter discussed in the preceding footnote, that persuades me that even absent Hartsell's complaint to NTDS about the bad checks, he and his wife would nonetheless have been denied employment by Pemberton. As Pemberton put it to Wagner, "[I]f George had kept his mouth shut, he'd probably still have his job."

CONCLUSIONS OF LAW

1. Respondent Greenwood Trucking, Inc. is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By terminating the employment of George and Dorothy Hartsell on 28 April 1986 for engaging in concerted activity protected under Section 7 of the Act, Respondent violated Section 8(a)(1) of the Act.

3. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

The customary cease-and-desist order should be entered and the traditional notices should be posted. The General Counsel seeks the inclusion, as she has done in every case tried before an administrative law judge for many months now, of a visitatorial clause in the remedial order. Although the Board has never flatly rejected the possibility of adopting such a clause, it also has never adopted one. Its invariable response has been that such a clause is not appropriate "in the circumstances" of the case before it. E.g., *E. B. Manning & Son*, 281 NLRB 1124 at fn. 1 (1986); *Princeton Holiday Inn*, 282 NLRB 30 at fn. 2 (1986) (finding clause "unnecessary" even in absence of exceptions to it). Although the clause strikes me as benign and useful, clearly the Board does not favor it except, perhaps, in some highly unusual circumstance. This is not that sort of case.

Having found that Respondent unlawfully discharged George and Dorothy Hartsell on 28 April 1986, I shall recommend that it be ordered to offer them immediate and full reinstatement to their former jobs, without prejudice to their seniority and other rights and privileges, and to make them whole for any net loss of earnings they may have suffered from 28 April 1986 to the date of Respondent's offers of reinstatement, with interest, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 615 (1977).[16]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Greenwood Trucking, Inc., Greenwood, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees in circumstances that restrain or interfere with their right to engage in concerted activity for the purpose of mutual aid under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to George and Dorothy Hartsell immediate and full reinstatement to their former jobs, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the remedy section of this decision.

[14] There is no way to be certain about the extent to which the "loads for Chris" and Hartsell's reference to Wagner taking over the NTDS contract played a part in Pemberton's decision. In describing the call in his second affidavit, Pemberton appeared to place sole reliance on the "bad checks" aspect of the call; he wrote, "The call to Lamar *on the checks* made no difference, it just put the icing on the cake"; and again, "[T]he call *on the checks* just put the icing on the cake."

[15] The Board stated in *Wright Line* that the causation analysis there set out must be applied in all cases alleging violation of Sec. 8(a)(3) or Sec. 8(a)(1) turning on employer motivation. *Ibid.*

[16] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Remove from its files any references to the discharges of George and Dorothy Hartsell on 28 April 1986, and notify them in writing that this removal has been made and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Greenwood, Missouri, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employees in circumstances that restrain or interfere with their right to engage in concerted activity for the purpose of mutual aid under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WE WILL offer George and Dorothy Hartsell immediate and full reinstatement to their former jobs; WE WILL compensate them with interest for any net loss of pay they may have suffered because we terminated them; and WE WILL remove from our personnel files any reference to their 28 April 1986 discharges, and notify them of this action and of our intention not to rely on such discharges in future personnel actions.

GREENWOOD TRUCKING, INC.

Batesville Casket Company, Inc. and Hill-Rom Company, Inc., Employer-Petitioners *and* Furniture and Casket Workers Local Union No. 525, a/w United Steelworkers of America (Upholstery Division), AFL–CIO. Case 25–UC–137

30 April 1987

DECISION ON REVIEW AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN, BABSON, STEPHENS, AND CRACRAFT

On 21 April 1986 the Regional Director for Region 25 issued a Decision and Order in the above-entitled proceeding in which he dismissed the instant unit clarification petition, which sought to separate the existing single unit of employees of the Batesville Casket Company, Inc. and Hill-Rom Company, Inc.,[1] represented by the Union at Batesville, Indiana, into two separate units. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioners filed a timely request for review of the Regional Director's decision on the grounds, inter alia, that the Regional Director erred in his application of the principles set forth in *Rock-Tenn Co.*, 274 NLRB 772 (1985), by failing to clarify the unit.

By unpublished order dated 18 July 1986, a three-member panel of the Board (Member Babson dissenting) granted the Petitioners' request for review with respect to that issue.[2] Thereafter, the Union filed a brief on review.[3]

The Board has considered the entire record in this case, including all submissions by the parties with respect to the issue under review, and makes the following findings.

In 1947, in Cases 11–R–1192 and 11–R–1198, the Board certified the Union as representative of all production and maintenance employees of Batesville Casket Company and Hill-Rom Company, combined into a single unit.[4] At that time, Batesville Casket (a manufacturer of burial caskets) had 235 employees, and Hill-Rom (a manufacturer of hospital room furniture) had 15 employees; their work "complex" consisted of 3 adjacent and interconnected buildings where space and equipment were shared. The three Hillenbrand brothers were each officers of both Companies, and G.C. Hillenbrand was responsible for all manufacturing operations. The Companies had common personnel and labor relations policies and shared administrative, accounting, and purchasing functions. In addition, the employees of each Company accrued unitwide seniority, frequently performed work on the other Company's product, and could bid into positions with either Company.

In the early 1950s, additional production buildings were constructed and the Companies' manufacturing functions were moved into separate buildings. There is no evidence of any day-to-day interchange of either employees or supervisors since that time, although, as will be discussed, "tranfers" or "moves" between the Companies are not infrequent. The Hillenbrand complex now includes three buildings containing Hill-Rom operations, two buildings containing Batesville Casket operations, and several additional buildings which are shared by the Companies, including an administration building, a medical facility, and a vehicle garage.

In the mid-1970s, the Companies established separate human resources (personnel) departments and, as with Hillenbrand's other subsidiaries, both now have separate boards of directors, officers, personnel managers, etc. At the time of the hearing in 1985, Hill-Rom employed 615 employees in Batesville, with additional production facilities located in Canada; Batesville Casket employed 575 employees in Batesville, with additional production locations in 3 other States.

Hillenbrand Industries prescreens all applications for employment at the main corporate office and acceptable applicants are referred to one or the other Company for interviews; the individual Companies then make the final decision as to selection or rejection of an applicant. Thereafter, discipline, termination, and promotion is handled by the individual Company. The Companies independently process grievances up to the third level, at which time the union grievance committee (consisting of one plant steward from each of the five manufacturing buildings) and Hillenbrand's senior counsel meet with the management of the particular Company involved. Decisions to proceed to arbitration

[1] Hereinafter referred to as Petitioners.

[2] The panel majority (Chairman Dotson and Member Babson) denied review of the Petitioners' contention that Batesville Casket Company, Inc. and Hill-Rom Company, Inc. are separate employers and hence cannot be compelled to engage in continued multiemployer bargaining. Member Johansen would have granted review of this issue; however, he regards himself as institutionally bound by the vote of the panel majority.

[3] By letter dated 24 July 1986, the Petitioners requested that their request for review be treated by the Board as their brief on review.

[4] In 1939, and again in 1947, the Board found that the Petitioners constituted a single employer and, based on the agreement of the unions and the Petitioners' failure to object (in 1939), and the agreement of the parties (in 1947), that the appropriate bargaining unit was one composed of employees of both Companies. See *Batesville Casket Co.*, 72 NLRB 650 (1947); *Hillenbrand Industries*, 13 NLRB 167 (1939). See also *Hillenbrand Industries*, 14 NLRB 316 (1939).

In both instances, the Board expressly found that Hillenbrand Industries was a trade name designating Petitioners. Hillenbrand Industries was incorporated following the 1947 certification, and the Petitioners are presently two of its five wholly owned subsidiaries.

are made by the individual Company; however, Hillenbrand's counsel selects the arbitrators on behalf of management and generally tries any arbitration, although outside counsel also has been employed.

The record shows that an employee of one Company may apply for an opening at the other Company and, if hired, will be credited with overall seniority on completion of a probationary period. Similarly, although bumping is not permitted between these two employers, employees laid off by one of the two Companies may "move" to the other Company if there is an opening. After completing a probationary period, that employee will become a permanent employee with seniority rights carried over from the Company for which he originally worked. The evidence presented showed 23 such "transfers" or "moves" in the 6 months preceding the hearing alone.

The employees of Batesville Casket and Hill-Rom share similar pay scales, and many job classifications are common to both Companies. The average earnings of the employees at the two plants are approximately equal; employees receive identical Christmas bonuses and identical benefits, with the exception that Hill-Rom allows its employees to take vacation a day at a time if they desire while Batesville Casket does not. Plant and safety rules are issued by Hillenbrand and thus are identical for all of the production buildings, and employees from the two Companies participate together in Hillenbrand-sponsored social and athletic activities, as well as in union affairs and community events.

The parties have negotiated a series of consecutive contracts covering this bargaining unit over the past 50 years, and at no time prior to the instant proceeding has any party sought to modify or change the unit, even though Hillenbrand's vice president of human resources serves as spokesman of the Petitioners' bargaining committee, and Hillenbrand's senior counsel is a member of that committee as well.

The Regional Director dismissed the petition on the ground that the Board's clarification process is intended for recent and not historical changes. The Petitioners contend, however, that significant changes in the organizational structure and operations of the two Companies demonstrate that there is no longer any community of interest between the two groups of employees; thus, a combined unit of both Batesville Casket and Hill-Rom employees is no longer appropriate. Further, Petitioners contend that such changes need not be recent in order to justify the separation of the single unit into two separate units, relying on the Board's decision in *Rock-Tenn*.

It is well established that the Board's unit clarification process is not appropriate for upsetting an agreement of a union and an employer or an established practice of such parties concerning unit placement of various individuals or classifications.[5] The Board determined in *Rock-Tenn*, however, to clarify an existing multiplant unit to constitute two separate single-plant units when it found that "compelling circumstances" existed for disregarding the bargaining history on a two-plant basis, and that the historical unit no longer conformed reasonably well to the normal standards of appropriateness.[6]

In *Rock-Tenn*, the union had been representing a combined unit of employees working at a paper mill and a partition plant since the purchase of the plants by the Clevepak Corporation in 1968, and the parties had negotiated successive collective-bargaining agreements covering employees in the combined unit. During both the 1978 and 1980 negotiations, Clevepak proposed bargaining for the employees as separate plant units. On both occasions, the union rejected the proposals. After Clevepak sold the paper mill and the partition plant to separately incorporated operating divisions of Rock-Tenn Company in 1983, the two corporations jointly requested separate negotiations at each plant for a new contract. The union refused, and the companies filed the unit clarification petition.

The Board found that, at the time of the 1983 purchases, there were few remaining factors of commonality between the two plants. Thus, each plant was engaged in a totally different operation with different manufacturing processes, each plant had separate and distinct corporate management and supervisory staff, labor relations control had been completely decentralized, and grievances were handled separately. There were many dissimilarities in working conditions, including different hours of operation, separate hiring, no job bidding between plants, no carryover of seniority if an employee transferred, and separate layoff and recall policies. The collective-bargaining agreement was administered on a separate basis for each plant, and the Board noted that an ambiguous contract provision might be interpreted in one way in one plant and in an entirely different way in the other.

The Board concluded that the significant changes in the organizational structure and operations of the two plants negated any community of interest that may have existed previously among employees of the two plants, and constituted "com-

[5] See *Union Electric Co.*, 217 NLRB 666 (1975); *Columbia Gas Transmission Corp.*, 213 NLRB 111 (1974).

[6] 274 NLRB at 773.

pelling circumstances" for disregarding the bargaining history on a two-plant basis. Accordingly, the Board clarified the unit as requested by the companies to find that only separate plant units were appropriate. In so doing, the Board specifically noted that the Rock-Tenn corporations had acquired the plants "only recently," and although they continued to abide by the predecessor's collective-bargaining agreement for the "brief period" prior to its expiration, "shortly" after commencing operations they requested the union to bargain on a separate plant basis. Hence, the Board concluded that their "interim adoption" of the two-plant agreement did not preclude resolution of the dispute.[7]

Contrary to the Petitioners' contention that the Regional Director erred in his application of *Rock-Tenn*, we find that the Regional Director properly applied that case and other relevant Board precedent[8] to the facts of the instant case. Further, while in *Rock-Tenn* the Board adopted former Chairman Miller's concurring opinion in *Columbia Gas*,[9] neither that concurring opinion nor the Board's decision in *Rock-Tenn* indicated that the Board should or would interfere with the composition of long-established bargaining units in the absence of *recent*, substantial changes.

In the instant case, as in *Rock-Tenn* and *Columbia Gas*, there is no ambiguity or dispute regarding the parties' long history of collective bargaining in the combined unit. Unlike the situation in *Rock-Tenn*, however, here there have been no recent, significant changes in the Petitioners' operations, and at no time before the instant petition was filed did either party seek to modify the existing unit or split it into two units as Petitioners now contend is appropriate.

The record clearly shows that the only "significant" operational changes involving the existing unit were the establishment of separate manufacturing plants and elimination of day-to-day interchange of employees, which occurred nearly 30 years ago, and the creation of separate personnel or human resources departments, which occurred over 10 years ago. No party disputes these facts.[10] Further, the same employees continue to perform the same functions in the same locations under the same immediate supervision, and the changes have had no practical effect at all on several significant areas of personnel policy or labor relations because Hillenbrand Industries remains directly involved with screening all applicants and approving them for hire and with grievances and arbitrations on behalf of these two subsidiaries, as well as with the actual negotiation and execution of all collective-bargaining agreements.

In addition, the Companies have continued to negotiate as one with the Union as representative of their employees in a single combined unit, and successive agreements all have been agreed to on the same unit basis. Lastly, we note that, at this time, no party seeks an election among employees in the established unit or questions the status of the Union as the bargaining representative of the combined unit[11] or of either Company's work force.

We find that, although these two Companies function separately and autonomously in many respects, there continues to exist a high degree of commonality due to the relationship of the parent Company to its subsidiaries and the long history of bargaining as a combined unit. Thus, the great majority of the changes which the Petitioners rely on to support their request for separate plant units are not recent, having occurred over 30 years ago; it is obvious that such changes in no way have destroyed the stability of the bargaining relationship between these parties.

Accordingly, inasmuch as Petitioners have not shown that there have been *recent*, substantial changes in their operations, or that other compelling circumstances exist which would warrant disregarding the long-existing bargaining history of the two-plant unit, and as the single unit of Petitioners' employees is not contrary to the provisions of the Act, we find it would not further the Act's purpose of promoting industrial stability to clarify this established unit to constitute two separate units, merely because Petitioners now have asked us to do so. Accordingly, we affirm the Regional Director's dismissal of the instant petition.

ORDER

The Regional Director's dismissal of the petition is affirmed.

CHAIRMAN DOTSON, dissenting.

Contrary to my colleagues, I would grant the Employers' petition to clarify the existing two-plant unit to constitute two separate units. It is

[7] 274 NLRB at 774 fn. 7.

[8] The Regional Director also relied on *Sunar Hauserman*, 273 NLRB 1176 (1984); and *Union Electric Co.*, 217 NLRB 666 (1975).

[9] Former Chairman Miller stated that "[i]f the two units proposed . . . were shown to be appropriate units by our usual standards, and if the existing single unit had been rendered inappropriate by reason of organizational changes, I would grant the petition" for clarification. 213 NLRB at 112. He concurred in the result reached by the majority, however, as he found that the two separate units proposed by the Employer were not appropriate, and that the existing unit had been rendered appropriate by bargaining history.

[10] There is evidence, however, that the latter change, creation of separate human resources departments, resulted in little or no change in "labor policy" or "the procedure and process of collective-bargaining."

[11] *National Education Assn.*, 206 NLRB 893 (1973).

clear that the historical (combined) unit is no longer appropriate when measured against the Board's usual standards. Thus, Batesville Casket and Hill-Rom are now entirely separate Companies, each with its own board of directors, management, and supervisory hierarchy. Their manufacturing facilities and equipment are separate and distinct, and there is no interchange of employees or supervisors. Each Company has its own administrative and human resources (personnel) departments, and handles its own promotions, discipline, and termination. Grievances are handled within the separate Company up to the third level, and it is the individual Company that makes the decision whether to pursue a grievance to arbitration.

Contrary to the "recency of change" requirement, which my colleagues purport to enunciate today, the standard articulated by Chairman Miller in his concurrence in *Columbia Gas Transmission Corp.*, 213 NLRB 111, 112 (1974), subsequently and specifically adopted by the Board as its standard, in *Rock-Tenn Co.*, makes no mention of recency.[1] Thus, it is immaterial that the changes which occurred in this case are not recent. It is undisputed that these changes did take place, and that the separate corporate and operational structure of these Companies, together with the lack of functional intergration, the decentralization of labor policies, and the absence of employee interchange, have negated the community of interest which once existed between the employees of the Companies, and hence have rendered a combined unit inappropriate for purposes of meaningful and effective collective bargaining.

Section 9 of the Act mandates that the Board determine in each case what unit is appropriate for the purposes of collective bargaining. In my view, the majority is both abdicating this statutory responsibility and ignoring the realities of business and industry. Whether a single sudden or recent organizational change of enormous impact has occurred should be immaterial to the Board's consideration. The organizational result is the same regardless of whether the changes are sudden and recent or, instead, as in this case, evolved slowly over a longer period of time—the Board must take the case as it is presented and make its determination based on the facts before it.

Finally, I note that the decision in *Rock-Tenn*, changing Board policy, was announced barely a year before the instant petition was filed. Thus, I find it inappropriate to fault the Employers for not seeking to clarify sooner the historical and, in my view, now clearly inappropriate unit. Accordingly, as the two units proposed are shown to be appropriate units by the Board's usual standards, and as the existing single unit has been rendered inappropriate by reason of organizational changes,[2] I would grant the Employers' petition and clarify the unit into two separate, single-plant units, as requested.

[1] "If the two units proposed . . . were shown to be appropriate units by [the Board's] usual standards, and if the existing single unit had been rendered inappropriate by reason of organizational changes, [the Board should] grant the petition for clarification." 274 NLRB 772, 774 fn. 7 (1985).

[2] See *Rock-Tenn*, supra.

Local 2017, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Federal Mogul Workers Association) (Federal Mogul Corporation) ***and*** **Floyd Beard, Jr., Robert Luce, and Marcus Gardner.** Case 7–CB–6509

30 April 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 23 May 1986 Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 2017, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Greenville, Michigan, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] We agree with the judge's conclusion that the Respondent violated Sec. 8(b)(1)(A) by reprimanding members Beard, Luce, and Gardner because they filed unfair labor practice charges with the Board. We find that her analysis of the Respondent's motivation is consistent with *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and *Limestone Apparel Corp.*, 255 NLRB 722 (1981). See *Mine Workers Local 2202 (Old Devon Corp.)*, 282 NLRB 106 (1986).

In considering the Respondent's *Wright Line* defense, Members Babson and Stephens do not rely on the judge's analysis under *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968). In that case, no question of dual motive was presented. The union there acknowledged that it had expelled a member because the member had filed an unfair labor practice charge against the union. The question in *Marine & Shipbuilding Workers* was whether the union's action, standing alone, was justified for union institutional reasons. In the present case, by contrast, the Respondent denies that it reprimanded the three members for filing unfair labor practice charges and asserts instead that it reprimanded them because they divulged internal union matters to the Employer in violation of the Union's constitution. Because dual motives are ascribed to the Respondent here, Members Babson and Stephens find that a *Wright Line* analysis is appropriate and that a *Marine & Shipbuilding Workers* analysis is inapposite. Cf. *Operating Engineers Local 381 (Building Trades Employers)*, 148 NLRB 679 (1964).

Howard M. Dodd, Esq., for the General Counsel.
A. Robert Kleiner, Esq., of Grand Rapids, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Based on charges filed on 28 May 1985, as amended on 2 July, a complaint issued on 23 July 1985 alleging that Local 2017, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Respondent or Local 2017) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by reprimanding the above-named Charging Parties because they filed unfair labor practice charges with the National Labor Relations Board (the Board). The Respondent filed a timely answer denying it had violated the Act.

A trial was held before me in Grand Rapids, Michigan, on 18 February 1986. On the entire record and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Federal Mogul Corporation (the Employer), a Michigan corporation with an office and place of business in Greenville,[1] manufactures, sells, and distributes automotive parts and related products. During the year ending 31 December 1984, a period representative of its operations during all times material herein, the Employer, in the course of its business operations, manufactured, sold, and distributed at its Greenville, Michigan plant products valued in excess of $50,000 which it shipped directly to points located outside the State. Accordingly, the complaint alleges, the Respondent admits, and I find that Federal Mogul Corporation is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent, Local 2017, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

For many years, the production and maintenance employees at the Employer's Greenville facility were represented by the Federal Mogul Workers Association (FMWA), an independent labor organization. Early in 1984, the UAW proposed to FMWA's leadership that they consider affiliation. Subsequently, on 8 September 1984, FMWA held a special membership meeting to consider and vote on the affiliation issue. During this meeting, Marcus Gardner, one of the Charging Parties, openly expressed his opposition to the joinder. Although the 500 employee-members differed, affiliation was approved by a vote of 170 to 150. By letter dated 10 September 1984, the Union formally notified the Employer of the outcome and pledged continued commitment to the extant collective-bargaining agreement.

Subsequently, at the next union meeting on 18 September, the Local's executive committee approved a request

[1] The Employer has plants in other States but only the Greenville, Michigan facility is involved in this proceeding.

made by the union leadership for discretionary use of $25,000 to cover various expenses. The following morning, Personnel Manager Lawrence approached Union President Dave Hondorp on the shop floor[2] and accused him of "ripping off" the Union's treasury of $25,000 and amending the Union's constitution and bylaws, thereby failing to represent the employees who had elected him. By letter sent the same day, the Employer rejected the Union's request for recognition, insisting that "the fair and equitable thing to do is to have a vote of the membership of the Federal-Mogul Workers' Association in the plant" under the aegis of the NLRB.

Given the Employer's position, the Union refused to participate with management in grievance-resolution meetings. Consequently, on 9 October, the Company filed an unfair labor practice charge with the Board alleging that the FMWA was unlawfully refusing to meet with it to resolve grievances and was attempting to coerce the Company into granting recognition in contravention of the parties' collective-bargaining agreement. In the charge, the Employer defended its refusal to recognize the affiliated Local asserting that it would "recognize the UAW only after satisfactory proof that a democratically determined majority of the effected [sic] employees so desire." Two days later, on 11 October 1984, the Charging Parties, Gardner, Luce, and Beard, also filed charges with the Board alleging that the Union's governing body had improperly conducted the affiliation vote, sought discretionary use of $25,000 of FMWA's assets, and colluded with UAW organizers.

Hondorp testified that, after receiving copies of these charges, he noted they were similar in content to the accusations which Lawrence leveled at him on 19 September. Accordingly, Hondorp deduced that the Charging Parties must have supplied Lawrence with the information which he used to denounce him. Hondorp then accused Lawrence directly of meddling in union affairs and of goading the employees into filing the unfair labor practice charges. Lawrence denied that he had instigated these matters and, instead, without naming names, claimed that employees had sought him out on two occasions to voice their dissatisfaction with the affiliation vote.

By letter dated 22 October 1984, Hondorp received notice that the Regional Director had approved withdrawal of the charges filed by the three employees. Subsequently, the Employer also withdrew its charge.[3] Nevertheless, Hondorp advised his fellow union officers of his recent exchange with Lawrence. Apparently as a result of Hondorp's report, internal union charges were preferred against the Charging Parties on 25 October accusing them of violating the following provisions of the Union's constitution and bylaws (G.C. Exh. 9):

> 52. Internal Grievance Policy
>
> (a) Any member may be fined, suspended, disqualified from holding office or expelled from the Union
>
> . . . .
>
> (d) For disclosing to any employer or their representative or any person other than a fellow member any of the decisions or proceedings of the Federal-Mogul Workers' Association which have not been publicly disclosed by the Union.
>
> (e) For circulating or causing to be circulated false or slanderous statements about the Association or any officer or member thereof, or for causing to be circulated any statements condemning any decision rendered by the Association.

Beard, Gardner, and Luce were notified of the charges against them but not of the specific conduct which allegedly gave rise to them.[4] A hearing on the internal union grievances was held on 16 March 1985. On the advice of counsel, none of the Charging Parties chose to attend the hearing.[5] Therefore, Hondorp was the only witness at this proceeding. He described his second conversation with Lawrence on 19 September to the panel members and also told them that FMWA's former attorney had warned him that charges might be filed by members seeking to contest the affiliation with the UAW. At the conclusion of this hearing, the Respondent decided to issue reprimands to Beard, Luce, and Gardner for "conduct unbecoming a union person." In addition, Hondorp wrote and posted a memo to all union members entitled "RESULTS OF INTERNAL GRIEVANCE," which announced, inter alia, that "the Board decided to issue a letter of reprimand to each of these members" (that is, to Beard, Luce, and Gardner) stating that their actions were unbecoming and slanderous to our Union and members of the Top Bargaining Committee."

At the trial in this matter, the General Counsel asked Hondorp to explain precisely what he meant by the word "slanderous." In response, Hondorp explained that he considered slanderous the comments that union officials had "ripped off the Treasury" and unlawfully amended the Union's constitution and bylaws, the same comments which appeared in the charges filed with the Board. At the same time, he denied that the reprimands had anything to do with the Charging Parties' opposition to the affiliation. However, in an affidavit provided to a Board agent on 11 June 1985, Hondorp gave a different slant to the word "slanderous," averring there that he "was referring to allegations by Gardner, Luce, and Beard that our affiliation election was not proper and I meant by this their actions that made the union look bad." Significantly, Hondorp failed to mention the 19 September encounter in his pretrial statement.

The unfair labor practice charges giving rise to the complaint in this case grow out of the reprimands issued to the Charging Parties.

---

[2] Hondorp was a Federal Mogul employee for 27 years prior to the instant hearing.

[3] Although the charges were withdrawn, FMWA, apparently bowing to pressures exerted by the Company and dissidents, announced on 26 November that it would conduct a second vote on the affiliation question. The vote, taken at a 15 December meeting, decidedly approved the affiliation.

[4] Subsequently, the charge that they had violated provision 52(e) was dropped.

[5] At the instant trial, the Charging Parties denied having conferred with Lawrence.

Discussion

Settled law holds that a Union violates the Act when it resorts to restraint or coercion to prevent a member from filing unfair labor practice charges with the Board. *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968). Here, contrary to the allegations of the complaint, Respondent contends that it did not reprimand the Charging Parties for reasons condemned by the Act, but solely because they divulged internal union matters to a management representative in contravention of the FMWA's constitution. Thus, the sole question presented by this case is whether the discipline imposed on the Charging Parties was an impermissible intrusion on rights protected by the Act or nothing more than the proper exercise by the Local of its authority to discipline errant members for misconduct in a wholly internal union matter. On the basis of the entire record, I conclude that the Union was predominantly, if not wholly, motivated by a desire to penalize the Charging Parties because they resorted to Board processes. I reach this conclusion for the following reasons:

As Hondorp admitted, the allegations that Gardner, Beard, and Luce filed with the Board on 11 October mirrored the accusations which Personnel Manager Lawrence leveled at him on 19 September. However, the Respondent contends that the Union reprimands were imposed solely because the Charging Parties divulged information to the Employer and had nothing to do with their unfair labor practice charges. Thus, the encounter between Hondorp and Lawrence on 19 September assumes critical importance. Yet, as the General Counsel showed, Hondorp failed to mention this allegedly important exchange with the personnel manager in his pretrial affidavit, which he provided to a Board agent at a point in time when his recollection of events should have been much fresher than it was at the instant trial. It follows, therefore, that the 19 September meeting could not have figured prominently, if at all, in Respondent's decision to discipline the Charging Parties.

Respondent further contends that the unfair labor practice charges filed with the Board entered into the Union's disciplinary action only to the extent that it exposed those who met with Lawrence on 19 September. This contention, too, is unconvincing. As Hondorp readily acknowledged, neither he nor Lawrence identified any employee who met with the personnel manager on 19 September. Hondorp even stressed in his testimony that Lawrence did not indicate the number of employees who met with him. Because Hondorp admittedly knew that some 150 employees had opposed the affiliation, he could not have reasonably concluded that the employees who signed the Board charges were the same or the only members who divulged union matters to the Employer. The Respondent made no further inquiries to determine the identity of those who were suspected of collaborating with management. Instead, the executive committee rushed to judgment and was content to impose discipline solely on the three persons who had the temerity to file Board charges. Accordingly, had these employees not taken this action, it is fair to infer that the Union would not have singled them out for disciplinary action.

Further, although Hondorp attempted to deny that the employees' opposition to the affiliation played any role in the Union's disciplinary decision, he had to retract when shown a flatly contradictory statement in his pretrial affidavit. Clearly, Hondorp's affidavit together with the Union's notice to the employees of the second affiliation election (see G.C. Exh. 7) reveal that the Respondent was displeased with those who pressured the Union into conducting another vote. In that notice, Respondent placed the blame for a second vote squarely on the shoulders of the Company and "its allies." But from Respondent's perspective, the Charging Parties were the only avowed allies of management and it was their unfair labor practice charges that apparently played a large part in provoking the second affiliation vote. Given these circumstances, it is likely that the union leadership was more concerned and chagrined with the unfair labor practice charges than they were with the fact that unidentified employees may have conferred with Lawrence. At the very least, it is reasonable to conclude that the Union viewed the charges as woven closely into a fabric of events which caused it public embarassment and compelled it to rerun the affiliation vote.

The Respondent may well have considered the Charging Parties' conduct as evidence of disloyalty to the Union and a matter requiring discipline. However, the Union's interest in maintaining solidarity must give way here where an overriding policy of the Federal labor laws also is implicated. Any coercion used to discourage "access [to the Board] is beyond the legitimate interests of a labor organization." See *NLRB v. Marine & Shipbuilding Workers*, supra at 424. Accordingly, by issuing reprimands to the Charging Parties for engaging in such concerted protected activity, the Respondent violated Section 8(b)(1)(A) of the Act.

Conclusions of Law

1. Federal Mogul Corporation is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act; it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

2. The Respondent, Local 2017, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

3. By reprimanding Floyd Beard Jr., Robert Luce, and Marcus Gardner because they filed unfair labor practice charges with the Board, the Respondent has violated Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(b)(1)(A) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall be ordered to desist from issuing repri-

mands or imposing other forms of discipline on its employee members because they have filed unfair labor practice charges with the National Labor Relations Board. I shall further recommend that the Respondent be ordered to expunge from its records any reference to the reprimands issued to the Charging Parties, Beard, Luce, and Gardner, and to post an appropriate notice to its members.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Local 2017, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Greenville, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Reprimanding employees because they filed unfair labor practice charges with the National Labor Relations Board.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and remove from its files any reference to the reprimands issued on 6 May 1985 to Floyd Beard Jr., Robert Luce, and Marcus Gardner and notify them in writing that this has been done.

(b) Post at its business copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT reprimand or impose other forms of discipline on our members because they have filed unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and expunge from our files any reference to the reprimands issued to Floyd Beard Jr., Robert Luce, and Marcus Gardner on 6 May 1985 and notify them in writing that this has been done.

LOCAL 2017, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

---

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Davlan Engineering, Inc. *and* District No. 9, International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 14–CA–16116 and 14–RC–9383

30 April 1987

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 13 August 1982 the Regional Director for Region 14 issued a complaint, alleging that the Respondent had violated and was violating Section 8(a)(5) and (1) of the National Labor Relations Act. The complaint alleges that on 13 July 1982, following a Board-conducted election in Case 14–RC–9383, the Union[1] was certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate; and that, commencing about 26 July 1982, and at all times thereafter, the Respondent has refused, and continues to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested it to do so. On 23 August 1982 the Respondent answered, admitting in part, and denying in part, the complaint's allegations.

On 24 September 1982 the General Counsel filed a Motion for Summary Judgment. On 29 September 1982 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent filed a response to the Notice to Show Cause.

On 6 December 1982 the Board issued a Decision and Order[2] in this proceeding, granting the General Counsel's Motion for Summary Judgment and finding that the Respondent had violated Section 8(a)(5) and (1) of the Act. The Respondent petitioned for review of the Board's Decision and Order in the United States Court of Appeals for the Fourth Circuit. The petition was transferred for venue to the Eighth Circuit, where the Board filed a cross-application for enforcement of its Order. On 3 November 1983 the court granted the parties' joint motion for leave to withdraw, without prejudice, the petition for review and cross-application for enforcement, in order to permit the Board's reconsideration of this case. All parties were offered the opportunity to file statements of positions in connection with the Board's reconsideration of its decision.

Ruling on Motion for Summary Judgment

In its answer to the complaint, its response to the Notice to Show Cause, and its statement of position, the Respondent repeats the argument, first raised in the representation proceeding, that four employees who solicited union authorization cards were union agents for the purpose of card solicitation so that their improper statements concerning the Union's initiation-fee-waiver policy were imputable to the Union and violated *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). Neither the General Counsel nor the Union has filed a statement of position in this supplemental proceeding.

Our review of the record, including the record in Case 14–RC–9383, reveals that on 29 August 1980, pursuant to a Stipulation for Certification Upon Consent Election, an election was held among the employees in the stipulated unit. The tally of ballots shows that of approximately 53 eligible voters, 34 cast ballots for, and 16 against, the Union; there were 2 nondeterminative challenged ballots. The Respondent timely filed objections to conduct affecting the results of the election, alleging, inter alia, that four employees were union agents for purposes of soliciting other employees to sign union-authorization cards and, in that capacity, stated that the Union would waive initiation fees for employees who signed cards before the election, thereby interfering with employees' free choice in the election under *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). After a hearing, the Regional Director recommended overruling the objections.

Regarding the fee-waiver statements that were the subject of the Respondent's first objection, the Regional Director concluded that the four employee-solicitors were not agents of the Union and that their statements, when evaluated under the more lenient standards applicable to third-party conduct, were not grounds for overturning the election. The four employees were not union agents when they solicited the cards, the Regional Director concluded, because they neither belonged to an in-plant organizing committee, nor were they "vested . . . with any substantial authority in connection with the distribution of authorization cards." In addition, the Regional Director relied on the absence of evidence that the Union's business agent had actual knowledge of the *Savair* statements, as well as the absence of evidence that the Union adopted or ratified the employees' statements or otherwise held out the solicitors "in such a fashion that other em-

[1] District No. 9, International Association of Machinists and Aerospace Workers, AFL–CIO.

[2] 265 NLRB No. 66 (1982). Not included in bound volumes.

ployees reasonably were led to conclude that they were acting as its agents or on its behalf."

On 13 July 1982 the Board adopted the Regional Director's recommendations and certified the Union as the exclusive bargaining representative of the employees in the stipulated unit.[3] In adopting the Regional Director's recommendations, the Board affirmed its continued adherence to established precedent "which holds that the solicitation of authorization cards by employees, standing alone, does not make those employees agents of the union." 262 NLRB 850 fn. 3 (1982).

The Respondent refused to bargain with the Union. On 6 December 1982 the Board issued a Decision and Order[4] finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive bargaining representative of the employees in the stipulated unit, and by refusing to provide the Union with information relevant and necessary to its role as exclusive bargaining representative.

We have decided to vacate our earlier Decision and Order and Certification of Respresentative.[5] Objections to representation elections based on improper initiation-fee-waiver statements made by employee card solicitors alleged to be union agents have all too frequently been presented to the Board. The question of union agency as it relates to the impact of such statements has been troubling and recurring. As we explain below, the harm resulting from improper fee-waiver statements can be largely avoided by unions undertaking a clear explanation of their policy. The principles set forth today are intended to encourage unions to undertake such explanations so that most *Savair* objections will be obviated.[6]

The record evidence shows that Doug Hanicke, then employed by the Respondent, initiated the organizing campaign by contacting Richard Vaughn, a union representative, about organizing the Respondent's employees. Vaughn said that the Union would become active in the organizational campaign if a sufficient number of employees were interested in union representation. Vaughn then mailed Hanicke about 50 union-authorization cards for employees to sign. The only instruction Hanicke received was that he should not solicit cards "on company time." Three other employees at the time, Robert German, Ron Nickels, and Charles Rachel, joined Hanicke in soliciting cards from their fellow employees. Donald Owens, the Union's organizer, testified that these card solicitors were four of the five persons who "really worked like hell to keep the guys together and everything else." In the course of soliciting their fellow employees to sign, these four employees made a variety of statements, as found by the hearing officer, to the effect that if an employee signed a card at some point during the campaign before the election, his union initiation fee would be waived. Such statements, if attributable to the Union, are grounds for overturning the election under *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 272, 281 (1973).

Section 2(13) of the Act provides that:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Application of this statutory provision leads us to conclude that, in the absence of extraordinary circumstances, employees who solicit authorization cards should be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting.[7] When a union makes authorization cards available to employees with the understanding that they will solicit other employees to sign them, it thereby vests the solicitors with actual authority to obtain signed cards on its behalf. See Restatement 2d, *Agency* (1958). Additionally, when a union permits or acquiesces in employees' soliciting on its behalf without indicating to third parties that such solicitation is unauthorized, it thereby vests the solicitors with apparent authority to obtain signed cards on its behalf.[8] In both cases, whether

[3] *Davlan Engineering*, 262 NLRB 850 (1982).

[4] 265 NLRB No. 66 (1982) (not included in bound volumes).

[5] A respondent in a proceeding alleging a violation of Sec. 8(a)(5) usually is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations. However, this prohibition applies to the parties to the representation proceeding and does not preclude the Board from reconsidering its own earlier action and reopening its representation proceeding.

[6] To the extent that *Allied Metal Hose Co.*, 219 NLRB 1135, 1143–1146 (1975) (in which volunteer employee card solicitors made improper *Savair* statements and the union did not comment on the subject until after the election), *Call-A-Mart*, 214 NLRB 225, 228–229 (1974) (in which union representatives did not fully explain the union's initiation-fee-waiver policy and thereafter employees who voluntarily solicited cards on the union's behalf made statements violative of *Savair*), and other like cases are inconsistent with the analysis set forth herein, they are overruled.

[7] As set out in Restatement, 2d, *Agency* § 3(2) (1958), "[a] special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service."

[8] By allowing employees to engage in unfettered solicitation activities and by using the signed cards they obtain to support the filing of a petition, the union becomes "responsible for the information which comes to the mind of the third person" regardless of whether or not it knows of the specific conduct involved. The union in that situation either has "intend[ed] to cause the [unit employees] to believe that the [solicitor] is

Continued

by action or inaction, the union has created a special agency relationship for the limited purpose of card solicitation. See Restatement 2d, *Agency* § 3 (1958). Accordingly, the union will be deemed responsible for representations concerning its fee-waiver policies made by its special agent solicitors, whether or not they have been specifically authorized or instructed to speak on this subject. See generally Restatement 2d, *Agency* § 161A, 162 (1985).

A union may avoid responsibility for the improper fee-waiver statements of its solicitors, however, by clearly publicizing a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards. Such publicity may take any number of forms including, for example, an explanation of the fee-waiver policy printed on the authorization card itself. A union that fails to take adequate steps to provide the employees with an explanation of its policy acts at its peril.[9]

Applying these principles to the facts presented, we find that when Union Business Agent Vaughn mailed 50 authorization cards to Douglas Hanicke with instructions to get them signed, he thereby vested Hanicke with actual authority to engage in solicitation, making Hanicke the Union's special agent for the limited purpose of soliciting cards. By acquiescing in solicitation activities by Nickles, Rachel, and German, the Union vested these three employees with apparent authority to solicit, and likewise rendered them its special agents. All four made improper fee-waiver statements. By virtue of their status as special agents of the Union, their statements were imputable to the Union.[10]

The Union here did not adequately inform the unit employees of a lawful fee-waiver policy. Union Business Agent Vaughn, who gave the cards to employee solicitors, as noted above, gave no instructions regarding to the Union's waiver policy. At most, Vaughn's testimony reveals that at a meeting with employees he may have told them that he would discuss fees after the election. Union Business Agent Owens testified that he "might have" mentioned the Union's fee-waiver policy while meeting with some employees, that he did not see why he "shouldn't of." He testified that in a discussion with employees he may have said he would talk to the Union's district body about reducing fees for the newly organized shop, but could not recall any specific meeting where the matter was discussed. We do not view this as adequate to establish that the effects of the statements of the four solicitors were or could have been neutralized and find that the statements reasonably tended to interfere with the outcome of the election.

Accordingly, we find merit to the Respondent's Objection 1 and deny the General Counsel's Motion for Summary Judgment.

ORDER

It is ordered that the proceeding in Case 14–RC–9383 is reopened and consolidated with the proceeding in Case 14–CA–16116.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied, and the complaint in Case 14–CA–16116 is dismissed.

IT IS FURTHER ORDERED that the Certification of Representative in Case 14–RC–9383 is vacated.

IT IS FURTHER ORDERED that the proceeding in Case 14–RC–9383 is remanded to the Regional Director for Region 14 for the purpose of holding a second election.[11]

[Direction of Second Election omitted from publication.]

---

authorized to act for [it] or should realize that [the] conduct is likely to create such belief." Restatement 2d, *Agency* § 27 (1958).

[9] Obligating a union to provide employees with a clear explanation of its fee waiver is neither onerous nor unfair. Compared with the entirely avoidable expenditure of time, money, and Board resources attendant to litigating *Savair* objections and holding rerun elections, the burden on a union of publicizing its policy is relatively slight. The union is the party to the election that derives the benefit from card solicitation and is alone in a position to explain authoritatively its fee-waiver policy. By undertaking an effective explanation of its fee-waiver policy, a union may protect the election victory it seeks from attack on *Savair* grounds.

[10] See *Dollar Rent-A-Car*, 236 NLRB 206, 210 fn. 11 (1978) (in which it was found that statements made by an employee the union designated to solicit cards were attributable to the union); *J.C. Penney Co.*, 214 NLRB 445, 452 (1974) (in which the Board set aside an election based on improper *Savair* statements made by two employees to whom the union had given cards and instructed to solicit signatures); and *Woodworkers (Central Veneer)*, 131 NLRB 189, 190 (1961) (in which the Board found that a union had made a nonemployee its agent when it provided him with authorization cards to solicit employees and accepted the results of his efforts by filing a petition based on the signed cards he procured).

[11] Should the Union not wish to proceed to an election, it may withdraw its petition without prejudice to filing a new petition.

Ersel Prince d/b/a Prince Trucking Company *and* Local Union 9553, United Mine Workers of America. Cases 9–CA–23189, 9–CA–23364–2, 9–CA–23457, and 9–CA–23475

30 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 12 February 1987 Administrative Law Judge Robert T. Wallace issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ersel Prince d/b/a Prince Trucking Company, Ethel, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make the following employees whole, with interest, for any loss of wages and benefits suffered by them as a result of unlawfully laying them off about 5 June and 18 July 1986, in the manner set forth in the judge's recommended remedy. The employees laid off about 5 June 1986 were John Sizemore, Jerry Carter, James Dean, Arnold Toler, Arvid Con Barker, Randall Morgan, Cecil Bobbet, Everett Vance, Arthur Farley, Roger Johnson, Chauncy Adams, and Aubrey John Hartman. The employees laid off about 18 July 1986 were John Sizemore, Aubrey John Hartman, Arthur Farley, James Dean, Roger Johnson, Chauncey Adams, and Arnold Toler."

2. Substitute the attached notice for that of the administrative law judge.

[1] Although the judge found that the Respondent laid off certain employees on 17 July 1986, the parties stipulated that the layoffs occurred about 5 June and 18 July 1986.

[2] In response to the General Counsel's exceptions, we shall modify the recommended Order and notice to include the names of unlawfully laid-off employees and, as discussed above, to correct the dates of the second unlawful layoff. The General Counsel's request that the remedial Order include a visitatorial clause is denied.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten not to hire and WE WILL NOT refuse to hire or recall people because they filed grievances or engaged in other protected activities.

WE WILL NOT attempt to deter you through threats and coercion from filing grievances or engaging in other protected activities.

WE WILL NOT threaten you with physical harm because you file grievances or engage in other protected activities.

WE WILL NOT lay you off in retaliation for grievance filing and for engaging in other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, the following employees for any loss of wages and benefits suffered as a result of unlawful layoffs effected by me about 5 June and 18 July 1986.

John Sizemore	Aubrey John Hartman
Jerry Carter	Arthur Farley
James Dean	Cecil Bobbet
Arnold Toller	Everett Vance
Arvid Con Barker	Roger Johnson
Randall Morgan	Chauncy Adams

ERSEL PRINCE D/B/A PRINCE TRUCKING COMPANY

Donald Becker, Esq. and *David L. Ness, Esq.*, for the General Counsel.
Ersel Prince, Jr., pro se.

DECISION

ROBERT T. WALLACE, Administrative Law Judge. On a series of charges filed by the Union between 9 June and 29 August 1986, as amended, a second consolidated amended complaint was issued on 8 September in which, as further amended at the hearing, it is alleged that Respondent Prince violated Section 8(a)(1) and (3) of the National Labor Relations Act by threatening and by laying off employees because they filed grievances and engaged in other protected activities.

The case was tried before me at Logan, West Virginia, 17 and 18 November. On the entire record, including my

observation of the demeanor of the witnesses and after due consideration of a brief filed by the General Counsel, I make the following

FINDINGS OF FACT AND ANALYSIS

Ersel (June Bug) Prince operated a coal-hauling trucking company in the Logan area since 1973. On 11 April 1986, however, he abandoned that business and began to produce coal in the Rich Creek Hollow area of Logan, West Virginia, at mine 4. He operated the mine pursuant to an agreement with the owner (Chafin Coal Company) under which he was paid a fixed amount for each ton of coal produced. Prior operators were lessees Hunt Mining Company (during February and March 1986) and Caryco Mining (1980 through January 1986), and Chafin Coal Company (1980 and earlier). The latter is owned by John Chafin. His sons, John Jr. and Arthur, were officers and managers of Caryco.

During 1986, Prince provided services valued in excess of $50,000 for Chafin Coal Company, and the latter sold and shipped from its Logan County facilities coal valued in excess of $50,000 directly to points outside the State of West Virginia. It is undisputed, and I find, that Prince and Chafin Coal Company are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

As operations began, all of Prince's nonsalaried employees (between 10 and 12) were members of the Union and at least 8 had worked for the predecessor lessees, and Prince recognized the Union and signed the applicable National Bituminous Coal Wage Agreement. Here too it is undisputed, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

John Sizemore and Arnold Toler were among those initially hired by Prince. On filing their applications for employment on 10 April, they urged Prince to hire a friend (Neal Dingess) who had worked with them for Caryco. Prince declined stating that Chafin Sr. told him he would have to leave the Hollow (i.e., his lease would be canceled) if he hired Dingess. In context, the statement was violative of Section 8(a)(1) of the Act as it could be expected to have a chilling effect on the willingness of the applicants to engage in protected activities as employees of Prince. They were aware that Dingess had been a thorn in the side of Chafin by filing numerous grievances in his capacity as the Union's mine safety committeeman while employed by Caryco and by his efforts as recording[1] secretary of the Union to force several lessees of Chafin operating in the Hollow (including Hunt) to observe state law by posting bonds guaranteeing employees' wages. That dispute, and Dingess' prominent role in it, had been the subject of then current articles in newspapers of general circulation in the Logan area, to wit: *The Logan Banner* and *The Charleston Gazette*. In these circumstances, an inference is warranted and taken that Prince was aware of Dingess' activism and the probability that it prompted Chafin's admonition;[2] and by choosing to cite that admonition as his reason for not hiring Dingess, Prince was effectively conveying what his attitude would be towards union activists. Any doubt in that regard is dispelled by his subsequent conduct as described herein.

On 22 April, five individuals who had formerly worked at mine 4 (including Dingess, Arthur Farley, and Audrey Hartman) filed a grievance with Prince claiming that he had deprived them of "panel rights" to bid for jobs at the mine. Later that day Sizemore (who had been hired as an electrician and promptly named by the Union as mine safety committeeman with duties similar to those of a steward) urged Prince to hire some or all the grievants. In the presence of two other employees (Everett Vance and Jerry Carter), Prince reiterated his statement that Chafin would make him leave the Hollow if he hired Dingess; and he added that he would hire Farley and Hartman on the following Monday provided they took their names off the grievance.[3] I find both statements coercive in violation of Section 8(a)(1). The former for reasons indicated above, the latter because of its inhibiting effect on the right of employees to avail themselves of contractual grievance procedures. See *United States Steel Corp.*, 250 NLRB 387, 390 (1980).

On Wednesday, 4 June, Prince told the employees that he wanted to run coal during a 2-week shutdown for vacations scheduled to begin on 28 June, and he asked them to work through that period.

On the morning of 5 June, Sizemore handed two written grievances to General Foreman Bill Merritt, his own and that of Carter.[4] Both contained complaints that supervisors had performed unit work. Merritt took the grievances to Prince who, on reading them, became highly incensed and said: "Well, we'll just cut them off." He then instructed Merritt to hand out layoff slips to all hourly employees[5] at the end of the shift. Merritt asked what he should write on the slips as a reason for the layoffs. Prince replied: "Uneconomic conditions," but added: "[and] be sure to tell them that they were filing too many grievances." Merritt complied, in part, by preparing and issuing the layoff slips that afternoon. However, when Morgan asked him "Why?", he told the assembled employees: "I ain't going to lie to you. The man told me that too many grievances have been filed, and poor economic conditions."

The next day (Friday) normally would have been the last workday of the week. About noon on that day, Merritt and his two section foremen (his brother Roger and Dallas Vance) were alone at the mine. About noontime they attempted to persuade Prince to call the men back. Prince replied heatedly, "No. I'll starve the sons-of-

[1] The Board has held that statements to job applicants may constitute conduct violative of Sec. 8(a)(1) of the Act. See *Semi-Alloys, Inc.*, 260 NLRB 992, 995 (1982).

[2] See *NLRB v. Radcliffe*, 211 F.2d 309, 315 (9th Cir. 1954), cert. denied 348 U.S. 833.

[3] Farley and Hartman complied, and they were hired by Prince on 28 April as promised.

[4] Earlier (on 21 April) Sizemore filed a grievance over Respondent's contracting out of coal transportation from the mine. In it he asked that such work be posted for bidding and that backpay be paid for the time involved.

[5] At the time these were 12 in number, as follows: Vance, Randall Morgan, C. Barker, Carter, Toler, C. Bobbett, Sizemore, Hartman, Farley, R. Johnson, C. Adams, and J. Dean.

bitches to death . . . for two or three months if I have to. If I want to run a scoop or . . . want you to . . . that's the way I'll have it. This is my mines [sic] and I'm going to run it the way I want to. I'm tired of John Sizemore and his union bitching and his fucking grievances."

Shortly thereafter Sizemore came to the mine to get his paycheck. While doing so he asked Prince if the men had been laid off over the two grievances. He responded, "Yes," and characterized them as "chicken shit grievances." A brief discussion ensued during the course of which Prince offered to call everyone back if Sizemore and Carter agreed to drop the grievances. Sizemore agreed on the spot and he phoned Carter and obtained his withdrawal. Prince then had Sizemore call the men by telephone and tell them to return to work on Monday. Later on Friday, Prince bragged to the Merritts that he had made Sizemore pull in his horns. I find the notice of layoff and the actual layoff to have been prompted solely by an unlawful purpose (i.e., retaliation for grievance filing) and so to be in violation of Section 8(a)(1), (3), and (1), respectively—as alleged in the complaint. I also find the prerequisite for ending the layoff (i.e., dropping the grievances) to have been coercive in violation of Section 8(a)(1).

Work at the mine progressed without significant interruption until 17 July (Thursday) when another layoff was ordered. On that morning, Sizemore reminded General Foreman Bill Merritt that as mine safety committeeman he had a duty to make quarterly inspections of the mine accompanied by a representative of the Union's safety department and someone selected by management; and he gave Merritt the customary 24-hour notice of intent. Merritt, in turn, informed Prince who became indignant and told him: "What do they want to make a safety run for, we just got through with the Federal inspector. It looks like we are going to have to cut them off again to teach John Sizemore a lesson." He thought for a while and then instructed Merritt to lay off all hourly employees (then 11 in number) except 4 who had most seniority, effective at the end of the workday; and he confided that the man with fifth highest seniority (Toler) was being laid off only so that the sixth senior (Sizemore) "wouldn't think I am discriminating against him." He added, "That ought to teach John a lesson." Merritt again asked what reason he should put on the layoff slips. Prince replied, "Not a damn thing." Prior to that moment Merritt had no inkling that a layoff was in the offing.[6] Here too, I find that the layoff was motivated solely by Prince's desire to punish or retaliate against Sizemore and, through him, the Union for engaging in a protected act (i.e., performing a mine inspection as provided in the collective-bargaining agreement)—in violation of Section 8(a)(3) and (1). Also, I credit testimony of Merritt and Sizemore to the effect that on 18 July the former told the latter that the layoff was meant to convey a message that there was a price to be paid for too assiduously pursuing his duties as mine safety committeeman. As communicated by admitted Supervisor Merritt, that message patently was coercive; and it constitutes an independent violation of Section 8(a)(1).

On Monday 21 July, Merritt complained to Prince of being unable properly to run the mine with so few men, and he emphasized the need for an electrician to maintain equipment. The only electricians were Sizemore and Farley and both were on layoff. Sizemore was the senior, and apparently to eliminate that obstacle to his recalling Farley, Prince told Merritt to offer Sizemore a job as a salaried chief electrician at a substantial increase in pay. Prince explained that if Sizemore accepted he would promptly "can him."[7] Following instructions, Merritt then called Sizemore and offered him the chief-ing job. Sizemore declined and inquired, "What's he trying to do to me, can me?" Faced with a direct question Merritt replied honestly, "Yeah, probably." I find that answer tantamount to a threat to punish Sizemore for engaging in protected activities, and so violative of Section 8(a)(1).[8]

Morgan was one of the four hourly workers not laid off; and he succeeded Sizemore as mine safety committeeman. On 29 July, he filed a grievance over salaried employees performing classified work. Later in the day, Prince and the Merritt brothers were at the mine helping each other move supplies. Roger inquired of Prince, "Do you think I can slip this rock dust by . . . Morgan without him filing a grievance?" And Prince replied, "Fuck 'Badeye' [Morgan]. He's already filed one grievance. What you need to do is take him down . . . to the boom hole and . . . whoop the shit out of him . . . I thought I got rid of my problem when I got rid of Sizemore and now Badeye is trying to show his ass." That night Roger, concerned about the conversation, called Morgan and told him what Prince had said. Morgan replied, "Is he that mad that he wants to whoop me?" Roger answered, "Yes, because of the grievance . . . I just want you to keep your eyes on him [Prince] and everything, you know." I find a threat was communicated, in violation of Section 8(a)(1).

Prince ceased to operate the mine on 16 September, assertedly for financial reasons. There is no allegation nor is there any evidence that the shutdown involved any unfair labor practice.

Credibility Determinations

In making many of the findings above, I have credited testimony of admitted Supervisors Bill and Roger Merritt. It seems to me that both testified in a straightforward manner; and neither appears to have any prospect of gain. On the contrary, they testified at considerable risk because they then held supervisory jobs at other mines and could not expect that their appearance in a proceeding of this type would endear them to their

[6] By 23 August all the laid-off employees were recalled and two new ones had been hired.

[7] Under art. XVII, sec. (m) of the applicable National Bituminous Coal Wage Agreement employees promoted to permanent supervisory status forfeit their seniority rights immediately.

[8] Further indication of Prince's animus toward Sizemore is the fact that, after consulting with his labor relations advisor (Clifford "Snooker" Martin), he recalled Farley on 23 July ostensibly because he possessed a qualification that Sizemore lacked, to wit: experience in rebuilding hydraulic pumps. But, Farley testified credibly that on recall he performed the same work as before and that it did not involve rebuilding pumps.

present or any future employers. Further, their accounts were consistent with and corroborated by that of the seven hourly workers who testified. In addition, I have credited the hourly workers in situations where the subject of their testimony was peculiarly within their own knowledge, having found them to have spoken without guile. And finally, the testimony of both the supervisors and hourly workers rings true in the context of probabilities arising out of objective facts. For example, both layoffs occurred immediately following assertion of protected rights, and on a Thursday instead of the normal end of a workweek, Friday—thereby lending credence to the claim that Prince acted solely in retaliation for assertion of those rights.

In contrast, Prince's flat denial that he made any of the statements attributed to him is unpersuasive. Similarly, I regard as unpersuasive, and indeed pretextual,[9] his claim that the layoffs on 5 June and 17 July were due to economic reasons. In reaching that conclusion I accept (despite absence of adequate data) his assertion that the financial situation of the mine during his tenure as lessee was precarious. But at the time of the layoffs that circumstance is not shown to have been a contributing factor. As to the 5 June layoff, Prince claimed in an affidavit taken prior to the hearing that it was due to his running out of cash and a delay in obtaining a $10,000 loan from his father. But at the hearing he admitted having obtained that loan in April when he began operations. Further, the evidence shows that lessor Chafin had issued Prince a check for $46,196 on 3 June; and absent any explanation from Prince, an inference is warranted that he knew that check (one of the largest he was to receive) was coming and would be received by him on or prior to payday (6 June) when he did in fact meet the payroll. And as to Prince's claim that the 17 July layoff was due to adverse mining conditions (badtop) that condition was known and was being dealt with since 1 June (Tr. 145), and no reason is given as to why the situation would improve by operating the mine with *less* miners. In that regard, Prince made no reply to Section Foreman Roger Merritt's estimate that they would have been out of the badtop area and operating at full capacity within 2 weeks had a full complement been maintained.

CONCLUSIONS OF LAW

I find that Respondent violated Section 8(a)(1) and (3) of the Act in the particulars and for the reasons stated above; that it is not shown to have violated the Act in any other respect; and that the unfair labor practices here found to have been committed affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

In addition to the customary cease-and-desist order and requirement for notice mailing,[10] my order will require Respondent to make whole affected employees for all wages and benefits lost as a result of their unlawful layoffs on 5 June and 17 July, in accordance with the principles set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[11] I see no need for, and consequently will not require, the visitatorial clause sought by the General Counsel.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Ersel Prince, d/b/a Prince Trucking Company, Logan, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening not to hire, and refusing to hire or recall, individuals because they filed grievances or engaged in other protected activities.

(b) Attempting through threats and coercion to dissuade employees from filing and pursuing grievances.

(c) Threatening to inflict bodily harm on an employee for engaging in protected activities.

(d) Threatening to fire an employee for engaging in protected activities.

(e) Laying off employees in retaliation for filing grievances and for engaging in other protected activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Make employees whole, with interest, for any loss of wages and benefits suffered by them as a result of unlawfully laying them off about 5 June and 17 July 1986, in the manner set forth in the remedy section.

(b) Preserve and, on request, make available for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, as well as other records necessary and useful in analyzing the amounts due employees under the terms of this Order.

(c) Mail to the Union and to each unit employee who was on its payroll at any time during the period from 11 April to 16 September 1986, copies of the attached notice marked "Appendix."[13] The notice shall be duly signed by Respondent on forms provided by the Regional Director for Region 9.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[9] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982).

[10] Because Respondent indisputably has ceased operations, mailing (rather than posting) of the notice is appropriate in this case.

[11] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Setterlin Company *and* Bricklayers Local Union 55 of the International Union of Bricklayers and Allied Craftsmen *and* Carpenters Capital District Council of the United Brotherhood of Carpenters and Joiners of America *and* Cement Masons Local Union 536, Operative Plasterers' and Cement Masons International Association of the United States and Canada *and* Laborers Local Union No. 423, Laborers' International Union of North America. Cases 9-CA-20915-1(E), 9-CA-20915-2(E), 9-CA-20915-3(E), and 9-CA-20915-4(E)

30 April 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 10 December 1986 Administrative Law Judge William F. Jacobs issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Setterlin Company (the Applicant) filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Applicant, The Setterlin Company, Columbus, Ohio, be awarded the sum of $29,857.31, pursuant to its application for an award under the Equal Access to Justice Act.

[1] In his supplemental decision, the judge states that the Respondent's 17 April 1985 Motion for Summary Judgment and the General Counsel's response were sufficient to permit the Board to make a decision on the merits at that point in time without the necessity of holding a hearing. We disagree. Although in hindsight it is clear that the Respondent did present all the relevant evidence to the Board in its Motion for Summary Judgment, the Board did not know at that time that the General Counsel would fail to produce at a hearing any additional evidence in support of her position as alleged in her response.

[2] We believe that Congress, in revising the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), as amended by Pub. L. 99-80 Stat. 183 (1985), did not alter but merely clarified the definition of "substantially justified." "Substantially justified" means more than "mere reasonableness." H.R. Conf. Rep. No. 99-120 at 9 (1985).

SUPPLEMENTAL DECISION

Equal Access to Justice Act

WILLIAM F. JACOBS, Administrative Law Judge. My decision in the above-cited consolidated cases issued on 10 March 1986. No exceptions were filed. Thereafter, on 6 May 1986 the Board issued its final order adopting the conclusions and recommendations set forth in my decision. Pursuant to the Equal Access to Justice Act (EAJA), Public Law 96-481, 94 Stat. 2325 and Section 102.143 of the Board's Rules and Regulations, Respondent on 22 May 1986 filed with the Board in Washington, D.C. an application for fees and expenses with memorandum and evidence in support thereof. On 23 May 1986 the Board referred this matter to me for appropriate action. Subsequently, the General Counsel filed an answer to Respondent's application and Respondent filed a reply, both with supporting memoranda.

The application, answer, and reply raise the following issues:

1. Whether the position of the General Counsel was substantially justified in the underlying unfair labor practice proceeding.

2. Whether Applicants' claim for 10.5 hours of legal fees for David P. Hiller for 10 December 1985 is justified in light of the fact that he appeared on that date as witness for Respondent at the unfair labor practice trial and did not make an appearance that date as legal counsel on Respondent's behalf.

The Substantial Justification Issue

On 18 May 1984[1] the charges in the instant case were filed. Shortly thereafter the Region undertook a thorough investigation of the charges. On 25 May Respondent, through its attorney, David P. Hiller, provided the Region with a statement of position that was accompanied by documentary evidence supporting its position. The statement of position traced the history of bargaining between the parties dating back to the date of Respondent's withdrawal of its bargaining rights from the AGC. The supporting documentary evidence consisted of, for the most part, letters between the parties that reflected the record of bargaining or attempted bargaining. The evidence that I relied on in determining that the complaint lacked merit was congruent with the facts and documentary evidence supplied to the Region by Respondent prior to complaint. On 29 May the Region followed up Respondent's evidentiary submission with an interview of Robert L. Jones, executive secretary of Carpenters' District Council from whom an affidavit was obtained. In his affidavit, Jones described the sequence of events that transpired during the bargaining period and thereafter. The substance of Jones' affidavit was factually in total agreement with the facts as presented by Respondent in its 25 May documented statement of position. A comparison of the two positions gave rise to no factual discrepancies warranting credibility findings. The facts discovered by the Region during its investigation

[1] Hereafter all dates are 1984 unless otherwise indicated.

are the same as those on which I later rendered my decision.

On 6 July the Regional Director issued the following document in which he refused to issue complaint:

> Gentlemen:
>
> The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.
>
> The investigation does not support the allegations of the charges that the Employer failed to bargain with the Union in violation of the Act as charged. The evidence disclosed that representatives of the Employer met with representatives of the four Charging Party-Unions on several occasions during April and May of 1984. In addition, the Employer met jointly with all the Unions on April 30, 1984. On May 11, 1984, the Employer gave the employees a "Status Report" in which it set forth its own bargaining proposals. Moreover, the Employer stated it would continue to work during a strike and that although employees might be subject to fines or membership suspension if they worked during a strike, they had a right to work and the decision was up to them. It was concluded that the report was not unlawful but was encompassed by free speech provisions of Section 8(c) of the Act. Moreover, it did not constitute direct dealing or bargaining with the employees with an object of unlawfully undermining the Unions' bargaining status. Finally, it was concluded that the parties had reached an impasse on June 1, 1984 when the Employer implemented its fringe benefit proposals which it had earlier offered to the Unions and to which they had not objected. The implementation by the Employer of its last offer, therefore, did not violate Section 8(a)(5) of the Act. See *E.I. DuPont & Co.*, 268 NLRB 1075 (1984), and *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).
>
> Under these circumstances, it was concluded that further proceedings in this matter were not warranted and I am refusing to issue a complaint.

Subsequent to the Regional Director's refusal to issue complaint, Charging Parties appealed. On 21 December the Office of Appeals sustained the appeal stating:

> Dear Mr. Goodman:
>
> Your appeal from the Regional Director's refusal to issue complaint in the above-referenced case has been fully considered.
>
> The appeal is sustained. It was concluded that the Employer's cessation of fringe benefits payments and check-off and its presentation of a bargaining offer directly to employees raised Section 8(a)(1) and (5) issues warranting Board determination based on record testimony developed at a hearing before an Administrative Law Judge.
>
> Accordingly, the case is remanded to the Regional Director with instructions to issue an appropriate 8(a)(1) and (5) complaint, absent settlement. All further inquirils should be addressed to the Regional Director.

This letter, couched in the usual boilerplate language, offered no explanation as to precisely what Section 8(a)(1) and (5) issues remained that might warrant the taking of testimony at a hearing.

On 4 January 1985[2] Respondent, through its attorney, filed with the Office of Appeals a motion for reconsideration. Accompanying the motion was a 26-page position statement covering the entire course of bargaining, citing appropriate cases and distinguishing cases cited by the Charging Parties from the factual circumstances involved in the instant case. Attached to the motion was the relevant correspondence that had passed between the parties the previous spring and since. Respondent placed before the Office of Appeals its entire case. Virtually everything that it eventually put into the record at the hearing Respondent offered to the Office of Appeals for its consideration in order to avoid having to go to hearing. On 18 January the Office of Appeals sent the following letter to Respondent's attorney:

> Dear Mr. Hiller:
>
> This is in response to your Motion for Reconsideration dated January 3, 1985 and supplemental letter dated January 9, 1985, requesting oral argument and reconsideration of our decision on December 21, 1984 sustaining the Charging Parties' appeal.
>
> We have carefully received the evidence presented and adduced in the instant matter in light of the contentions raised in your motion and have concluded that no basis exists for a departure from our initial determination. Accordingly, the motion is denied.

Again, the Office of Appeals failed to explain to Respondent why a hearing was necessary or what issues remained to be litigated.

On 6 March, the Region, having been given no other choice by the Office of Appeals, issued complaint despite the fact that it had in its files the entire case; the undisputed facts, relevant documents, and case citations containing many of the legal findings on which dismissal of the complaint eventually issued. The complaint contained among its allegations paragraphs 10(a), (b), and (c):

> 10. (a) On or about May 10, 1984, Respondent ceased making payments on behalf of employees to the respective health and welfare plans and pension funds provided for in the collective-bargaining agreements to which Respondent was a party with the Bricklayers, Carpenters, Cement Masons and Laborers as described above in paragraphs 6(a), 7(a), 8(a) and 9(a), respectively.
>
> (b) About May 23, 1984, Respondent implemented its own health and welfare benefits through a plan with Builders Exchange and Phoenix Mutual

[2] Hereafter all dates are in 1985 unless otherwise indicated.

Life and its own pension benefits through the Setterlin Company Pension Plan.

(c) Respondent engaged in the acts and conduct described above in paragraphs 10(a) and (b) without having afforded the Bricklayers, Carpenters, Cement Masons and/or Laborers an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees with respect to such acts and conduct and the effects thereof.

At the time the complaint issued the Region had in its possession documentary proof, supplied to it by Respondent's counsel months before, that the allegations were untrue. Indeed, in an affidavit supplied to the Region on 29 May 1984 the executive secretary of the Carpenters stated[3] that he did not know whether the Respondent had implemented the new health and welfare benefit program as of that date. Seven months later when on 22 October 1985 the Region issued its amended consolidated complaint the errors contained in the above-quoted paragraphs remained unchanged and were not corrected until the day of the hearing. On 20 March Respondent filed its answer denying the commission of any unfair labor practices and proffering affirmative defenses to the allegations identical to those eventually pursued at the hearing.

On 17 April Respondent filed a Motion for Summary Judgment with a 32-page memorandum in support thereof. In its memorandum Respondent once again reiterated the entire history of bargaining between the parties and argued that there were no factual issues in dispute that warranted a hearing. Attached to the memorandum were various supporting documents most of which were eventually offered and received by stipulation into the record at the hearing. In addition to a resume of the factual history, Respondent included in its memorandum argument and case law. Several of the cases cited were ones on which I relied in my decision dismissing the complaint.

On 23 April the Associate Executive Secretary of the Board issued an order transferring proceeding to the Board and Notice to Show Cause. On 7 May the General Counsel filed a response to the Notice to Show Cause and Opposition to Respondent's Motion for Summary Judgment. In the response the General Counsel requested: "that Respondent's Motion for Summary Judgment be denied because it raises factual matters which require development and resolution at a hearing and because the legal basis for Respondent's motion is not supported by Board law or policy." After declaring these reasons as to why a hearing was necessary, the General Counsel laid out the facts that were expected to be adduced at the hearing. The description of facts included in the response, however, though perfectly true in its coverage, totally failed to indicate or give consideration to Respondent's fully documented fears and reasons for taking the action it had. But this fact is of small consequence because Respondent had already placed on record the bases on which it had acted and this was well known to the Board through the contents of the file. Thus, the General Counsel's response was sufficient, along with the information made available to the Board by Respondent, to permit the Board to make a decision on the merits (i.e., the facts), without the necessity of holding a hearing.

Insofar as the legal argument is concerned, the General Counsel, in her Response, argued that Respondent's position is not supported by Board law or policy. The General Counsel, in her Response, conceded "that many of the facts in this case are undisputed and are clearly established by contemporaneous documentary evidence." She argued, however, that "Respondent has totally disregarded and failed to address . . . the unfair labor practice strike issue."

But the position of the General Counsel on this point is untenable because if the record is clear that there are no unfair labor practices, then the issue of whether or not the strike that subsequently occurred is an unfair labor practice strike never evolves as an issue. Though the General Counsel's response offers a number of arguments why Respondent's actions should be considered violative of the Act, it does not adequately present the clearly defined reasons why Respondent took the action it did. The problem of assent was the key issue in the case and the General Counsel, although she mentioned it briefly, did not adequately address the subject despite the fact that her files contained all of the correspondence enabling her to do so.

On 13 May Respondent filed a 17-page reply memorandum in which Respondent once again thoroughly reviewed the entire history of the case, presenting all of the facts none of which were in dispute, and pointing out the General Counsel's failure to address the assent issue as well as the failure of the Charging Parties to request bargaining about the health and welfare and pension implementation issues. Also, Respondent pointed out that on 17 May and again on 29 May it had written to the Charging Parties advising them that the changes in the health and welfare and pension plans had not yet been implemented and that Respondent was still willing to negotiate the subject matter.

On 30 September the Board issued an Order Denying Motion and Remanding Proceeding to Regional Director. The Order contained no explanation or reasons why the motion was denied.

On 22 October the Region issued an order consolidating cases, amended consolidated complaint and order rescheduling hearing. On 1 November Respondent filed its answer, which included the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

16. Both before and after the unfair labor practices charges were filed by charging parties, as well as before Respondent implemented its proposals with respect to fringe benefits, Respondent offered charging parties the opportunity to bargain with regard to Respondent's proposals.

17. Despite the opportunity to bargain afforded by Respondent, the charging parties neither requested bargaining nor pursued their bargaining opportunities.

[3] Par. 18.

18. The charges and the allegations of the complaint are therefore barred by the doctrines of waiver, acquiescence and estoppel.

SECOND AFFIRMATIVE DEFENSE

19. Respondent's Status Report of May 11, 1984 was a protected communication, encompassed by the free speech provisions of Section 8(a) of the Act.

WHEREFORE, Respondent demands that the amended complaint be dismissed, in its entirety, and that Respondent be awarded its costs and expenses herein, including reasonable attorney fees.

Even a cursory inspection of the Region's file in this case would reveal that the allegations contained in the complaint were unsupported by the contents of the file and that the affirmative defenses were wholly supported by the evidence. Moreover, analysis of the Regional file at the time of issuance of complaint would reveal no factual issues subject to credibility determinations. Finally, contained in the Regional file were copies of all of the documents filed by Respondent either with the Region or with the Board. These documents contain many of the case citations that when applied to the facts as reflected by the documentary evidence should have led to the conclusion that complaint should not have issued.

I find that complaint should never have issued in this case, that the General Counsel's position was not substantially justified, and therefore shall recommend that a proper EAJA award be made to the applicant in the amount of $29,857.31.[4]

[4] This amount represents the $30,644.81 claimed (390.25 attorney hours at $75 per hour equals $29,268.75 and expenses in the amount of $1376.06) minus $787.50 (10.5 attorney hours at $75 per hour) claimed for work done on 10 December 1985 for "ULP trial before Judge Jacobs" by David Hiller. Hiller did not make an appearance on that date and appeared only as a witness.

CONCLUSIONS OF LAW

1. The applicant is a prevailing party with respect to the amended consolidated complaint and meets the eligibility standards set forth in the Equal Access to Justice Act.

2. The General Counsel has failed to establish that the issuance of the consolidated complaint or the amended consolidated complaint and their continued prosecution were substantially justified.

3. The applicant is entitled to be reimbursed for reasonable attorney's fees and expenses incurred in connection with the underlying unfair labor practice proceeding and the fee application as set forth above.

On the foregoing findings of fact, conclusions of law, and the record in this case, pursuant to Sec. 102.153, I issue the following recommended[5]

ORDER

Applicant, The Setterlin Company, shall be awarded $29,857.31 pursuant to its application under the Equal Access to Justice Act.

[5] In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 103.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

United Supermarkets, Inc. *and* Retail Clerks Union, Local No. 368, AFL–CIO, Chartered by United Food & Commercial Workers International Union, AFL–CIO. Cases 16–CA–8650 and 16–CA–8759

30 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 18 September 1980 Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.

The parties stipulated to the basic facts constituting the alleged unfair labor practices, and the facts in general are largely undisputed. The Respondent operates seven supermarkets in the Amarillo, Texas area, including one located in a small shopping center at the intersection of Martin Road and Amarillo Boulevard. The supermarket is situated at the south end of a row of eight stores in the shopping center that are set back about 120 feet from Martin Road. The shopping center's parking lot occupies most of the area between the row of stores and Martin Road.

About 3 p.m. on 10 August 1979, two employees who had been discharged by the Respondent, Pricella Sain and Mary Jane Price, began picketing on the sidewalk in front of the entrance to the supermarket under the supervision of Union Representatives Dennis Patterson and Jim Shelton. Sain and Price walked back and forth wearing picket signs that bore the message: "United Supermarkets Unfair to Retail Clerks Union Local 368 Dallas, Texas." Sain and Price attempted to talk to customers approaching the supermarket about the proceedings then pending against the Respondent.

In 1977, two representation elections had been held among the Respondent's Amarillo area employees. A majority of the employees in the meat department unit had voted in favor of the Union while a majority in the grocery unit had voted against the Union. Additionally, unfair labor practice charges had been filed against the Respondent alleging that the Respondent had unlawfully discharged 13 employees, including Sain and Price, and had unlawfully refused to bargain with the Union. As of the date of the picketing, the unfair labor practice cases and objections to the elections had been consolidated before an administrative law judge.[2]

Sain and Price told approaching customers about the unfair labor practice complaint pending against the Respondent, stated that they wanted the Respondent to settle the matters, and asked the customers to shop at other supermarkets until the matters were settled. They also stated that the wages and benefits paid by the Respondent were inferior to those provided by union supermarkets. Sain and Price did not distribute handbills.

After a short period of time, officials of the Respondent emerged from the supermarket and told Sain and Price, as well as Patterson and Shelton, to move out near the street or into the parking lot, or the police would be called. The four declined to move away from the front of the supermarket, so Max Smithey, the Respondent's Amarillo grocery supervisor, summoned the police. After conferring with Smithey, a police officer asked Sain, Price, Patterson, and Shelton to leave the property and go at least to the city's right of way along the street. They refused to do so and, at 4:30 p.m., were arrested for criminal trespass, with Smithey pressing charges.

The judge found that by threatening to cause the arrest, and by causing the arrest, of the Union's pickets and representatives while they were engaged in activity protected by Section 7 of the Act, the Respondent violated Section 8(a)(1) of the Act.[3] We affirm the judge's finding of 8(a)(1) violations, but do so only on the basis of the analysis set forth in our recent decision in *Fairmont Hotel*, 282 NLRB 139 (1986).

In *Fairmont*, the Board reviewed *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and its progeny, and determined that in cases involving conflicts between Section 7 rights and property rights, the Board's task is "first to weigh the relative strength of each party's claim." The Board found:

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] These matters ultimately were decided in *United Supermarkets*, 261 NLRB 1291 (1982). In deciding this case, we take official notice of that decision.

[3] The judge also dismissed two other alleged violations of Sec. 8(a)(1) unrelated to the picketing. No party has excepted to those dismissals.

> If the property owner's claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative.

Fairmont Hotel, supra at 142 (fn. omitted). Factors that may affect the relative strength or weakness of an asserted property right include the following: the use to which the property in question is put, any restrictions placed on public access to the property or to the facility located on the property, and the size and location of the private facility. By way of example, the Board noted that "a single store surrounded by its own parking lot provided exclusively for the convenience of customers will have a significantly more compelling property right claim" than "the owner of a large shopping mall who allows the general public to utilize his property without substantial limitation." Id. at 142. Concerning the Section 7 right, factors that may affect the relative strength or weakness of such a right include the following: the nature of the right asserted, the purpose for which it is being asserted, the employer that is the target of the activity, the situs of the activity, the relationship of the situs to the target, the intended audience of the activity, and, possibly, the manner in which the right is being asserted. Id. at 142. By way of example, the Board noted that "organizational rights and the right to engage in primary economic activity at the situs of a dispute may be viewed as more compelling than handbilling and other informational activity at locations other than the primary situs." Id. at 142.

Applying the *Fairmont* analysis to the facts of this case, we find that the Section 7 rights are more compelling than the Respondent's property rights. The Respondent's supermarket is in a small shopping center which the general public is invited to patronize. A customer parking lot is provided directly in front of the supermarket and other stores, and there are several entrances to the parking lot to provide ready access from the adjacent public streets. There are no restrictions on access through these entrances. Furthermore, the Respondent's supermarket shares the parking lot with the seven other stores in the shopping center, and the sidewalk in front of the supermarket continues along the entire row of stores. Thus, Max Smithey testified that motorists coming to the shopping center may park in front of the supermarket and not enter the supermarket, but, rather, go to some other store. Additionally, customers of the other merchants in the shopping center walk on the sidewalk in front of the supermarket on their way to and from the other nearby stores. Indeed, Max Tipton, the Respondent's grocery supervisor for all its stores, specifically testified to this fact. There is no evidence that the Respondent or any other merchant at the shopping center takes measures to ascertain that everyone who uses the sidewalk in front of the row of stores is a customer of some store in the shopping center. It is apparent that the sidewalk in front of the Respondent's supermarket is open to virtually anyone and certainly to customers of any of the merchants at the shopping center. Inasmuch as access to the sidewalk in front of the Respondent's supermarket is so unrestricted and is commonly used by persons who are not customers, employees, or suppliers of the supermarket, we conclude that the Respondent has retained only a very limited property right claim to the sidewalk in front of its supermarket.

By contrast, the Section 7 right at issue here is a strong one. By picketing in front of the Respondent's supermarket, Sain and Price, under the direction of Union Representatives Patterson and Shelton, were attempting to protest the Respondent's asserted unfair treatment of its employees that constituted alleged unfair labor practices and to bring pressure on the Respondent to end these practices, as well as to protest Respondent's alleged payment of wages inferior to those of unionized stores.[4] The importance of the right to protest unfair labor practices is evidenced by the greater rights accorded employees who strike over unfair labor practices as compared to employees who strike over economic issues. See, e.g., *Pecheur Lozenge Co.*, 98 NLRB 496 (1951), enfd. as modified 209 F.2d 393 (2d Cir. 1953). Moreover, the Respondent was the target of the picketing in question, and the situs of the picketing was immediately in front of the one of the Respondent's supermarkets at which some of the alleged unfair labor practices had occurred.

---

[4] We reject the judge's conclusion that "[p]icketing signs carried by Price and Sain in the instant case were synonymous with those in *Giant Food Markets* and thus plainly of 'area standards' character." JD slip op. at 6 (fn. omitted). As noted above, Price's and Sain's picket signs stated, "United Supermarkets Unfair to Retail Clerks Union Local 368 Dallas, Texas." In *Giant Food Markets*, 241 NLRB 727 (1979), the picket signs stated: "Informational Picketing—Giant Food Markets does not pay area standards wages and benefits. Please don't shop. Retail Clerks Union 1557, 203 North 11th Street, Nashville, Tennessee." The fact that Sain and Price, in addition to publicizing the Respondent's alleged unfair labor practices, also told prospective customers that the Respondent's wages and benefits were inferior to those at union stores, did add an area standards element to their message. However, their voicing of this additional concern did not reduce the character of the picketing, taken as a whole, from that of unfair labor practice picketing to that of area standards picketing.

Additionally, the Respondent's customers were the intended audience of the Union's picketing. Inasmuch as persons could be identified as customers of the Respondent when they approached the entrance to the Respondent's supermarket, picketing on the sidewalk in front of the supermarket was an appropriate means for the pickets to convey their message to this audience. Also, the picketing activities were carried out not only by nonemployee union representatives but also by two discharged employees whose terminations had been alleged to constitute unfair labor practices. Sain's discharge was ultimately determined to be unlawful, while Price's discharge was not. See *United Supermarkets*, 261 NLRB 1291 (1982). An unlawfully discharged employee retains her status as an employee for purposes of the Act. *Holly Manor Nursing Home*, 235 NLRB 426, 428 fn. 4 (1978). Accordingly, Sain's right as an employee to picket in protest of the Respondent's alleged unfair labor practices was perhaps even greater than that possessed by the other three individuals.[5] Finally, contrary to the Respondent's contentions, the manner in which the picketing was carried out did nothing which might arguably diminish its protected character. We agree with the judge's conclusion that the evidence shows that the picketing was peaceful, the supermarket's entrance was not obstructed, and there was no interference with prospective customers.

In sum, the Section 7 interest being asserted in picketing to protest the Respondent's unfair labor practices was quite a strong one, while the Respondent's property interest in limiting the use of the sidewalk in front of its supermarket was relatively weak. Accordingly, we find that the Section 7 right exercised by the Union outweighs the Respondent's property right to exclude the pickets from the sidewalk. Because the rights asserted by the Union and the Respondent are not relatively equal, it is unnecessary to consider the availability of reasonable alternative means by which the Union could have communicated its message to its intended audience. For the foregoing reasons, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by threatening to cause the arrest of the pickets and by causing their arrest.[6]

[5] See *Hudgens v. NLRB*, 424 U.S. 507, 521–522 (1976). We reject the judge's conclusion, at fn. 9, that "[t]he fact that both these individuals [Price and Sain] were alleged discriminatees in a case awaiting decision following trial does not appreciably change their status as nonemployees," and that "for analytical purposes here they were equitable with nonemployees."

[6] Unlike his colleagues, Member Stephens does not automatically exclude consideration of the factor of alternative means whenever Sec. 7 rights are more compelling than property rights or vice versa. *Fairmont Hotel*, 282 NLRB 139 (1986) (Member Stephens concurring). Nonetheless, he reaches the same conclusion as they do here. Where, as here, the Sec. 7 rights are especially strong and the property rights are relatively attenuated, he would impose a much lighter "alternative means" burden on the General Counsel than he would when the relative strengths of Sec. 7 rights and property rights were reversed. The alternative means suggested by the Respondent—purchasing radio, television, and newspaper advertisements or distributing handbills in adjacent residential areas—are not means the employees and the Union could reasonably be required to use as an alternative for communicating with the Respondent's customers under the circumstances here. Therefore, Member Stephens finds that the requirement for showing lack of alternative means is satisfied in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Supermarkets, Inc., Amarillo, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1.

"1. Cease and desist from

"(a) Threatening to cause the arrest, and causing the arrest, of any employees or union representatives while peacefully picketing the Respondent's supermarket on Martin Road in Amarillo, Texas, in protest of unfair labor practices allegedly committed by the Respondent.

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to cause the arrest, or cause the arrest, of any employees or union representatives while peacefully picketing our supermar-

ket on Martin Road in protest of unfair labor practices that we have allegedly committed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

UNITED SUPERMARKETS, INC.

Edward B. Valverde Esq., for the General Counsel.
Don Graf and *William Harriger*, of Lubbock, Texas, for the Respondent.
Marvin Menaker, of Dallas, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard at Amarillo, Texas, on June 24 and 25, 1980, based on a consolidated complaint alleging that United Supermarkets, Inc. (Respondent), violated Section 8(a)(1) of the Act by demanding that certain picketing cease on the sidewalk in front of an Amarillo, Texas area store, by causing the arrest of picketers and representatives of Retail Clerks Union, Local No. 368, AFL-CIO, chartered by United Food & Commercial Workers International Union, AFL-CIO (the Union), when such picketing continued, and by informing persons, including one former employee, that it would not hire them because of their membership in the Union.

On the entire record, including my observation of the witnesses and consideration of posthearing briefs, I make the following

FINDINGS OF FACT

After purchasing the store equipment of three Shop-Rite/Piggly-Wiggly outlets located in Amarillo, Respondent caused a hiatus in retail operation and then reopened these with new employees as part of a seven-store network in and around Amarillo, in Potter County, Texas. The Union had formerly represented employees of the three Piggly-Wiggly stores and is a party to pending litigation which, in part, relates to a representation election conducted in 1977 among employees of Respondent's meat department.[1]

As of August 1979 each store was managed by a store manager and assistant store manager, both of whom were admittedly supervisors within meaning of the Act. The positions of "third man" also existed as one of providing responsibility in greater depth, but about which controversy exists over whether incumbents at given store locations are or are not statutory supervisors. Each store manager reports directly to Max Smithey, Amarillo grocery supervisor, who in turn reports to Max Tipton, general grocery supervisor. Aside from this line of authority, each meat department is run by a market manager, also an admitted supervisor, and this individual reports directly to Amarillo Market Manager Wendell Robbins.

In early August 1979 a meeting of various union members was conducted by Business Agent Dennis Patterson. From this it was determined to picket Respondent because of unresolved unfair labor practice allegations and to publicly press contention that wages and benefits for Respondent's employees were markedly below other unionized grocery chains.[2] In consequence of this representatives Patterson and Jimmy Shelton accompanied Emily Ramey, Mary Jane Price, and Pricilla Sain to Respondent's Martin Road store where in late afternoon of August 10, Price and Sain donned signs and commenced extending their message to all approaching shoppers that were willing to listen. In the course of doing this, the narrow sidewalk running completely in front of the store, and from which the only entrance was available, was patrolled by constant back and forth walking as to best converge with shoppers coming off the adjoining parking lot while fulfilling Patterson's instructions not to physically block store entry. To those who would listen, the picketers expressly suggested that grocery shopping be diverted to union stores. Seeing awkwardness and uncertainty in Price's accomplishment of this, Patterson arranged for Ramey, who was experienced in picketing from a 1975 strike against Piggly-Wiggly, to briefly substitute and demonstrate technique before moving on to another store location.[3]

Sain testified that soon after the activity began, a person identified as Joe Holliman, who she believed to be a second assistant store manager, appeared from inside and engaged Price in conversation. Shortly after this both Tipton and Smithey arrived at the store, and the former addressed Price as "young lady," saying she must get off the sidewalk or face arrest. Patterson elaborated on Respondent's reaction to this onset of picketing by testimony in which he described his conversation with Holliman, during which the latter became increasingly peevish over the refusal of the union adherents to move off the sidewalk surface and out onto the parking lot or the public right-of-way, even more distant. In the course of this, Patterson recalled Holliman's insistence that the private property be cleared, and an added dogmatic statement about personally seeing that the female picketers would not continue to approach customers. Soon Amarillo police officer Jerry Massengill appeared and sought to mediate the confrontation with aid from a superior. At this point Tipton appeared to add heated remarks about how persons devoted to the Union must fall

[1] In the course and conduct of retail grocery business operations at Amarillo, Texas, Respondent annually receives gross revenue in excess of $500,000 while purchasing and receiving goods valued in excess of $50,000 directly from suppliers located outside the State of Texas. On these admitted facts I find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and otherwise that the Union is a labor organization within the meaning of Sec. 2(5).

[2] All dates and named months hereafter are in 1979, unless shown otherwise.

[3] Initially a comprehensive schedule of picketing was envisaged by Patterson to blanket most of Respondent's Amarillo area operations. This was not in actuality fulfilled, yet sufficient picketing did occur on the original August 10 date and throughout that month to trigger all but one of the episodes comprising this case. The Martin Road store is an integral part of a shopping center comprising several other businesses.

back to the public domain. Utimately, arrests were made of Price, Sain, Patterson, and Shelton, leading to prosecution for criminal trespass in the municipal court and ultimate acquittal.

A separate branch of the case concerns remarks about the hiring prospects of those identified with the Union. Sain testified that while working a part-time job at Union Foods Distributor Company (a wholesaler totally unrelated to Respondent) in mid-April, she conversed with Steve Johns about job prospects. Johns was at that time market manager for a Bell Street store of Respondent in Amarillo, and was himself working a part-time second job at United Foods. In her former employment with Respondent, this having ended in 1977 under circumstances that form part of the C cases litigation mentioned above, Sain had worked approximately 1 year for Johns as a meatwraper. In this context, and as occurring about mid-April, it is Sain's testimony that Johns conceded he was just losing a meatwrapper, but in view of all the union troubles and problems associated with Sain as "a Union person" he could not consider her for hire back.

On a separate note, Ramey and Elizabeth Nepper testified that on August 31, after numerous days of picketing the South Washington Street store, they initiated conversation with Store Manager Barry Hawkins about whether he was curious concerning their reasons for picketing. Ramey recalled that his answer to this was "because we didn't hire Union people," while Nepper termed it "yes, because we don't hire Union people," following which she asked incredulously, "you mean we can't work for you?" and heard Hawkins answer, "That's right!"

The testimony of Tipton is that after learning of multistore picketing activities during the afternoon of August 10, he persuaded pickets at a Grand Street store to move some distance away from the customer entrance and then traveled to the store at the Martin Road-Amarillo Boulevard intersection. His first observation there was one of Price (surname Walker) and Sain, who in his view were impeding the approach of customers. Tipton spoke with them, bluntly requesting that they move off the sidewalk and at least out to the parking lot. They summoned Patterson, who engaged Tipton (now joined by Smithey) in conversation. The two agreed to disagree over whether Patterson's members need move off the sidewalk, and after further scattered remarks by Respondent's representatives urging departure off the private property, which constituted the approximate 6-foot-wide sidewalk, both officials returned inside where Smithey telephoned police. Smithey was the individual who formally pressed trespass charges on which prosecution of these four persons proceeded to acquittal.

Regarding the April incident involving Sain, on which paragraph 7(c) of the complaint is based, Johns testified that he was sporadically moonlighting as a meatcutter for United Food Company during the spring of 1979.[4] Johns testified that he randomly worked with Sain as she, too, performed part-time employment there as a meatwrapper and a secretary. He recalled a casual talk with Sain as a person once under his supervision, but denied discussing "anything to do with the Union," saying that if the subject of reemployment arose between them he simply and solely referred her to Respondent's main hiring office.

Hawkins testified that as manager of the South Washington Street store he would see Ramey and Nepper sporadically picketing his store for 6–8 hours per day whenever they appeared during August. He made passing remarks to them about weather, but denied any exchanges about employment or the apparent object of their cause. He expressly denied making any statement of the type attributed to him on August 31.

I defer treatment of the issue that is primarily one of law and concerns the respective rights of parties concerning picketing on a private sidewalk in close proximity to the Martin Road store. Taking first the allegations of paragraph 7(c), I conclude it is not time-barred by Section 10(b) of the Act. A statute of limitations ordinarily takes liberal construction, and here the charge in Case 16–CA–8759 as filed October 12 was not originating at a point in time exceeding fair meaning of the estimate "middle of April." There is no ready way to particularize the date of Johns' claimed remark, and I see no reason to hypertechnically reason that a full 6-month period appears to have preceded such filing. A secondary theory that I note is that the earlier charge, filed in August, contained a "catch-all" allegation sufficient to embrace the April incident. Here the quirk is an apparent merger of all aspects of that charge into the original complaint as issued only for Case 16–CA–8650, which is silent regarding this allegation and therefore seemingly breaks a link by which the requisite relatedness must be shown.

On the merits I am first persuaded to term Sain as a highly credible witness. This is so both intrinsically as her demeanor and consistency under cross-examination would show, and comparatively in terms of Johns' wooden, unimpressive testimony on key points in which he projected some recalcitrance to call out his true memory and for which I discredit his flat denial of subjects conversationally covered. However, that does not end the matter. The exact words described by Sain are not free from ambiguity in terms of whether Johns was enunciating a wrongful intent or commenting on the legal position of his employer having formally resisted her pending claim for reinstatement.[5] Johns is not shown to have had any consistently integral role in Respondent's customary hiring practices for its meat departments, nor can it be said that while utterly unattached from the course of his regularly supervisory employment such a chance remark should be enthusiastically attributed to Respondent. I am convinced that Johns' *actual* words amounted to no more than comment on Respondent's manifest resistance to Sain's resumed employment, as

[4] Johns is now employed as a market manager in one of Respondent's Lubbock, Texas stores. At material times he was market manager at the Bell Street store in Amarillo, supervising five other persons of the meat department.

[5] Sain is specifically 1 of 14 alleged discriminatees in consolidated C and R cases previously heard and now awaiting decision by a judge (Tr. 23, 193).

pressed in the NLRB's primary forum. Finally, Sain could hardly be coerced more drastically than through unlawful discharge and, should the purifying process of law result in this conclusion, her rights will be then fully summarized. For these reasons, I decline to characterize the evidence pertaining to paragraph 7(c) of the complaint as adequate proof of an unfair labor practice.

Regarding paragraph 7(d) of the complaint, I find the same general pattern here as to a finding of fact. Ramey and Nepper were persuasively credible in demeanor, candor, and consistency.[6] Conversely, Hawkins impressed me as blandly unwilling to search his memory, and I doubt his version of limited interchange with the picketers to the point of discrediting it. It is highly probable that these picketers did, as described, tire of a seemingly unproductive effort and politely tease some comment from Hawkins, their most visible adversary. Yet, here his words, when taken most favorable to the General Counsel, are even less actionable than those treated above. Hawkins had been impeccably free of unsolicited comment toward Ramey and Nepper, their approach to him on August 31 had somewhat taunting overtones, and the faint meaning of his words by Ramey's version is that he did no more than restate their own legal posture. For these reasons I again decline to find that the episode constitutes an unfair legal practice.

In *Giant Food Markets*, 241 NLRB 727 (1979), and *Hutzler Bros. Co.*, 241 NLRB 914 (1979), the Board recently found an 8(a)(1) violation in situations practically indistinguishable from what is represented here. Both cases involved attempted indepth publicity by nonemployees to retail customers imminently entering a shopping center establishment, and threat of arrest directed to such publicists. Relatedly, the physical configuration of boundary streets, vehicular entryways, a large parking surface, and targeted sidewalks having the technical character of private property was essentially the same. Such a layout must tentatively be viewed as the functional equivalent of a "community business block,"[7] although not to the extent that it must be deemed randomly open "to the general public."[8] Picket signs carried by Price and Sain in the instant case were synonymous with those in *Giant Food Markets*, and thus plainly of "area standards" character.[9]

Given this comparability, the question quickly becomes one of whether consideration of *Sears Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), must dictate a different result. Respondent asserts that in *Giant Food Markets* the Board incorrectly differed with the United States Supreme Court regarding the significance of area standards picketing, and that in *Hutzler* the high Court's holding was simply ignored.[10] My own duty is to abide the Board's doctrine, unless unaccountably at odds with evident teaching of the United States Supreme Court.

In *Sears*, five justices, exclusive of a separate concurrence, traced the interplay of trespassing activity by unionists and the relationship to fundamental accommodation between state and Federal sovereignty as manifesting in the doctrine of preemption. This review covered *Garner*,[11] *Farmer*,[12] and *Garmon*[13], leading the Court to review the fact situation of *Sears* in which a restraining order of state court caused retreat of picketers who had peacefully patrolled a private walkway in ostensible protest of construction craft personnel being utilized inside an adjoining department store without having been dispatched under an applicable master labor agreement. From this the Court reasoned that the injunctive action was privileged because the controversy presented to the state court was carefully focused only on the *location* of the picketing, a "critical inquiry" quite different from whatever controversy could have been presented to the Board. Furthermore, the Court was influenced by the picketing union's failure to file an unfair labor practice charge and, that as a beleaguered enterprise *Sears* was without other effective remedy[14] because an unfair labor practice charge of its own would simply trigger the "complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred" in terms of whether the picketing had a recognitional or work reassignment objective as such would have triggered "arguable" protection under *Garmon* in the absence of any contemporaneous state interest of compellingly urgent need to protect. Cf. *Laburnum Construction Corp. v. Smith*, 347 U.S. 656 (1954); *Auto Workers v. Russell*, 356 U.S. 634 (1958); *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966); *Farmer*, supra.[15]

The Court complicated its rationale with certain conjectures and assumptions, and in the process was moved to comment that a related principle of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), scrutinizes the point at which Section 7 rights other than hardcore organizational activity may be favorably accommodated when a "locus" of their respective nature and strength as compared to "private property rights asserted in any given context" leads to some balanced choice at a point "along the spectrum." At this point in the *Sears* opinion, the Court was intrigued by whether trespassory activity was

[6] It is true, however, that their powers of observation or recollection are somewhat suspect when the two versions of their testimony are compared, particularly about Ramey not adding the colorful and presumably memorable final exchange between Nepper and Hawkins.

[7] *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968).

[8] *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972).

[9] The fact that both these individuals were alleged discriminatees in a case awaiting decision following trial does not appreciably change their status as nonemployees. From Respondent's standpoint, and here emphasizing its property rights as technical lessee of realty, such persons were validly discharged for cause and lacked any continued connection to the business. My observation is without force regarding the collateral issues of discharge, but only to highlight that for analytical purposes here they were equitable with nonemployees, particularly since accompanied at the time by staff functionaries of the Union.

[10] Respondent reports in its brief that these Board decisions have been appealed to the Sixth and Fourth Circuit Courts of Appeals, respectively.

[11] *Central Storage v. Teamsters Local 776*, 346 U.S. 485 (1953).

[12] *Farmer v. Carpenters*, 430 U.S. 290 (1978).

[13] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

[14] The Court expressly discounted the course of meek acquiescence as "legitimately" disdained, or self-help as fraught with undesirable "risk of violence."

[15] I note that placid nature of picketing at the Martin Road store, and contrary to Respondent's contention, hold that no interference to prospective customer occurred. The evidence, pictorial and otherwise, does not show obstruction of persons, deliberate blockage of the store's single door, or any other conduct peculiarly different than when the shopping public confronts a center of attention.

inherently usually unprotected, yet tied the matter back into *Babcock & Wilcox* in the sense that the collateral question of alternative reasonable means of communicating the labor organization's message, or discriminatory treatment of solicitations were each involved. The Court also wrote perhaps its most puzzling sentence,[16] and followed with opinion language and a footnote 42 upon which Respondent here places so much emphasis. Such lengthy passages are quoted below:

> Even on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation,[42] it would be unprotected in most instances. While there does exist some risk that state courts will on occasion enjoin a trespass that the Board would have protected, the significance of this risk is minimized by the fact that in the cases in which the argument in favor of protection is the strongest, the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum. Whatever risk of an erroneous state-court adjudication does exist is outweighed by the anomolous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issue in those cases in which the disputed conduct is least likely to be protected by §7.
>
> If there is a strong argument that the trespass is protected in a particular case, a union can be expected to respond to an employer demand to depart by filing an unfair labor practice charge; the protection question would then be decided by the agency experienced in accommodating the §7 rights of unions and the property rights of employers in the context of a labor dispute. But if the argument for protection is so weak that it has virtually no chance of prevailing, a trespassing union would be well advised to avoid the jurisdiction of the Board and to argue that the protected character of its conduct deprives that state court of jurisdiction.

[42] This assumption, however, is subject to serious question. Indeed, several factors make the argument for protection of trespassory area-standards picketing as a category of conduct less compelling than that for trespassory organizational solicitation. First, the right to organize is at the very core of the purpose for which the NLRA was enacted. Area-standards picketing, in contrast, has only recently been recognized as a §7 right. *Hod Carriers Local 41 (Calumet Contractors Assn.)*, 133 N.L.R.B. 512 (1961). Second, *Babcock* makes clear that the interests being protected by according limited-access rights to nonemployee, union organizers are not those of the organizers but of the employees located on the employer's property. The Court indicated that "no . . . obligation is owed nonemployee organizers"; any right they may have to solicit on an employer's property is a derivative of the right of that employer's employees to exercise their organization rights effectively. Area-standards picketing, on the other hand, has no such vital link to the employees located on the employer's property. While such picketing may have a beneficial effect on the compensation of those employees, the rationale for protecting area-standards picketing is that a union has a legitimate interest in protecting the wage standards of its members who are employed by competitors of the picketed employer.

[16] As stated in *Sears*, 436 U.S. at 205:

> For while there are unquestionably examples of trespassory union activity in which the question whether it is protected is very debatable, experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected.

Cf. *Seattle First National Bank*, 243 NLRB 898 (1979).

Sears, supra at 206–207.

It is clear that the Board would routinely find a violation on the instant fact situation. In *Giant Food Markets* the Board sweepingly addressed Respondent's contentions by noting that in a shopping center context the labor organization's intended audience is not readily identifiable, that practicalities of vehicular entry from a public throughfare into such typical parking lots is not conducive to orderly communication, and that area standards picketing is an "affirmatively protected" activity. *Hutzler* practically made a parody of the alternate means of contact notion by analyzing the singular and collective inadequacy of "newspapers, radio and television stations, billboards, sound trucks, posters and banners, office space rentals, handbill distribution at parking lot entrances, street contacts, telephone contacts and home visits." Were this not enough, the opinion that the Board adopted even treated the prospect of tracing license plate numbers, intercepting persons at nearby bus stops, or attempting to convey the desired message to individuals when found in nearby public places including restaurants. I believe that the meaning of *Sears* is not only that such a controversy as pertains here is uniquely suited for NLRB resolution, but that the necessary balancing militates in favor of the Union. All of its agents behaved peacefully and with deference to legitimate business interests. No alternate form of publicity was present beyond those types rejected in *Hutzler*, and an unfair labor practice charge was promptly filed in protest of forced suspension of picketing. Respondent has advanced no compelling property interest in the sense of diminished value, and in fact as a lessee (rather than lessor) is more immune from risk based on such an unwelcome advent.[17] Further, there was an actual admission by Tipton that Respondent has allowed bake sales on its sidewalk, a circumstance no less disruptive to free flow of customers than peaceful picketing seeking only voluntary dialogue even while the approaching person continues or quickens their step toward the entrance.[18]

I believe the most influential factor here was the threat of arrest, the arrival of a police officer, and the subsequent prosecution. Most precedent that pertains to a matter of this type merely involves injunctive relief sought institutionally against a labor organization. *Logan Valley*, supra; *Giant Food Markets*, supra; *Hutzler Bros.*, supra. Here a personal jeopardy or apprehension was set in motion without a showing that other less drastic op-

[17] See *Peddie Buildings*, 203 NLRB 265 (1973); cf. *Giant Food Markets* in which Wiggins & Co., a party to the proceeding in the capacity of lessor to other respondents, was found to have taken no action and was thus exonerated from allegations of unfair labor practice conduct.

[18] This is a specific indication of discriminatory treatment as emphasized by the Court in *Sears*, and ties into the fundamental question of whether trespassory conduct need cause a forfeiture of private rights as potentially contemplated in *Babcock & Wilcox*.

tions were not available to Respondent.[19] Again in the sense of a "spectrum," this pugnacious tactic is highly coercive in nature and tips the balance in favor of a remedial restoration of the Section 7 rights so unjustifiably abused. Accordingly, I render conclusions of law that by threatening to cause arrest, and by causing arrest, of the Union's pickets and representatives while they were engaging in protected activity under Section 7 of the Act, Respondent violated Section 8(a)(1) of the Act, but that it has not violated the Act in any respect other than as specifically found.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, United Supermarkets, Inc., Amarillo, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to cause arrest, and causing arrest, of any union pickets and representatives while peacefully picketing as part of protected concerted activity at Respondent's portion of the Martin Road-Amarillo Boulevard shopping center.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Amarillo, Texas, area stores and other conspicuous places in the Martin Road-Amarillo Boulevard Shopping Center, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the consolidated complaint be dismissed in all other respects.

[19] I recognize that in *Central Hardware* an arrest was made, yet that related to the field organizer of a union who ducked an outdoor confrontation and then persisted in remaining inside the store in guise of a "customer." In *Scott Hudgens*, 230 NLRB 414 (1977), the tortuous fact situation and procedural background involved unfulfilled threats to arrest pickets. In this latter case no law enforcement figure appeared, and to that extent the arguably protected rights in process were not held up to doubt in the public's eye or in the awareness of an employer's own employees.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Ken Hash Construction, Inc. ***and*** **District Council of Carpenters of Seattle, King County and Vicinity.** Case 19–CA–15705

30 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 30 January 1984 Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

As found by the judge, the Respondent is "an employer engaged primarily in the building and construction industry" within the meaning of Section 8(f) of the Act. In *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), the Board overruled *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973), abandoned the conversion doctrine, and modified unit scope rules in 8(f) cases. The Board decided to apply the following principles (at 1377–1378):

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

Applying *Deklewa* to the instant case, we reverse the judge and conclude that the Respondent violated Section 8(a)(5) and (1) of the Act. On 27 August 1981 the Respondent entered into a compliance agreement with the Union, which bound it to all provisions of the existing Western and Central Washington Area labor contract between the Associated General Contractors of America and pertinent affiliates of the United Brotherhood of Carpenters and Joiners of America. The contract was effective until 1 June 1983. On 8 February 1983 the Respondent repudiated the compliance agreement. The complaint alleges that since that date the Respondent has violated Section 8(a)(5) by failing to continue in full force and effect all the terms and conditions of the agreement.

Under the first *Deklewa* principle, the collective-bargaining agreement is enforceable under Section 8(a)(5) of the Act. However, under the fourth principle, the Union enjoyed no presumption of majority status following the contract's expiration date of 1 June 1983, and thus at that point the Respondent was free to repudiate the 8(f) bargaining relationship. Therefore we find that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the 1981–1983 contract with the Union during the contract term and shall limit the make-whole remedy accordingly.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By repudiating its 1981–1983 collective-bargaining agreement with the Union and withdrawing recognition from the Union during the term of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to make its employees whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), for any losses they may have suffered as a result of the Respondent's failure to adhere to the contract from 8 February 1983 until 1 June 1983, with interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[1]

[1] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Therefore, any additional amount owed with respect to the health and security fund and pension plan shall be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, Ken Hash Construction, Inc., Renton, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition during the term of a collective-bargaining agreement from District Council of Carpenters of Seattle, King County and Vicinity, as the exclusive collective-bargaining representative of the Respondent's employees covered by the agreement.

(b) Refusing to adhere to its 1981–1983 collective-bargaining agreement with the Union until the 1 June 1983 expiration date.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the above-described employees, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent's failure to adhere to the contract from 8 February 1983 until it expired on June 1983.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Renton, Washington office copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by District Council of Carpenters of Seattle, King County and Vicinity, if willing, in conspicuous places where notices to employees and members are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, during the term of a collective-bargaining agreement, repudiate that agreement and withdraw recognition from District Council of Carpenters of Seattle, King County and Vicinity, as the exclusive collective-bargaining representative of our employees covered by the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make our employees whole for any losses they may have suffered as a result of our failure to adhere to the 1981–1983 contract with the Union until the contract expired on 1 June 1983.

KEN HASH CONSTRUCTION, INC.

George I. Hamano, for the General Counsel.
Judd H. Lees, of Mercer Island, Washington, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried at Seattle, Washington, September 27, 1983.[1] The charge was filed by District Council of Carpenters of Seattle, King County and Vicinity (the Union), on May 13, and the complaint was issued June 28. The primary issues are whether Ken Hash Construction, Inc. (Respondent), repudiated a collective-bargaining agreement with the Union on February 8, and thereafter until June unlawfully failed to maintain in effect former terms and conditions of employment, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act.

On the entire record,[2] including my observation of the demeanor of witnesses, and after consideration of briefs

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates and named months hereafter are in 1983, unless otherwise indicated.

[2] The General Counsel's unopposed motion to correct the transcript, dated October 31, is granted and received in evidence as G.C. Exh. 19.

filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent maintains an office and place of business in Renton, Washington, where it is engaged as a general contractor in commercial building construction. During a representative past 12-month period, it had gross sales in excess of $500,000 and sold goods or provided services valued in excess of $30,000 from facilities in Washington to customers within the State, each of whom met an other than indirect jurisdictional standard of the National Labor Relations Board, while during that same representative period purchasing goods and materials directly from outside the State valued at $2500, and purchasing goods and materials from suppliers within Washington, each of whom had in turn obtained such goods and materials directly from sources outside the State, valued at $30,000. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Basis of Analysis*

On August 27, 1981, Respondent entered into a compliance agreement with the Union, which bound it to all provisions of the existing Western and Central Washington Area labor contract between the Associated General Contractors of America (AGC) and pertinent affiliates of the United Brotherhood of Carpenters and Joiners of America (UBCJA). Thereafter in workweeks from that ending Wednesday, September 23, 1981, to that ending February 9, Respondent paid applicable wage scale to its carpenter employees and made periodic contributions to benefit funds. On February 8 Ken Hash, Respondent's president, wrote the Union advising that the initial compliance agreement was repudiated.

During the approximate 18-month period following its effectiveness, Respondent had performed various jobs within the Union's geographical jurisdiction as a tenant improvement contractor. About half these were at Bellevue Square Shopping Center, while the balance were miscellaneous commercial or residential projects in the vicinity. Respondent's steadiest employee was Steven Schneider, a cousin-in-law to Hash. Schneider worked close to a full-time basis during October and November 1981, and then tapered off into the new year following which he did not reappear on the payroll for 6 months because of a skiing injury. Then for the fall and winter months of 1982–1983, his pattern of hours worked resembled those of the prior year. Schneider's chief replacement was S. Robert Tellefson, who averaged 72 hours per week from February through June 1982 and worked briefly again in the fall. Two other persons with significant employment were Jerry Wysocki and John Stenslie, whose total annual hours of at least 230 each were concentrated in early and late 1982, respectively. Hash utilized Chris Hall as a carpenter for 104 hours work in early 1982 and employed former coworker Alvin Klein for 128 hours spread over September and October of that year. Robert Bineck worked an insignificant 30 hours during spring of 1982, and Keith Hanson had a tryout as journeyman carpenter in August, which lasted only 14 hours.

Of Respondent's approximately 20 projects during times material to the case, excluding those under 8 hours total time, Schneider worked on 13, Tellefson worked on 5, while Wysocki and Stenslie each worked on 4. All carpenters employed by Respondent were members of locals affiliated with the Union, and the only cessation of membership involved Schneider who took a withdrawal from Local 1797 in March 1983.

B. *Analysis*

This is a classic situation of an employer executing a prehire agreement authorized by Section 8(f) of the Act at a time when it had no employees, and then commencing operations appropriate to its business purpose. In that setting the questions are those of whether a permanent and stable work force was achieved, and whether the Union represented a majority of an appropriate unit within such work force.

Here the very nature of Respondent's business anticipates the random deployment of carpenters as various renovation work progresses towards completion. A service of this type is not akin to construction projects in which employment concentrates in a series of discrete jobsites. For this reason the overall profile of when and to what degree carpenters were utilized is the most revealing test on the issue of whether operations led to reopening of the compliance agreement into a recognizable bargaining obligation under Section 9(a).

Such an examination shows only limited, sporadic use of the craft, insufficient to demonstrate that a requisite nucleus of employees was at any time the core work force of permanence and stability over any significant period of time. Cf. *Hageman Underground Construction*, 253 NLRB 60 (1980). With rare exception, there was only one carpenter with substantial employment in each of the passing months. The first such occasion was that of November 1981 when Wysocki joined Schneider to the extent of 40 hours work during the month. Wysocki did not continue on the payroll during December 1981 and reappeared for only 114 and 90 hours in February and March 1982, respectively, plus an insignificant 3 hours work later in June. Tellefson became Schneider's essential replacement, but aside from February and March 1982 when he combined variously with Wysocki and Hall for 195 and 214 total monthly hours of work he did not function as part of any appreciable nucleus of employees until Schneider himself had returned by September 1982. In that month, as well as October and November directly following, Respondent's use of carpenters peaked with 289, 307, and 258 hours, respectively. However, these totals include Klein, who worked only portions of 2 consecutive months and Hanson, who was quickly found unqualified. From December 1982 onward only Schneider remained on the payroll, the consequence of this overall review showing only fortuitous, casual

and irregular calling of personnel in a manner that lacks the requisite doctrinal characteristic of permanence and stability, let alone a showing of employee combinations for even a significant span of time.

Beginning with 1983, Respondent employed only Schneider, a circumstance leaving the carpenter craft bargaining unit inappropriate. The same policy grounds that influence the Board to decline issuing certifications in single person units apply when it is sought to elevate an 8(f) undertaking to that in which majority representative status is claimed. Accordingly, I render a conclusion of law that Respondent has not violated the Act as alleged.

[Recommended Order omitted from publication.]

General Portland Inc./Fort Worth Plant *and* Cement, Lime, Gypsum Allied Workers Division of International Brotherhood of the Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Case 16–CA–11785

30 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 12 September 1985 Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] conclusions[2] and to adopt the recommended Order.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Inasumuch as we agree with the judge that the Union's assertion of safety complaints was a pretext to engage in a series of work stoppages, we find it unnecessary to rely on his alternative finding that the Union was obligated to follow the prior grievance procedure for matters which allegedly arose during the extended term of the prior contract. We also find no need to rely on the judge's discussion in fn. 31 of his decision of the legality of an employer's use of permanent and temporary replacements during a lockout. See *Harter Equipment*, 280 NLRB 597 (1986).

[2] In dismissing the complaint, we emphasize our reliance on the particular facts of this case in which the Respondent had legitimate and substantial justification for placing conditions on the strikers' reinstatement. We further find that the General Counsel has failed to meet the burden of proving actual antiunion intent or that in the circumstances of this case the Respondent's insistence on 21 days' advance written notice of work stoppages and/or its later revised 3 days' advance notice requirement constituted inherently destructive conduct. We also find that the present case is distinguishable from the cases cited by the General Counsel and the Charging Party, in which the Board found that employers had unlawfully conditioned the strikers' reinstatement after they had unconditionally offered to return to work. Unlike here, in *Brooks, Inc.*, 228 NLRB 1365 (1977), the strikers were unfair labor practice strikers and there were no threats by the union of future strikes. *American Cyanamid Co.*, 235 NLRB 1316 (1978), involved unfair labor practice strikers and the employer's requirement of an absolute waiver of reinstatement rights for the strikers, whose jobs had been permanently contracted out, and a 1-year bargaining waiver. Although *Lindy's Food Center*, 232 NLRB 1001 (1977), and *Roadhome Construction Corp.*, 170 NLRB 668 (1968), involved economic strikers, they are distinguishable because the employers there did not prove a legitimate and substantial business justification for conditions placed on the strikers' reinstatement.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

J. O. Dotson, Esq., for the General Counsel
Ray J. Schoonhooven, Esq., Frederic H. Fischer, Esq., and *Kay Ann Hoogland, Esq. (Seyfarth, Shaw, Fairweather & Geraldson)*, of Chicago, Illinois, for the Respondent
Stephen B. Rubin, Esq. (Asher, Pavalon, Gittler & Greenfield), of Chicago, Illinois, for the Charging Party

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. At the end of an economic strike called by the Union to protest the suspension of several bargaining unit employees, the Respondent refused to accept the unconditional offer of the strikers to return to work, and it locked out everyone not then working until the Union agreed to give an advance notice of 21 days before calling any future work stoppages. I find that Respondent acted lawfully when it conditioned the return of the strikers on the Union's signing an agreement to give 21 days' notice before commencing any future work stoppages, and I shall dismiss the complaint.

This case was tried before me in Fort Worth, Texas, on 22–25 April 1985 pursuant to the 7 March 1985 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on a charge filed 10 August 1984 by Cement, Lime, Gypsum Allied Workers Division of International Brotherhood of the Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO (Union or Charging Party), against General Portland Inc./Fort Worth Plant (Respondent, GP, or General Portland).[1]

In the complaint the General Counsel alleges that during July-September the Respondent violated Section 8(a)(3) and (1) of the Act by conditioning reinstatement of strikers at its Fort Worth, Texas plant on a requirement that the Union agree in writing to give Respondent advance notice of up to 30 days before commencing a work stoppage, and by refusing to reinstate strikers when the Union declined to agree to Respondent's condition.

By its first amended answer Respondent admits certain factual matters, denies violating the Act, and pleads several affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

[1] All dates are for 1984 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

A Delaware corporation with a plant in Fort Worth, Texas, Respondent manufactures, sells, and distributes cement. During the past 12 months, Respondent purchased and received at its Fort Worth plant products exceeding $50,000 in cost directly from points located outside the State of Texas. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act (1:33).[2] Although Respondent so stipulated, it expressly reserved its position that the Union is not the statutory representative of Respondent's employees at the Fort Worth plant. The relevance of this contention is discussed later.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. The Fort Worth plant

At its Fort Worth plant Respondent manufactures Portland cement, oil well cement, and other cement-related products. Division General Sales Manager William E. Smith was the manager of Respondent's Fort Worth plant during the 1984 events made the subject of this proceeding (3:596). Smith described in detail the nature of the cement production at Fort Worth and the type of equipment and machinery used. He also submitted a four-page document describing the process (R. Exh. 28).

Raw materials are crushed and formed into a slurry. The slurry is fed in a continuous process into three kilns where it is burned at a temperature of about 2700 degrees Fahrenheit (4:783; R. Exh. 28 at 1). The burning causes the slurry to form into black balls known as clinker (3:622). The clinker is reground with a small percentage of gypsum into Portland cement. The finished product is stored in silos and thereafter shipped to customers (3:622–624).

The heart of this pyroprocessing line, as it is called, is the rotary kiln and its ancillary equipment (3:612). The kiln is a huge horizontal cylinder 11 feet in diameter, over 400 feet long, with walls made of three-fourths-inch steel (3:620, 641). Each kiln is positioned on six sets of rollers and, in the continuous process, rotates about its longitudinal axis about one revolution per minute (R. Exh. 28 at 1). Excluding the refactory brick lining the kiln, the material inside the kiln weighs from 60 to 200 tons or more (3:641; R. Exh. 28 at 4). There is a complex system of fans used to exhaust the heated air and to assist in what cooling is undertaken. General Sales Manager Smith estimated the current cost of replacing a kiln at $15 to $20 million (3:638; R. Exh. 28 at 2).

On leaving the kiln, clinker is moved to the finish mill where it is ground into powder before being stored and shipped to customers. Finish mills also are cylinders, although they are "only" 13 feet in diameter and 16 feet long. They are half full of 3-inch steel balls which grind the clinker into powder as the cylinders are rotated (3:648). As with the kilns, the replacement cost for a finish mill is $15 to $20 million (3:648).

As one might expect with the extreme heat utilized in the kilns,[3] and with the presence of gases there is an abundance of danger from the possibility of explosions which can result in the loss of life and result in damage in the millions of dollars (3:639). Smith described a 1981 incident at Fort Worth resulting in the death of two workers from a steam explosion caused when water rushed into the superhot area of the kiln (4:871–872).

As the record reflects, training of the kiln operator (burner) is extensive, and Respondent has issued its kiln burner employees an instruction manual containing over 60 pages (3:632).[4] Two other employees work with the kiln, a feeder employee and an oiler. The burner, of course, has the critical duties. Respondent's around-the-clock operation requires that employees working in continuous process jobs, including the kilns, change shifts at their duty stations (3:618, 626).

Although massive in size, the kilns are delicate equipment because of the extremely high temperatures used in production. Improperly shutting down a kiln poses severe risks to both people and property. Smith testified that it is during shutdown that the greatest hazard potential exists for explosions, injury, and damage (3:638, 642).

In the production process the kiln expands over 10 inches in length (3:640). When a kiln is shut down, such as for maintenance, a specific procedure is followed. the burner's instruction manual contains three pages devoted to this critical sequence (3:632, R. Exh. 30). A procedure is described for an emergency shutdown. As the kiln cools during the shutdown, it must be rotated every few minutes or it can warp into a giant, useless steel banana (3:640).

As one would anticipate, the normal shutdown time takes longer than is required for an emergency situation. Smith testified that it required 3 days for Respondent to completely shut down kiln 3 in mid-May (4:785–786, 793, 814). However, it appears that kilns are not normally shut down completely to effect minor maintenance or adjustments, particularly when the adjustments occur away from the superhot area of the kiln.

International Representative Paul H. Balliet estimated that it would take 12 to 16 hours to shut down a kiln the size of Respondent's (2:231). He further testified that the rotating could be done periodically and, therefore, the kiln would not have to be attended constantly during the (emergency, apparently) shutdown procedure (2:239–240). I credit Smith over Balliet to the extent there are differences on this. Smith has had much more experience

[2] References to the 4-volume transcript of testimony are by volume and page.

[3] The heat is produced by gas- or coal-fired processes (R. Exh. 28 at 2).

[4] It apparently takes weeks to train a new employee for the kiln burner job (4:833).

in the cement industry, and he is particularly familiar with the equipment at Respondent's Fort Worth plant.

Smith testified that the emergency procedure requires at least 16 hours of constant attention to shut down a kiln safely (4:765–766, 785, 825). The kiln must be rotated one quarter turn up to four or five times the first 30 minutes (3:640; 4:765), and periodically the balance of the 16 hours (4:784).[5] After the first 16 hours the attendant can cease his constant attention to the kiln and occasionally walk away from it, but even after the 16 hours the kiln still must be turned at different intervals (4:784–787). By the 36-hour mark, Smith testified, an attendant could go to the kiln every hour or so and rotate it slightly (4:826).

The principal focus has been on the kiln, but there are other functions Respondent classifies as part of the continuous process, including the finish mills. Although explosions are not one of the dangers from incorrect operation or an improper shutdown of a finish mill, such actions can result in extensive damage of motors, bearings, equipment, and product (3:648–651). Smith testified that in an emergency a finish mill could be shut down in 15 to 20 minutes (4:767).

2. Bargaining history

Respondent and the Union have been parties to a succession of collective-bargaining agreements (CBA) at the Fort Worth plant (2:84). Recognition is extended there by Respondent to the United Cement, Lime, Gypsum Workers International Union, AFL–CIO, CLC, and its local unions. Local 68 was the union designated for the Fort Worth plant. Respondent negotiated a basic agreement for general application plus supplemental agreements covering the different plants, such as the Fort Worth plant. By its terms, the most recent CBA was effective from 1 May 1981 through 30 April 1984 (R. Exh. 14). Through agreement, the parties extended the contract until either mid-May[6] or 9 July at 7 a.m.[7] Smith, then the plant manager at Fort Worth but now the division sales manager, also testified that after 15 May the parties engaged in further bargaining, but those negotiations were unsuccessful (3:600–601).

Before passing from 15 May, I should note that on that date Smith called Balliet and asked if he would promise an orderly shutdown in the event of a work stoppage. Balliet agreed that he would do so (3:599). Balliet confirmed this at the hearing (2:185). Moreover, Smith credibly testified that Local 68 President Pilcher gave him the same promise on this occasion (3:600). Pilcher did not testify.

It is undisputed that the morning of 9 July (apparently with the start of the 7 a.m. shift) Respondent implemented the terms of its last best offer which it had made to the Union (3:601). From the testimony of International Representative Paul H. Balliet (2:186) and Local 68 President Odis W. Johnson (2:270),[8] it is clear that the Union was aware, or had been notified, that Respondent planned to implement its last offer at that time.[9]

B. *The Strike of 9 July 1984 and Subsequent Events*

1. Union meeting of 8 July 1984 at Holiday Inn

On Sunday evening, 8 July, the Union held a meeting at a local Holiday Inn. International Representatives Balliet and Hammond attended, along with Local 68's president, Richard Pilcher, Vice President Odis Johnson, plus three or four employees who apparently were members of one or more committees of the Union. About 10 persons were present.

Regardless of whether the initial purpose of the meeting concerned safety, it is clear that at the meeting a discussion ensued concerning a technique of confronting management. Balliet testified that he made available to those in attendance some 10 photocopies of two pages[10] from some book describing a tactic of confrontation allegedly used by UAW Local 282 in St. Louis in 1981 (2:195, 244).

The copied material relates a story concerning UAW Local 282 and Moog Automotive, and begins with the sentence, "Another alternative is what used to be called a 'slowdown strike.'" The article states that in September 1981 Moog Automotive, Inc., a parts supplier, presented the 500-member local with a final offer which would have cut wages by $3 an hour while boasting of record sales and making a 38-percent return on investment.

Rather than calling a traditional strike in the face of probable replacements from the 100,000 unemployed in St. Louis, the Union decided on a different tactic described as follows in Balliet's leaflet:

> When the contract expired, all rules were off. Workers in every department were signed up for a "Solidarity Committee." Under the leadership of a committee, the Moog workers began to "work to rule," refuse overtime, hold union meetings on the plant floor during lunch, and take concerted action to directly confront management over health and safety and production problems right on the spot. Most workers gave a dollar a week to a Solidarity Fund to help workers who might be suspended or fired. "We developed our own strategy on handling grievances," says Mike Cannon, shop chairman. "Workers would all get together, turn off their ma-

[5] Much more is involved than simply rotating the kiln. Thus, the coal feed is stopped, the temperature must be reduced gradually, and other items, such as fans and chains, have to be stopped (R. Exh. 30 at 4).

[6] Thomas W. Tatum, Respondent's vice president of employee relations, testified that August Clavier Jr., the Union's contract negotiator, canceled the contract extension about 10 May (2:507). Smith, the former plant manager, testified that the Union's cancellation was effective for 15 May (3:598).

[7] As testified to by International Representative Jack W. Hammond Jr. (2:84).

[8] Johnson took office as president of Local 68 on 1 January 1985. He was vice president of Local 68 during the preceding 3 years (2:251; 3:544).

[9] By letter dated 7 November 1984, NLRB Region 16 dismissed charges in two related cases. The dismissal letter reports that, by letter of 5 July, Respondent informed the Union that it planned to implement on 9 July the terms of its last offer (R. Exh. 5). I note this only in passing, for the 5 July letter is not in evidence, and the 7 November dismissal letter is in evidence only to show a course of events and not as evidence of the truth of independent factual assertions contained in the letter.

[10] The two pages are reproduced on a single page in the photocopies (R. Exh. 3, p. 2).

chines, and walk into the supervisors' offices. The foremen would cry, "Get back to work," but we insisted on talking about the specific problem until it was resolved."

On January 15, Martin Luther King's birthday, almost the entire work force stayed home. By March, the union was calling regular noontime and breaktime rallies inside the plant. Three times it called plantwide "Solidarity Days" on company time at the union hall. Over 80% of the employees attended.

Moog responded by stepping up the discipline. One worker received a suspension and reprimand for allegedly turning off his machine two minutes before quitting time. He taped the reprimand to the back of his shirt. When the foreman told him he couldn't do that, 70% of the workers in the department taped reprimand forms to their shirts too. The next day, the foreman was transferred.

Finally, Moog capitulated. The workers ratified an agreement that gave them a raise retroactive to their contract expiration date, two more raises over three years, COLA, insurance improvements, Martin Luther King's birthday as a paid holiday, a special grievance procedure on health and safety, and total amnesty and back pay for every single one of the seven members fired and 43 suspended during the six months of the action.

It is clear that the Union here planned to employ a similar tactic at the Fort Worth plant. Thus, a scheme was devised whereby employees would walk off the job the following morning for the purpose of attending a "safety meeting" at 7:30 a.m.

International Representative Hammond testified that he told the Holiday Inn group of how he had used the tactic on two occasions of expanding the safety and grievance committees at Kaiser Cement Company to encompass the whole shift. The Kaiser contract had expired and the Union previously had been unsuccessful in getting Kaiser to discuss the safety (inspecting spindles on quarry trucks) and grievance (Kaiser refusing to allow employees to take emergency calls) matters. According to Hammond, when Kaiser saw that its entire shift of workers had walked off the job and assembled to discuss the safety/grievance matters as a committee of the whole, the Company began talking, the problems were resolved, and the employees returned to work (3:517–518). Hammond then testified (3:518): "I told them that is what we want to do tomorrow."

Hammond further testified that the employees were to ask for relief before leaving their jobs to join the expanded safety committee, and that if Respondent refused to relieve them, then the employees were to shut down their equipment in an orderly fashion without harming anything. Referring to a passage in a book on labor law, Hammond warned the group that the employees' conduct would lose its protected status if the employees damaged equipment, cautioned that the Union could be sued, and told of other adverse consequences (3:516).

Odis Johnson testified that following the Holiday Inn meeting he telephoned several employees at home and told them to attend a safety meeting the next morning. He told them that between 7 and 7:30 a.m. they should ask for relief to attend a safety meeting, and to leave even if they received no relief (2:271–272).

During July–August 1984 C. E. Bartholomew was chairman of Local 68's grievance committee (2:289). He testified that although some of the Holiday Inn attendees were going to call employees that evening, other attendees planned to meet employees as they clocked in the next morning and give them their instructions at that time (2:306).

Testimony confirming all or parts of Hammond's version came from Balliat (2:241–242), Odis Johnson (2:268), C. E. Bartholomew (2:305), Gary L. Gann (3:390–391), and Clyde D. Carter (3:421). Balliet testified that the time suggested to wait for relief before shutting down was 15 minutes (2:248), but that no specific instructions were given to the kiln operators (2:242). Carter testified that as Tim Worthen, the burner/operator of kiln 3, was not present at the meeting, Carter spent about 30 minutes the next morning explaining to Worthen, and to finish mill operator Spencer Hart, that they should shut down their equipment in an orderly fashion if they were not relieved. At the hearing Carter did not define the "orderly fashion" in terms of minutes or hours, and if it differed from the 15 minutes described by Balliet the record does not show it.

During July–August 1984 Gary L. Gann was Local 68's financial secretary and a member of the grievance committee and the negotiating committee (3:376–377). Under cross-examination, Gann confirmed that the Holiday Inn group agreed that the only way the Union could force Respondent to return to the bargaining table was to use the confrontational tactic described to them by Hammond (3:397).

Finally, respecting the photocopy of a page describing the Moog Automotive confrontation, International Representative Balliet testified on cross-examination (2:195–196):

> Q. How do you recognize it?
>
> A. I reproduced this from a book and handed it on Sunday night to a few employees, members.
>
> Q. I see. To a few members, I see. What was the purpose of your introducing it and handing it out on Sunday night?
>
> A. Because of the—it is the Moog case, Moog Automotive case, in regards to protected concerted activity.
>
> Q. You handed it out so the employees would learn about in-plant tactics. Right?
>
> A. Yes.
>
> Q. And about confrontations with management. Right?
>
> A. Yes.
>
> Q. And is this what you were doing on Monday morning?
>
> A. Yes.
>
> . . . .
>
> Q. This in-plant confrontation which is described in this document is what you were engaging in on July 9, the morning, is it not?

A. Yes.

References to safety problems at the Holiday Inn apparently were rather vague and limited, as is the testimony concerning the subject. It seems that a certain P & H crane was considered unsafe by Odis Johnson. However, Johnson testified that his complaint about the crane was several months old (2:270). He concedes that he had never filed a grievance concerning the crane nor was he aware of anyone having filed a grievance over the crane's safety (2:270–271). Johnson also testified that he complained at the meeting about the taste of the water (2:270).

Respondent contends that the Union's reliance on safety was nothing but a cloak to mask a "quickie strike" or a form of industrial harassment (1:13; brief at 55–58). The purpose of this confrontation tactic was to bring Respondent back to the bargaining table (3:397, Gann) and, perhaps, to dissuade Respondent from its plan to implement its last offer the morning of 9 July. As we recall, Odis Johnson testified that the Holiday Inn group decided to confront Respondent on 9 July with safety issues because Respondent was going to implement its last offer unilaterally (2:270).

2. Events of 9 July 1984

There can be no doubt that the union officers and committee members successfully spread the word that the entire first shift on 9 July was to seek relief and report for a safety meeting at 7:30 a.m.

As then Plant Manager Smith testified, Respondent implemented its last contract offer effective the morning of 9 July (3:601). About 25 minutes into the 7 a.m. to 3 p.m. shift, the intercom, Smith testified, "exploded" with calls (3:601).[11]

Several witnesses testified concerning what occurred thereafter. About 7:30 a.m. International Representatives Hammond and Balliet, accompanied by Odis Johnson and Gary Gann, arrived at Smith's office and were invited in. Several other employees stood outside the door and looked in.

As this was Hammond's first visit to the Fort Worth plant, he introduced himself to Smith and stated that they were there to discuss some safety problems, specifically the P & H crane "plus others." Smith said he would be willing to discuss safety but that there was a procedure for doing so. Hammond inquired whether Respondent had implemented its last offer, and Smith replied yes. Hammond replied, "We will be operating under Section 7 of the National Labor Relations Act." Hammond then said the plant would be shut down to bring in all the employees to discuss the safety matters. Smith responded that the plant would not be shut down, that all the employees would not have to attend, and that there was a procedure for discussing safety problems.

By this time several people were speaking at once. The confusion deepened when a supervisor, Administrative Services Manager David E. Parsons, arrived and advised Smith that the kiln 1 operator (Pilcher) was demanding relief in 5 minutes to attend a meeting, and that he, Parsons, has advised the operator not to leave his job or he would be suspended pending discharge.

A moment later Maurice Simpson, first-shift supervisor, arrived and informed Smith that the kiln 3 operator (Tim Worthen) and the finish mill operator (Spencer Hart) were demanding relief in 5 minutes.

Smith then requested Hammond and the union group to go to the conference room, but they declined, saying they would go down to the parking lot to join their brothers. Turning to Parsons and Simpson, Smith instructed them to go into the plant and find out what was happening.

Downstairs the Hammond-Balliet group found employees gathering, and Local 68 Richard Pilcher (kiln 1 burner) informed Hammond that he was to be suspended and terminated for leaving his job when the Company refused to relieve him. About seven other employees informed Hammond that the same fate had befallen them (2:86, Hammond; 3:405, Gann).

The Hammond-Balliet group, this time larger in number, went back upstairs to speak with Smith. The hallway was full of employees, and several were speaking at once. Hammond told Smith that several employees told him they had been suspended pending discharge, and that Hammond wanted the suspensions lifted. Smith replied that he would discuss safety matters, but that he would not agree to anything regarding discipline at that point. Hammond stated that they would not talk about safety until the suspensions were lifted. Hammond warned Smith that he was violating the law because the employees had a right to discuss safety matters with Respondent in this manner and that this is the way they would do business since there was no contract (3:604, Smith).[12]

Smith stated that the same safety discussion procedures were in effect that existed before the contract terminated. Hammond responded that they were not bound to that because there was no contract. Hammond said they would return to the parking lot until Smith came to his senses and agreed not to discipline the employees. The time was about 7:45 to 8 a.m. (3:605). The Hammond-Balliet group returned to the parking area by the building.

About this time Smith observed that a large crowd of employees had gathered in the parking lot under the windows of the administrative offices. A group of about 15 seated themselves by a wall and fixed a stare on the plant manager's office. Meanwhile, supervisors and managers were scrambling to operate the plant and protect the equipment (3:610).

At this time many of the employees[13] began singing a song, "Solidarity Forever," the lyrics of which assert that there is strength for workers through union solidarity (R. Exhs. 2, inside back cover, and 3).

Around 8:40 to 8:50 a.m., Smith dispatched supervisor Bartlett to invite Hammond and his group back upstairs.

[11] Presumably the calls were about employees requesting relief.

[12] Balliet confirms this testimony and also concedes that Hammond said there would be more of these meetings (2:192–193).

[13] Of the 65 first-shift employees, 64 walked off the job (3:611). Hammond testified that these ranks swelled to 100 or more by employees from the second and third shifts (1:89, 90).

When they had arrived, Smith told Hammond that Respondent was willing to meet on safety matters, but that the Company would not change its position regarding discipline. The union group asserted that it would not discuss safety under those circumstances, and the union group returned to the parking lot.

About 9:30 a.m., after a police cruiser arrived on Respondent's request, Smith went to the parking lot and, from the back of a pickup, instructed the employees to leave the premises. The employees thereupon repaired to the union hall.

At the union hall the group held a meeting and decided to strike in protest of Respondent's suspension of some of the employees who had engaged in the work stoppage (2:89, Hammond; 2:149–150, Balliet; 2:253, 277, Johnson).

Around 11:30 a.m., Hammond telephoned Smith and informed him that the Union was commencing a strike at noon to protest Respondent's unfair labor practices. Unknown to Hammond, Supervisor Parsons was listening on an extension, took notes, and testified concerning the conversation. Consistent with the version of Smith and Parsons, I find that Hammond did not mention the suspensions specifically. I note that the charge Balliet filed that very day in Case 16–CA–11725, discussed below, alleges violations of Section 8(a)(1), (3), and (5). It is immaterial whether Hammond specifically referred to the suspensions when he spoke to Hammond.

The Union established a picket line at noon on 9 July and did not cease picketing until the morning of 10 August. About 10 July Hammond returned to California, and Balliet remained in Fort Worth until August (2:150). The legend on the picket signs asserted that the strike was to protest unfair labor practices (2:253).

3. Correspondence and later events

During the week following 9 July there were many contacts between the parties, including correspondence and discussions in person.

By mailgram dated 13 July, the Union, by International Representative/Coordinator Paul H. Balliet, notified Smith of the "continued availability" applied to all bargaining unit employees, including those previously suspended. Balliet ends the mailgram by stating, "It is our position that all bargaining unit employees are entitled to full back pay." (G.C. Exh. 2.)

Smith wired a reply on 14 July suggesting the parties discuss matters (G.C. Exh. 3). On 16 July the parties met at a local motel, the Sandpiper, to discuss the situation. Smith described Respondent's conditions for the return. First, the Union, both the International and Local 68, must promise in writing to give written notice at least 30 days in advance of any future work stoppage. Second, Respondent would continue its investigation and would impose discipline in its discretion. Third, there would be no backpay. Balliet expressed no position, but said he would notify Smith later of the Union's response.

Two days later Balliet requested Smith to put Respondent's conditions in writing. Smith did so by letter dated 19 July (G.C. Exh. 5). No reference is made by Smith to backpay, but the other two items (investigation will continue and discipline where appropriate, and a 30-day notice) are. The paragraph setting forth Respondent's position on the 30-day notice is pertinent and reads (G.C. Exh. 5):

> Dear Mr. Balliet:
>
> . . . .
>
> You will recall that all employees walked off the job in concert on July 9 without any advance notice or warning, jeopardizing the plant and equipment to the possible damage of several hundred thousands of dollars—some after being specifically instructed not to leave their critical and costly equipment without proper relief. In light of that and to preclude further potential damage by sudden and unannounced work stoppage, the Company will require as the sole condition upon the return to work of the strikers, a commitment in writing, from the International and Local Union representatives that the Union (International and Local) will give the Company at least thirty (30) days written notice in advance of any future work stoppage by employees of this plant.
>
> . . . .
>
> Sincerely,
> /s/ W.E. Smith
> W.E. Smith
> Plant Manager

By letter dated 24 July, Balliet and Pilcher, signing for the International and Local, respectively, expressed the opinion that Respondent's condition for returning employees was unlawful. In their last sentence, Balliet and Pilcher state (G.C. Exh. 6):

> We also assure you that should any further walkouts be necessitated by your conduct, adequate notice will be given so as to avoid jeopardizing the plant and equipment.

Smith wrote back on 27 July asking Balliet to please define adequate notice "in some quantifiable time frame." (G.C. Exh. 7.)

Balliet replied by letter of 30 July defining adequate notice as being "'Lawfully and reasonably sufficient,' so as to avoid jeopardizing the plant and equipment." (G.C. Exh. 8.)

The jousting over the issue of adequate notice set the parties in their respective positions thereafter. As we shall see, it directly impacted on the employees when they tried to return to work on and after 10 August, the date the strike ended and picketing ceased. Indeed, the debate has carried over to the legal issues to be decided.

The next correspondence is Smith's letter of 4 August to Balliet. As the letter explains Respondent's position, the full text is quoted here. The date of 9 July 1984, appearing in the letter's second paragraph, is shown as corrected by stipulation at the hearing (2:184). The text of the letter reads (G.C. Exh. 9):

Dear Mr. Balliet:

On July 9, 1984, Fort Worth Plant bargaining unit employees walked off the job in concert without any advance notice or warning. International Representative Hammond, during his discussion with me on July 9, 1984, stated that the Union would be doing business in such a manner, that is, shutting down the plant and then talking.

As I indicated to you in my letter of July 19, 1984, the Company cannot subject its equipment to potential damage by sudden and unannounced work stoppages by employees. By the behavior of employees and Mr. Hammond's comments on July 9, 1984, the Company feels that it has a high risk exposure to such "quickie" work stoppages. To protect against this exposure, I previously advised you that the Company will require, as the sole condition upon the return to work of the strikers, a commitment in writing, from the International and Local Union representatives that the Union (International and Local) will give the Company at least thirty (30) days written notice in advance of any future work stoppage by employees of this plant.

In subsequent correspondence, you have indicated that "adequate notice" will be given by the Union "so as to avoid jeopardizing the plant and equipment." To date, however, you have not provided the Company with a measure of time in quantifiable terms that advance notice will be given.

So that the Company can properly evaluate whether it can safely operate the Fort Worth plant under the Union's proposed advance notice terms, please provide me with the number of days or hours of advance notice prior to commencement of future work stoppages that you will guarantee will be given by the Union (International and Local). Upon receipt of your quantified advance notice terms, the Company will determine whether it can accept them or, alternatively, whether some compromise time period is acceptable, and I will respond to you accordingly.

Very truly yours,
/s/ W. E. Smith
W. E. Smith
Plant Manager

Balliet responded by his letter of 11 August. Before reaching that letter, however, we must consider the intervening events. Following Smith's letter of 4 August, the parties met on 9 August at the first guard shack at the entrance of the plant. Balliet was accompanied by about two or three committeemen.

It appears that at the 9 August meeting (at times there was confusion by several talking at once) the parties reiterated their positions initially. Shortly before the meeting at the guard shack, Smith had met with his staff and decided that they could reduce the advance notice from 30 days to 21 as the minimum time required to get the manpower needed to operate the plant in a safe and effective manner (4:691–692). Therefore, when one of the union people inquired[14] at the gate (first guard shack) meeting what Respondent's bottom line was, Smith replied 21 days.[15] Balliet (4:696, Smith) and/or Gary Gann (3:409, Gann) asked why the 21 days were needed. Smith responded by reminding Balliet of their conversation of 15 May in which Balliet had assured Smith that adequate notice would be given in the event a strike was called (4:694, 696).[16]

Smith further asserted, in effect, that the written notice was required because Respondent considered the Union's surprise strike of 9 July to have been both (1) a reneging on Balliet's 15 May assurance, and (2) wholly inadequate as to notice (4:699). He also explained that the time was needed in order to man the plant (3:409, Gann).

Balliet remarked that Respondent had not required the four employees who had left the strike and crossed the picket line to sign such a document (2:218–219).[17] Smith replied that the difference was that conditions were not the same because the others had crossed the picket line (4:697–698).

The Union group told Smith that they could not agree to sign Respondent's document or agree to the time. Balliet announced that the pickets would be removed the next morning by 7 a.m. for the purpose of returning to work as the other four employees had done, as individuals with no conditions (2:222–223, Balliet; 3:378, Gann; 4:700, Smith).

Smith replied that the strikers would not be coming back as the others had, for the others had crossed the picket line and the strikers were engaging in concerted activity (4:700). Smith stated that the strikers would have to be phased back in to allow the contractors' employees to be released in an orderly manner.[18] (2:221; 4:693) He asked Balliet what schedule they intended to return on, and Balliet replied "on our schedule." (2:222, Balliet; 4:701, Smith.)

During the meeting Balliet, in reference to Respondent's advance notice requirement, stated that although the Union would not sign a notice agreement, it would agree to work for 15 days after returning to work. When Smith asked what would happen on the 16th day, Balliet replied that he did not know (2:219; 3:393; 4:699).[19]

The positions expressed the next morning, 10 August, set the pattern that the parties followed thereafter. As Balliet had stated, the strike ended and the pickets were removed by 7 a.m. Committeeman C. E. Bartholomew, in the presence of Odis Johnson and a large group of em-

[14] It is unclear whether Clyde Carter (3:378) or Balliet (4:692) inquired.

[15] Earlier in the meeting Smith furnished a written promise for the Unions to sign commiting to give written notice of at least 30 days in advance of any future work stoppage (G.C. Exh. 10). Although Smith places the event as later in the meeting (4:700), the difference is immaterial.

[16] Balliet concedes that Smith mentioned this (2:217).

[17] Smith testified that it was five, not four, employees who crossed the picket line and returned to work and that they indeed were not required to sign any commitment such as required of the Union (4:697, 751, 803).

[18] Respondent had been operating its plant with supervisors, employees, and supervisors from other plants of General Portland, and employees of contractors. No permanent replacements were hired.

[19] At some earlier point Balliet had offered a guarantee that the employees would work 30 days without striking.

ployees at the second security shack, informed Smith that they were there to return to work on an unconditional basis the same as the others who had crossed the picket line (2:294; 4:702, 747).

Smith read the following prepared statement (4:703; R. Exh. 35):

> You are not applying to return to work as individuals. Your International Union Representatives advised me they would remove the picket line so you and all bargaining unit employees could return to work without giving the Company a written promise that the Company would receive written notice adequately in advance of any future work stoppages. This is a concerted union activity.

Bartholomew asked for a copy, but Smith said no. He then asked Smith to talk to them on an individual basis. Again Smith declined (2:294). Smith read the speech again, and then asked the employees to leave (2:294; 4:704) The employee group went to the union hall where they decided to return to the plant in small groups of twos, threes, and fours and seek to return to work (2:295).

On that same day, 10 August, and over the course of the next several days, employees in small groups of mostly two to four or so, and in some cases only one employee, went to the plant and offered themselves back to work unconditionally. Anticipating that this would occur, Smith had a separate statement prepared which he read to these small groups. This second statement reads (R. Exh. 36):

> Your action in returning is pursuant to a joint decision on your part, and is therefore a group action and concerted activity. The Company will not be returning employees from strike under these circumstances.

The response was the same whether it was a visit by a single employee, or to employees in the small groups who each announced that they were applying as individuals. The complaint does not allege that these prepared statements, either alone or together, constitute a violation of Section 8(a)(1) of the Act.

On 10 August Odis Johnson, Local 68's vice president, told Smith that he was willing to do "whatever it took" to get his job back. Smith said he wished he could accept Johnson back, but that Respondent would first have to receive the Union's agreement on a 21-day advance notice (2:262–263). Employee William E. Bellamy even told Smith that he was offering himself back nonunion and as an individual. Smith read one of the statements and said he could not help Bellamy (3:455).

Another employee, Kenneth Mathis, had been on sick leave for knee surgery and had not participated in the strike, although he had stopped to talk with strikers once or twice in the park across from the plant gate. Mathis had just received a partial medical release on 27 August when he asked Smith if he could return to work. Smith gave him the same answer which he gave the others (3:467). Smith testified that Mathis had not been (fully) released (4:807).

When employees pressed concerning what they could do as individuals to return to work, Smith read a third prepared statement as follows (4:706, 707; R. Exh. 37):

> Have your union representatives give us a written notice regarding advance notice before future work stoppages.

It is vividly clear from Smith's testimonial expressions, as well as the other evidence, that there was nothing the former strikers could sign, say, or do which would persuade Respondent to accept their offers to return to work—short of the Union providing Respondent with a written commitment for advance notice of 21 days (4:757–758, 761–763). In short, any offer to return to work, whether made by an individual, by a group of employees, or by the Union on behalf of the former strikers, was doomed before made unless the Union signed a commitment to give Respondent an advance notice of 21 days before calling any future work stoppages.

On 11 August Balliet led a group of employees to the plant where he spoke to Smith and offered the employees to work unconditionally. Smith gave him a copy of the proposed commitment to give an advance written notice of at least 21 days for Balliet to sign (2:172; 4:708; G.C. Exh. 11). Saying the document was illegal, Balliet refused to sign. He said they would work 15 days without a strike. When Smith asked what would happen on the 16th day, Balliet replied that he could not say (4:710).[20] Balliet then left.

Before he left for the plant that day (2:173), Balliet mailed a letter, dated 11 August, responding to Smith's letter of 4 August. As the letter describes the Union's position, it is set forth here (G.C. Exh. 12):

> Dear Mr. Smith:
>
> Your letter of August 4, 1984 has been received.
>
> First, I believe that you misconstrued the statements of International Representative Hammond on July 9, 1984.
>
> Even so, we believe that no employer has the right to regulate or impose restrictions on the protected right of workers to engage in lawful concerted activity.
>
> The adequate notice to which I referred in my letter of July 24 is not capable of being quantified. If a concerted action were to occur, that notice is adequate which permits either for the immediate relief of an operator or the orderly shutdown of the plant's equipment and production facilities.
>
> As soon as the General Portland Cement Company begins to understand the rights which workers have in the absence of a collective bargaining agreement, and returns to employment those employees who have made an unconditional application to return, without imposing unlawful conditions, the

[20] I do not credit Balliet's denial that the 15-day topic was mentioned (2:225). Balliet said he could not recall as to part of that topic. Smith's recollection was specific on this, and it is consistent with my other findings.

relationship between the Union and the Employer will improve substantially.

Sincerely,
/s/ Paul H. Balliet
Paul H. Balliet, International
Representative Coordinator

The next communication between Balliet and Smith was not for several weeks (2:174; 4:711).

The parties stipulated that on 14 August Smith mailed to each Fort Worth employee a letter explaining Respondent's position (2:174). Smith begins his letter by saying he wants to clarify some misconceptions he has heard from employees. He then describes the 21-day notice requirement. The last four paragraphs of his letter read as follows (G.C. Exh. 13):

> This commitment is required to protect against equipment damage and critical interruptions caused by sudden and unannounced work stoppages. The behavior of employees on July 9, 1984, and the comments of International Union representatives has convinced the company that "quickie" work stoppages are likely unless there is something to prevent them.
>
> For some reason unknown to me, your Union representatives have been unwilling to give the company the written commitment. Because of this refusal by Union representatives, the Company has not permitted the return of employees from strike.
>
> *If you want to return to work, insist that your International and Local Union representatives sign the written commitment* (for your information I have attached an exact copy of the commitment the Company is requesting). Upon receipt of a properly signed written commitment, the Company will promptly arrange for the orderly return to work of employees.
>
> Disciplinary action is pending for many employees because of their misconduct on July 9, 1984. A few employees will be subject to discharge for gross misconduct. Appropriate discipline will be taken where warranted.

The next communication between the parties occurred when Smith, by letter dated 21 September, reduced Respondent's advance notice requirement from 21 days to 3 days (G.C. Exh. 14). A minimum notice of 3 days, Smith wrote, would enable Respondent "to obtain the necessary manning by outside contractors to continue to operate the plant and, thus, avoid costly damage and/or costly shutdown."

In his one-sentence reply of 1 October, Balliet responded that the Union "reiterates its position, whereby, we are and have been willing to give you adequate notice of any shutdown to avoid jeopardizing plant equipment." (G.C. Exh. 15.)

By letter dated 4 October[21] Smith asked Balliet whether he was agreeing to give 3 days' notice by his letter of 1 October (G.C. Exh. 16). Balliet never responded. Balliet testified that after 4 October International Vice President Richard A. Northrup, of Chicago, took charge of resolving the strike (2:175).

By mailgram dated 31 October Northrup wrote Smith that "We are again advising you that we have terminated our strike and are available to work without conditions." (R. Exh. 38.) Smith replied on 1 November with his own mailgram repeating the advance notice requirement of 3 days (R. Exh. 39).

Matters moved quickly thereafter, and on 8 November the parties entered into a settlement (G.C. Exh. 17). Paragraph 1 of the document provides that Northrup, on behalf of the International and the bargaining unit, agrees to give an advance notice of 36 hours before any work stoppage between the date of the agreement and that of any new contract (G.C. Exh. 17). Local 68 is not included, nor is there any requirement that the 36-hour notice be in writing. Respondent agreed to begin returning employees to work on 13 November subject to certain categories of employees subject to various forms of discipline.

C. *Procedural History of Charges*

The Union filed several unfair labor practice charges concerning Respondent's actions. A summary of the procedural history of the cases helps to show the overall context of events.

On 9 July the Union filed a charge in Case 16–CA–11725 alleging that Respondent had violated Section 8(a)(1) and (3) of the Act by suspending 8 employees, ordering 65 employees to leave its premises, and Section 8(a)(5) by refusing to discuss safety with the Union (R. Exh. 4).

By date of 23 July the Union filed a charge in Case 16–CA–11754 alleging that Respondent had violated Section 8(a)(1) and (3) of the Act on 16 July by notifying the Union that some 65 employees would be subject to disciplinary action when they returned to work, by discharging two employees, and by suspending seven others (R. Exh. 6).

The Region dismissed these two charges on 7 November. In the meantime the Union filed the charge in the instant case. Filed 10 August, the charge in the instant proceeding, Case 16–CA–11785, alleges that on 10 August Respondent violated Section 8(a)(1) and (3) of the Act by refusing to return to work "its employees who made an unconditional offer to return to work on or about August 10, 1984."

In his 7 November letter dismissing the first two charges, Cases 16–CA–11725 and 16–CA–11754, Regional Director Michael Dunn attached an explanation covering over two pages (R. Exh. 5). The antepenultimate and penultimate paragraphs of Dunn's dismissal letter are pertinent and read:

> It was concluded that the initial work stoppage was unprotected as its stated reason was safety disputes which arose during the term of the collective bargaining agreement and thus, the Union's duty to arbitrate and not to strike over the disputes contin-

[21] At the hearing the parties stipulated that the date appearing on the letter is incorrect, and that the correct date is 4 October (2:152–153).

ued past the expiration of the contract. *Goya Foods, Inc.*, 238 NLRB 1465, *Nabisco, Inc.*, 267 NLRB No. 196. Therefore, the Employer's suspension of the original eight employees was not unlawful. Further, since the Employer was privileged to refuse to rescind the lawful suspension of the original eight employees, its failure to consider rescission did not constitute an unlawful failure to bargain. Further, the Employer offered to discuss safety at several different times throughout the morning of July 9. Hence, the Employer did not unlawfully refuse to bargain with the Union over the safety disputes.

The Employer's suspension of the entire first shift work force was not unlawful as the evidence did not establish that this suspension was motivated by a desire to retaliate against the employees for engaging in protected activity or that the suspension was inherently destructive of employee rights. In this regard, while the Employer initially suspended only eight employees for leaving their work stations without relief or permission, it would have been privileged to suspend everyone at that time as they were not engaged in protected activity as indicated above. Later, when it became clear that no discussion of safety would take place and work would not resume, the Employer decided to send everyone home and investigate the circumstances of the initial stoppage. And, the Employer ultimately disciplined or discharged only those employees who, like the original eight, left their work stations without relief or permission. Therefore, it could not be established that the Employer's suspension of the whole work force was motivated by a desire to retaliate against the employees' protected activity. Further, the events of the morning of July 9, indicate that the suspension of all employees reasonably would not be perceived by the employees to mean that protected strike activities always will be followed by adverse Employer action. Thus, it could not be found that the Employer's action was 'inherently destructive' of the employees' statutory rights. Furthermore, although the Employer's action may have had some adverse effect on employee rights, the Employer's legitimate business justification of investigating the initial unprotected action, in the absence of anti-union motivation, warrants a conclusion that the suspension of the entire work force was not unlawful.

Eight days later, on 15 November, Acting Regional Director Jerome Avedon, in dismissing the instant charge,[22] similarly attached a two-page explanation (R. Exh. 40). The final three paragraphs of Avedon's dismissal letter read:

> The Union was repeatedly informed by the Employer that its advance notice requirement was to avoid subjecting its equipment to potential damage by a sudden and unannounced work stoppage particularly in view of the work stoppage that had occurred on July 9. There was no evidence that the Employer's purpose in requiring an advance notice commitment was to break the Union nor did the Employer ever hire permanent replacements. Further, the Employer offered evidence that much of the plant had to be shut down to avoid damage as a result of the July 9 walkout and it was not until August 6 that the plant was finally back up to production with the last kiln back on line.
>
> Thus, it is concluded that no violation has occurred as the Employer had a legitimate business justification—advance notice for safety purposes and sufficient time to be able to secure contractors—for insistence on its demand, whether it be 30, 21 or 3 days, for advance notice of a strike as a condition of reinstatement of its employees because the Union refused to accept the lawful condition for reinstatement imposed by the Employer.
>
> In *American Ship Building v. NLRB*, 380 U.S. 300 (1965), the Supreme Court concluded that the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position after impasse has been reached was not unlawful. The Board has found that an Employer may lock out its employees to avoid economic loss or business disruption where the Employer believed a strike was imminent and the Union would not give assurance of continued work. *Building Contractors Association of Rockford, Inc.*, 138 NLRB 1405. In the instant case, the lockout was based on the Employer's legitimate view that the employees would engage in further work stoppages or intermittent strike action without advance notice to the Employer and was strengthened by the Union's repeated refusal to define in hours or days its "adequate" notice assurances.

Following the dismissals, Respondent apparently discharged three employees who had been operating critical equipment the morning of 9 July. Thus, on 10 January 1985 the Union, by its attorney, filed a charge in Case 16–CA–11985 alleging that on 4 December Respondent had violated Section 8(a)(1) and (3) of the Act by discharging Spencer Hart, Richard Pilcher, and Timothy E. Worthen (R. Exh. 7).

Pursuant to the 8 November memorandum of agreement settling the strike/dispute (G.C. Exh. 17), the cases of the three discharges were heard by Arbitrator Harold H. Leeper on 20 December. At page 2 of his 24 December Opinion and Award affirming the discharges, Arbitrator Leeper wrote, "The three Grievants were operators of the three most critical and most expensive machines in the plant. Pilcher was the operator (burner) of the number 1 kiln; Worthen was the operator of the number 3 kiln; and Hart was the operator of the Finish Mill." (R. Exh. 9.)

The Union appealed the Region's 15 November dismissal of the instant case (as well as Case 16–CA–11774), and on 22 February 1985 the General Counsel, through

[22] Avedon dismissed Case 16–CA–11774 as well as Case 16–CA–11785. The record does not contain a copy of the charge in Case 16–CA–11774.

her Office of Appeals, wrote Stephen B. Rubin, the Union's attorney, as follows:[23]

> Dear Mr. Rubin:
>
> Your appeal from the Regional Director's refusal to issue complaint in the above-captioned cases has been fully considered.
>
> The appeal in Case No. 16–CA–11785 is sustained and the appeal in Case No. 16–CA–11774 is denied. The Employer's conditioning of the return of strikers after August 10, 1984, upon the Union's agreement not to strike for 30, 21 or 3 days raised Section 8(a)(1) and (3) issues warranting Board determination based on record testimony developed before an Administrative Law Judge, absent settlement. However, the appeal is otherwise denied inasmuch as there was insufficient evidence that the Union had made an unconditional offer to return the strikers prior to August 10, 1984.
>
> Accordingly, the case is remanded to the Regional Director with instructions to issue an appropriate Section 8(a)(1) and (3) complaint absent settlement. All further inquiries should be addressed to the Regional Director.
>
> Very truly yours,
> Rosemary M. Collyer
> General Counsel
> By */s/ Mary M. Shanklin*
> Mary M. Shanklin, Director
> Office of Appeals

Presumably a confidential explanation from Shanklin was attached to the copy sent to the Region. We therefore are not favored with Shanklin's theory except to the extent counsel for the General Counsel incorporates and articulates that theory in his brief.

To complete this sequence, I note that by letter dated 13 March 1985 the General Counsel's Office of Appeals wrote to Attorney Rubin as follows regarding the related cases (R. Exh. 8):

> Dear Mr. Rubin:
>
> Your motion for reconsideration in Case Nos. 16–CA–11725 and 16–CA–11754 and your appeal in Case No. 16–CA–11985 have been fully considered.
>
> The appeal and motion are denied. Apart from considerations as to whether the employees' initial refusal to work on July 9, 1984, might otherwise have been considered concerted protected activity, in the circumstances of these cases, the Employer's tentative decision to terminate eight employees for leaving their critical work sites after having been told not to do so and the Employer's final decision to terminate three of these eight (Pilcher, Hart and Worthen) was not unlawful.
>
> It was concluded that the eight employees who left critical job positions without permission engaged in strike misconduct under *Marshall Car Wheel and Foundry Co.*, 107 NLRB 314, and therefore, their actions were removed from the protection of the Act. In this regard, it is irrelevant that supervisors took over operation of the critical machinery and therefore no actual damage was done; it is sufficient that the eight aforementioned employees' actions could have led to extensive damage to the equipment. Nor is it significant that non-critical workers were not told to return to work, as the supervisors took control of the operation of the facility.
>
> In light of the determination that any disciplinary action taken by the Employer against those employees who left critical positions without permission was not unlawful (and noting the absence of any affirmative evidence that the Employer took unlawful disciplinary action against any employee in a non-critical position), as well as the Union's failure to raise any new issue of law or fact in the motion for reconsideration, or appeal, further proceedings were deemed unwarranted.
>
> Very truly yours,
> Rosemary M. Collyer
> General Counsel
> By /s/ Mary M. Shanklin
> Mary M. Shanklin, Director
> Office of Appeals

[23] The 22 February 1985 letter was not made part of the record. After the hearing closed, and at my request, Respondent supplied a copy of the letter. I mark the copy as ALJ Exh. 1, receive it in evidence, and insert it in the folder for the General Counsel's Exhibits.

D. *Analysis and Conclusions*

Before treating the merits of the case, I first shall address some peripheral matters. Although Respondent, as earlier noted, stipulated that the Union is a labor organization, it expressly reserved its affirmative defense that the Union is not the statutory representative of Respondent's employees at the Fort Worth plant. This contention relates to the fact that on 15 March 1984 the United Cement, Lime, Gypsum and Allied Workers International Union, AFL–CIO, CLC, voted to merge into and become a division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO (R. Exh. 2 at 119). Shortly thereafter, apparently on 1 April 1984, the emerger was implemented. Respondent contends that certain "flawed and inadequate" procedures resulted in a postmerger organization legally imcompetent to act as the representative of the Fort Worth employees (Br. 47). This allegation becomes relevant only because the complaint alleges, and evidence was offered, that the Union, as the statutory representative of the bargaining unit, made an unconditional offer on 10 August on behalf of the striking employees to return them to work.

Citing *Knapp-Sherill Co.*, 263 NLRB 396 (1982), the General Counsel argues that Respondent is estopped from contesting the Union's statutory representative status (1:32). The Union joins in that position, and further argues that Respondent improperly seeks to place the employees in a Catch-22 situation. Thus, on the one

hand Respondent argues that the Union cannot speak for the employees, yet on the other it contends that it was justified in rejecting unconditional offers by individual employees, or small groups of employees, unless "their" Union signed a commitment to give an advance notice of 21 days. Respondent appears to argue that it is entitled to the best of both worlds because it did not learn of the alleged merger defects until 2 weeks before the instant hearing. The Union contends that it would be unconscionable to allow Respondent to prevail on this issue (Br. 11). In any event, argues the Union, the evidence shows that groups of strikers, by their presence before Smith, implicitly designated union representatives to speak on their behalf as their agent-in-fact. At the hearing the parties stipulated that Respondent has never, including up to the date of the hearing, withdrawn recognition from the Union (3:505).

Although there is much force to the positions advanced by the General Counsel and the Union, I need not resolve the statutory representative question for two reasons. First, as previously noted, any offer to return would have been an exercise in futility, and the law does not require that citizens engage in acts of futility. The strikers were therefore relieved of any need to offer themselves back to work, and an unconditional offer will be deemed as of 10 August concerning all strikers. *Eagle International*, 221 NLRB 1291 (1975).

Second, I need not resolve this issue because I dismiss the complaint on the merits. For this reason I need not pass on the Union's 5 July 1985 motion to reopen the record to receive an attached letter, dated 17 January 1984, relating to the merger issue.[24]

I find that the Union's assertion of safety as the basis for confronting Plant Manager Smith the morning of 9 July was merely a cloak devised to conceal its true motive—to engage in a series of confrontational tactics designed to force Respondent to return to the bargaining table and, perhaps, to dissuade Respondent from unilaterally implementing its last offer. Moreover, the Union was not free to disregard the prior grievance procedure for safety matters which allegedly arose, as here, during the extended term of the prior contract. *Nabisco*, 267 NLRB 1236, 1237–1238 (1983); *Goya Foods*, 238 NLRB 1465 (1978).

Respondent contends that the strike was unprotected regarding all the strikers, and not simply to the few who were disciplined for abandoning their critical job duties before they were relieved, because of Respondent's rules prohibiting employees from leaving their duty stations during working time without permission (Br. 63). However, such rules cannot restrict the proper exercise of statutory rights. Respondent makes no argument that all 64 employees from the first shift who engaged in the initial work stoppage in some way were aware of or ratified the Union's planned tactics. Moreover, over 100 other employees were not at work the morning of 9 July. They later joined the strike, or honored the picket line established at noon on 9 July, but they did not abandon critical jobs the morning of 9 July.[25] Regardless, in my view this case turns on Respondent's right to lock out the employees.

We now can turn to the merits of the case. On and after 10 August Respondent refused to return the former strikers to their jobs until the Union signed an agreement commiting to giving an advance notice (initially 21 days and then 3 days). By so refusing, Respondent locked out all employees not already working. Pointing to the fact that Respondent took back five strikebreakers without requiring them to sign any commitment, the General Counsel and the Union argue that an unlawful motive has been shown. The Union, in particular, contends that Respondent sought to punish the strikers (Br. 21, 22).

The five strikebreakers returned to work *during* the strike and before the lockout. Had Respondent suggested to employees during the lockout that Respondent would return them to work if they canceled their membership in Local 68,[26] then a strong argument could be made that Respondent's real motivation was to destroy the Union.[27] We do not have that here. Indeed, Plant Manager Smith rejected an offer of substantial nature made by employee William E. Bellamy on 10 August. Thus, Respondent locked out everyone not already working in its countereffort to put economic pressure on the Union to sign an advance notice commitment. Respondent acted within its legal rights.

As for the length of the notice Respondent demanded, it is clear that the Union recognized that a notice of some duration—even if just 15 minutes—was necessary. The debate between the parties was, and is, over what length of time would be adequate. Respondent could lawfuly demand a specific time frame in view of the apparent difference of opinion between it and the Union concerning what would constitute an adequate time to effect an orderly transition[28] at the beginning of a strike.

Respondent wanted an adequate time assurance because (1) in Smith's view Union Representative Balliet had reneged on his 15 May promise to provide sufficient notice for an orderly shutdown, (2) on 9 July Union Representative Hammond had expressly stated that work stoppages would be the way that business would be conducted in the future since there was no contract,[29] and (3) in July Respondent experienced serious problems in securing qualified employees from outside contractors.

An employer must reinstate economic strikers on their unconditional offer to return to work unless he is able to show that his refusal to do so was due to "legitimate and substantial business justifications." *NLRB v. Fleetwood*

[24] Respondent argues against the motion to reopen by its opposition dated 8 July 1985. I have forwarded the Union's motion and the Respondent's opposition to the Records Branch in Washington, D.C.

[25] A strike to protest a nondiscriminatory discharge is itself protected. *Pepsi-Cola Bottling Co.*, 186 NLRB 477, 478 (1970), enfd. 449 F.2d 824 (5th Cir. 1971). Of course, such a strike may not be conducted in an unlawful manner or it will lose its protection. *Waco, Inc.*, 273 NLRB 746 (1984).

[26] Every bargaining unit employee save one was a member of Local 68 (2:264; 4:855, Johnson).

[27] *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *O'Daniel Oldsmobile*, 179 NLRB 398 (1969).

[28] Respondent is not required to shut down its plant, but may choose to operate it.

[29] Union Representative Balliet's offer of 15 or 30 days of work with no assurance of what would occur on the 16th and 31st days simply reinforced Hammond's threat of future "quickie" strikes.

Trailer Co., 389 U.S. 375 (1967); *Lindy's Food Center*, 232 NLRB 1001, 1008 (1977).

At the conclusion of an economic strike, an employer may have reasonable cause to fear that the employees will abruptly go on strike again as part of a series of "quickie" strikes. In that situation, an employer may lawfully lock out its employees until it receives assurance that there will be no future work stoppage without adequate notice to the employer. *Tidewater Express Line*, 142 NLRB 1111 (1963) (return conditioned on advance notice of 48 hours before any future strike); *Building Contractor's Assn. of Rockford*, 138 NLRB 1405 (1962) (return conditioned on advance notice of 30 days before any future strike); and *International Shoe Co.*, 93 NLRB 907 (1951) (return conditioned on a no-strike agreement).

Rather than closing down when it locked out the former strikers, Respondent chose to operate with temporary replacements.[30] It is not a per se violation of Section 8(a)(3) and (1) of the Act for an employer to lock out his employees and to continue operating with temporary replacements. *Pankratz Forest Industries*, 269 NLRB 33, 38 (1984). Such a lockout is unlawful, however, if it is motivated by antiunion considerations. *Pankratz* at 38. "The purpose, or motive, behind the lockout is therefore the critical factor in determining whether the lockout violates the Act." Morris, I *The Developing Labor Law*, 217-218 (1983) (DLL).[31]

On 9 August Respondent reduced its time condition to 21 days. Thus, when the picketing ceased the morning of 10 August and the former strikers began offering themselves back to work unconditionally,[32] the existing condition for reinstatement was agreement by the Union to give an advance written notice of 21 days before engaging in another work stoppage.

On 10 August Smith knew that in mid-May, in anticipation of a strike, he had made all the necessary arrangements to effect a transition from unit employees to staffing the plant with strike replacements, and that this had been accomplished in a period of 3 days (4:768, 778–779, 793). Yet on 10 August Smith conditioned the return of strikers on union agreement to a notice of 21 days. Does this discrepancy reveal a motive to punish the strikers?

Smith credibly testified that in the days on and after 9 July he had much difficulty in obtaining an adequate staffing of replacements from the outside contractors. Initially there was some difficulty in securing the numbers needed, but the principal problem was that the quality level was low (4:817). On the 9 August recommendation of his staff, Smith reduced the time from 30 days to 21 days as the advance notice Respondent would need to assure the continued operation of the plant (4:691–692, 774, 824).

I find that Respondent did not impose the 21-day condition on 10 August to retaliate against the strikers. Smith, I find, simply desired to give himself plenty of breathing room in the event the strikers accepted the 21-day condition and returned. He was not thinking, I find, in terms of what notice he could get by with at an absolute minimum. I find that Smith also considered his July problems in trying to obtain adequate staffing. With that less than satisfactory experience in mind, Smith, acting with an abundance of caution, set the notice time as 3 weeks rather than the minimum time needed of 3 days.

As already noted, I have not overlooked Smith's testimony that the kilns could be shut down in 3 days,[33] or his testimony that in anticipation of a strike in mid-May Respondent shut down one of the three kilns (4:768–769), arranged with outside contractors to provide assistance (4:778–779, 817), included operation of critical equipment as part of the overall training of some supervisors (4:821–822, 831, 832–834), and that all this was accomplished in 3 to 4 days (4:778, 779). Nevertheless, I find that Smith acted from an abundance of caution on 10 August and not from an unlawful motive.

The next question which arises is why Smith waited another 42 days (from 10 August to 21 September) before reducing the time condition to 3 days. Smith was not directly asked this specific question at the hearing, but his position can be gleaned from his explanation of his basis for reducing the time to 3 days on 21 September. He testified that by 21 September Respondent had established ties with the outside contractors so that there was trained manpower available, and, as GP had experienced strikes at some of its other plants in September, it also had an abundant supply of trained salaried personnel available (4:715–716, 827–828).

Smith testified that he reached an adequate staffing level about mid-August (4:817). This meant, he explained, that he then had enough skilled help from the contractors to operate the plant (4:820). Moreover, Smith made clear that the 3 days specified on 21 September was deemed enough time to make the transition to operation of the plant; not simply to shut it down, but to keep it runing (4:828). I find that Smith knew in mid-August that he could make the transition in 3 days. Even so, I find that Smith's delay from mid-August to 21 Sep-

[30] The temporary replacements included supervisors, clerks, salaried personnel from other plants, summer students regularly employed, the five employees who abandoned the strike and crossed the picket line, and employees of independent contractors hired on and after 9 July.

Former Plant Manager Smith testified that Respondent elected to remain in operation rather than to shut down (4:676, 677, 774, 775, 795). Respondent chose to operate in order (1) that it could manufacture Class H oil well cement so that it would not lose that business to its several competitors (4:677, 775), (2) to avoid the costly damage known as spalling which accrues to refractory and bricklining the kilns whenever a kiln is shut down and restarted.

[31] A discussion of whether hiring permanent replacements, or using outsiders as temporary replacements, can be a violation of the Act by being "inherently destructive" of important employee rights appears at 1 DLL 204–205, 219–220, 633, and 2 DLL 1053–1056. For further background discussion on the use of temporary replacements, including their use for a "prolonged" period, see two memorandums of the General Counsel's Division of Advice: *Weissman Industries*, 116 LRRM 1511 (1984 Datz), and *Georgia-Pacific, Southern Division*, 104 LRRM 1167 (1980, Datz).

[32] An earlier offer by the Union was not unconditional. Moreover, the picketing did not cease until 10 August.

[33] Although Smith testified that after 16 hours a kiln did not have to be attended constantly (4:766, 785), he also clearly testified that it takes 3 days to shut down a kiln completely, such as in preparation for major maintenance or mothballing (4:768–769, 778, 785–786, 793). Although Respondent finally settled with the Union for 36 hours' notice, Smith credibly testified that he was not consulted as to the 36 hours and, more significantly, that the 36-hour figure is unrelated to the production process (4:826–827).

tember, a lengthy period to be sure, was not born of any desire to retaliate against the strikers.

I note that there is no evidence or allegation that Smith uttered any remark indicating antiunion animus.[34] I further observe that at no point during this timeframe did the Union attempt to negotiate with Respondent for a shorter time condition. Indeed, the period of mid-August (following Respondent's 14 August letter to all employees) until 21 September is practically a complete blank insofar as the record discloses. I therefore can only assume that during this period of some 5.5 weeks Smith, content with the security of a supply of adequate strike replacements, simply waited for new developments. I am unable to discern any unlawful motive in these circumstances.

The General Counsel focuses on the "16 to 24 hours" Respondent allegedly would need to shut down the kilns safely,[35] argues that anything beyond that is without business justification (Br. 14), and contends that ordinary business interruptions or loss normally incident to a strike are circumstances insufficient to justify invoking a lockout (Br. 14–15). This argument is based on the false premise that an employer in Respondent's industry (operating expensive equipment under extremely dangerous conditions in a continuous manufacturing process) has a right only to the notice required to shut down safely, without regard to the damage to equipment a shutdown and restart causes, the loss of product incident thereto, or the loss of a substantial portion of the business if the work is not continued by strike replacements.[36] Such is not the law, and I find that the lockout itself was lawful and that Respondent had the right to continue operation of its plant during the lockout by using temporary replacements.

Taking the final step, the Union argues that the prior condition imposed by Respondent violated the Act because it is "inherently destructive" of employees rights (Br. 20).[37] To the extent this position argues a per se approach, it clearly is without support in the controlling cases since *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

Aside from the Union's possible per se contention about "inherently destructive," neither the Union nor the General Counsel expressly argues that the facts call for a conclusion that the 21-day time condition was an "inherently destructive" time condition. By implication the Union suggests that such is the case, but it does not analyze the question of whether such a prolonged period is inherently destructive.

When the picketing ceased the morning of 10 August and the former strikers began offering themselves back to work, Respondent locked them out pending the Union's agreement to give an advance notice of 21 days. GP had been operating with temporary replacements for a full month. As of 10 August Respondent had all three kilns in operation (R. Exh. 32) and some 140 temporary replacements employed (R. Exh. 34). If we assess the lawfulness of Respondent's lockout as of 10 August, is it a prohibited per se approach (since that is the first day of the lockout) even though we analyze Respondent's current situation in light of the nearly 5 weeks leading up to 10 August? Stated differently, must the examination begin by looking forward, with the "prolonged" use being measured by the length of time subsequent to 10 August? If the latter, should the 5 weeks preceding 10 August be considered in an overall analysis?

If the starting date for any analysis of "inherently destructive" is 10 August, then we count 42 days before Respondent reduced the time condition to 3 days on 21 September.[38] Although there is a chart in evidence (R. Exh. 34) showing the numbers of the temporary replacements and their sources (whether outside contractors, students, new hires, salaried staff, and the like), there is practically no other evidence covering the portion of that period starting about mid-August.[39]

However, Smith did testify that by mid-August he considered his temporary replacements adequate both as to numbers and quality (4:816–817).[40] As of 15 August Respondent had about 140 temporary replacements (R. Exh. 34). As the students (a maximum of 22) returned to school beginning in early August, respondent increased the number of its outside contractor employees. Total replacements increased to 149 for the week beginning 3 September, reached the peak number of 176 for the week beginning 10 September, and thereafter steadily declined to 141 the week beginning 12 November just before Respondent began phasing back in the former strikers. The record does not disclose why there was a peak the week beginning 10 September.

Was the peak to meet a special order for some customer, or was that Respondent's desired level which it was unable to maintain? The latter explanation is unlikely, for as we have seen, and will mention again shortly, Respondent had several sources of ample replacements by September for the forseeable future. The evidence is inconclusive, as Respondent's regular complement of unit employees for its three shifts approximated 173. Although the record does not expressly disclose the correct

[34] As previously mentioned, the General Counsel does not allege that Smith's prepared statements first delivered on 10 August, telling the strikers that their return to work offers were part of a "concerted union activity," violated Sec. 8(a)(1) of the Act.

[35] Based on Smith's credited testimony, I have found that it takes 3 days to shut down a kiln completely. Counsel for the General Counsel may have reference to Smith's testimony that after 16 hours the kiln does not require constant attention by an experienced burner (4:765–766, 784–786, 825–826).

[36] The Class H oil well cement, manufactured by Respondent at its Fort Worth plant only, amounts to about one-third of the products manufactured there (3:614; 4:677, 775).

[37] As to the Supreme Court's "inherently destructive" phrase, see *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[38] Based on all the evidence, I find that the period of 3 days advance notice is the time Respondent normally would need to make the transition from unit employees to a safe level of strike replacements possessing the skills minimally necessary to operate the plant.

[39] As stated earlier, small groups of employees presented themselves for work in the first few days on and after 10 August, and Respondent's 14 August letter (G.C. Exh. 13) to all employees, including the former strikers, is the last correspondence until Smith reduced the time condition by his letter of 21 September (G.C. Exh. 14).

[40] If a finding was necessary, I would find that Respondent was as adequately staffed on 10 August as it was on 15 August. Respondent's own manpower chart so demonstrates (R. Exh. 34). Another of its records shows that as of 9 August all three kilns were in operation (R. Exh. 32).

number,[41] I reach the number of 173 from the list of 147 employees (G.C. Exh. 18) identified by Odis Johnson, Local 68's vice president, as those entitled to strike benefits, plus the 21 names on another list (C.P. Exh. 5) who, Johnson testified, were not eligible for strike benefits because they apparently were receiving medical insurance payments (4:853–854), plus the 5 strikebreakers.

As previously mentioned, Respondent reduced the time condition to 3 days on 21 September because by then GP, having experienced strikes at some of its other plants in September, had salaried personnel trained to operate the equipment, and there was an abundance of qualified help available from outside contractors (4:715–716, 827–828).

What can be made of the delay from 15 August (when Respondent admittedly was adequately staffed) to 21 September (when the available sources of replacements reached the point of abundance)? Can it be said that at some point during that timeframe Respondent's failure to reduce the time condition to 3 days was conduct "inherently destructive" of important employee rights and, therefore, as a matter of law, a violation of Section 8(a)(3) and (1) of the Act?

Did a violation accrue on 15 August, or 3 days later, or are these dates too soon? Should the week ending Sunday, 2 September, be the decisive date? That would allow Respondent 2.5 weeks of adequate staffing to contemplate what to do. During that time, and from mid-May, Respondent knew that with a supply of adequate replacements available, it could replace unit employees in 3 days in the event of a strike. Respondent knew that it could do this in 3 days based on its mid-May experience. That obviously is how Smith settled on 3 days in his letter of 21 September.

Is this inquiry academic? After all, when Respondent did reduce the time condition to 3 days, the Union simply reiterated its same position that it would give adequate notice. I find that Respondent was justified in considering the Union's position, unexpressed in hours or days, as completely insufficient in light of the events of 9 July and the statements of Union Representative Hammond, on 9 July, and the August statements of Union Representative Balliet concerning no guarantee after the 15th or 31st days of work.

Thus, it is clear that had Smith framed the condition on 9 and 10 August as an advance notice of 3 days, the Union would not have accepted it. These circumstances hardly seem appropriate in which to find Respondent's conduct as "inherently destructive" of important employee rights.

As already noted, the complaint does not allege that Smith's first and second prepared statements are violative of the Act. Nor is the position advanced that the statements reflect an unlawful motive by unnecessarily asserting, even stressing, that the return to work offers were union and concerted activities. The one-sentence third statement, and the letter of 14 August from Smith to each employee, do not mention, much less emphasize, union and concerted activities. Those two communications, one short and the other long, properly state the need of a commitment from the Unions. It could be argued that Respondent should have so limited all its messages to the former strikers as they offered themselves back to work. After all, the reason Respondent locked out the employees was the lack of a commitment from the Unions. Respondent did not lock out the employees because they had engaged in, or were engaging in, union or concerted activities as such. Yet the latter is, in effect, what Respondent told the employees. In fact, Respondent was locking out all employees not already at work by the end of the strike because it feared that they might follow the call of the unions to embark on a "quickie" strike in the future. Respondent wanted a commitment from the unions to protect itself. But it failed to limit its statements to that simple need.

Neither is it alleged that the 21-day advance notice condition, imposed at a time (9–10 August) when Respondent knew that it was adequately staffed, joined (as with the separate elements of TNT) with the first two statements of Smith to the former strikers so that the combined impact was "inherently destructive" of important employee rights.

I have found that Respondent was not unlawfully motivated in imposing the condition of an advance notice of 21 days or, later, 3 days, before the employees participated in another work stoppage. I have further found the circumstances here, including the Union's unwillingness at any time to accept a time condition of 3 days, inappropriate in which to make any finding concerning whether Respondent's time condition of 21 days, even though outstanding for a lengthy period of 37 days (15 August to 21 September) after Respondent admitedly had adequate staffing,[42] was conduct "inherently destructive" of important employee rights. Accordingly, I shall dismiss the complaint.[43]

In conclusion, I shall dismiss the complaint because the General Counsel has failed to establish that Respondent was unlawfully motivated by its actions, or that its conduct was inherently destructive of employees' statutory rights.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to return former economic strikers to work between 10 August and 8 November 1984, and conditioning their return to work on the Union's signing a commitment to give an advance notice of a specific period of time before commencing any future work stop-

[41] There were 65 unit employees on the first shift (3:611). Of those, 15 to 20 were involved in the continuous process of Respondent's operation (4:801).

[42] On 15 August Respondent knew that it could have made the transition from unit employees to strike replacements in 3 days.

[43] Complaint par. 14(a) was amended at the hearing to allege that on or about 19 July (rather than 10 August) Respondent imposed a notice condition of 30 days (3:477, 479). As the date of 19 July precedes any unconditional offers to return to work, the allegation regarding a 30-day notice condition would be dismissed in any event. Finally, it was at the 16 July (not 19 July) Sandpiper Motel meeting when Respondent advised the Union of the 30-day notice condition.

pages, Respondent did not violate Section 8(a)(3) and (1) of the Act because there is insufficient evidence showing that (a) Respondent took its actions to discourage union membership or activities, or (b) Respondent's action is inherently destructive of important employee rights.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[44]

ORDER

The complaint is dismissed.

[44] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Gracinda Fashions, Inc. a/k/a Grace Fashions, Inc. *and* Local 144, International Ladies Garment Workers Union, AFL–CIO

Gracinda Fashions, Inc. a/k/a Grace Fashions, Inc. a/k/a Starlite Fashions, Inc. *and* Local 144, International Ladies Garment Workers Union, AFL–CIO. Cases 22–CA–14035 and 22–CA–14525

30 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 29 December 1986 Administrative Law Judge Winifred D. Morio issued the attached decision. Respondent Starlite Fashions, Inc. filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Gracinda Fashions, Inc., and its alter egos Grace Fashions, Inc. and Starlite Fashions, Inc., Newark, New Jersey, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Respondent Starlite Fashions, Inc. has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

William F. Grant, Esq., for the General Counsel.
Kenneth P. Samson, Esq. (Samson & Samson), of Maplewood, New Jersey, for Respondents Gracinda Fashions and Grace.
Steven R. Weinstein, Esq. (Schwartz, Tobia & Stanziale), of Montclair, New Jersey, for Respondent Starlite.
Jesse H. Strauss, Esq. (Wrightman, Parson, Mazel & Dugan), of Newark, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WINIFRED D. MORIO, Administrative Law Judge. This case, heard on 9 October 1986 at Newark, New Jersey, was based on an order consolidating cases, first amended complaint, and notice of hearing that was issued by the Regional Director for Region 22 on 4 August 1986.

The complaints allege, in substance, that about 15 August 1985 Gracinda Fashions, Inc. (Gracinda Fashions) established Grace Fashions, Inc. (Grace) as a subordinate instrument to and a disguised continuance of Gracinda Fashions and that about 1 June 1986 Gracinda Fashions established Starlite Fashions, Inc. (Starlite) as a subordinate instrument to and a disguised continuance of Gracinda Fashions and that all three corporations are alter egos and constitute a single employer within the meaning of the Act. The complaints also allege that these corporations were employer-members of the Association of Rain Apparel Contractors, Inc. (the Association) and as such were parties to collective-bargaining agreements with Local 144, International Ladies Garment Workers Union, AFL–CIO (Local 144) covering their production, maintenance, packing, and shipping employees. The complaints further allege that representatives of the corporations withdrew their recognition of Local 144 as the exclusive representative of their employees about 15 August 1985 and since that date these representatives have failed and refused to abide by the terms of the most recent agreement between the Association and Local 144, which was effective from 1 June 1985 to 31 May 1988. The answers filed by counsel for the corporations deny the commission of the unfair labor practices as alleged.[1]

All parties were afforded the opportunity to present witnesses, to cross-examine witnesses and to file briefs. Briefs were filed by counsel for the General Counsel and counsel for Starlite.

On the entire record, including my observation of the demeanor of the witness and on consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Gracinda Fashions, Grace, and Starlite, New Jersey corporations with facilities in Newark, New Jersey, were engaged in the business of assembling coats, jackets, and related items of clothing. During the 12 months preceding the issuance of the complaint, Gracinda Fashions and Grace in the course and conduct of their business operations provided services valued in excess of $50,000 for various enterprises, including Cortland Fashions, Inc. (Cortland), which enterprises are located in New Jersey, and during that same period Cortland and the other enterprises purchased goods and materials in excess of $50,000 directly from points outside the State of New Jersey and derived gross revenues in excess of $50,000 from the direct sale and shipment of products to customers located outside the State of New Jersey. Based on a projection of its operations for a 12-month period since about 1 June 1986, Starlite in the course of its business operations will provide services valued in excess of $50,000 for various en-

[1] Gracinda Fashions and Grace were represented by the same attorney. Starlite was represented by another attorney.

terprises, including Majestic/FTP, which enterprises are located within the State of New Jersey. During the past 12 months these other enterprises, including Majestic/-FTP, purchased goods and materials valued in excess of $50,000 directly from points outside the State of New Jersey and derived gross revenues in excess of $50,000 from the direct sale and shipment of products to customers located outside the State of New Jersey. The parties admit, and I find, that Gracinda Fashions, Grace, and Starlite are employers within the meaning of Section 2(2), (6), and (7) of the Act. The parties admit, and I find, that Local 144 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

On 20 September 1985, Local 144 filed a charge in Case 2–CA–14035 against Gracinda Fashions and Grace alleging, in substance, that representatives of Gracinda Fashions had established Grace in order to avoid their bargaining obligation with Local 144. On 6 January 1986, the parties entered into a settlement agreement with respect to that charge, which was approved on 7 January 1986 by the Regional Director. The agreement was executed by Gracinda Soares on behalf of Gracinda Fashions and by Rosa DaSilva on behalf of Grace. The agreement, on its face, stated that the parties agreed to execute and be bound by a collective-bargaining agreement that was attached to the settlement agreement. The attached document stated that Gracinda Fashions and Grace agreed that, for labor relations purposes, they were alter egos; that Grace had been the employer since September 1985;[3] and that Grace would become a member of the Association and would honor the Association's collective-bargaining agreement, with Local 144, as modified by terms of the settlement agreement. According to this attached document, the Company agreed that its machinery would be collateral for moneys owed and the Company further agreed to pay all accrued benefits. The Union agreed to a schedule of reduced benefits.

On 1 August 1986, the Regional Director issued an order in which he withdrew his approval of this settlement agreement and set aside the settlement agreement on the ground that Gracinda Fashions and Grace had established Starlite as a disguised continuance of Grace and had refused to recognize Local 144 and to honor the collective-bargaining agreement entered into as part of the settlement agreement. Notwithstanding this order, which set aside the settlement agreement, it is the position of the General Counsel that the Companies were bound to honor the document, attached to the settlement agreement, because it was tantamount to a collective-bargaining agreement and Local 144 had entered into this agreement and made concessions in order to permit the Companies to remain in business. Thus, it appears that the General Counsel considers the settlement agreement and the document attached to it as separate agreements and, therefore, the order that set aside the settlement agreement did not have any effect on the obligation of the Companies to honor the document that was attached to the settlement agreement. The General Counsel further contends that Starlite, as the disguised continuance of both corporations, also was obligated to honor the collective-bargaining agreement that arose because of the settlement.

This case presents an unusual situation. The only witness called by the General Counsel in support of the allegations of the complaints was Alfred Soares, who was admittedly an officer of Gracinda Fashions, one of the corporations charged with violating the Act. Counsel for Starlite contended that Soares' testimony was motivated either because of animosity to his wife and daughter or as a means of securing certain production machinery, part of which he claimed he owned, and that was used by the employees of the three corporations.

Soares testified that Gracinda Fashions began its manufacturing operations about 1979 under the direction of his wife, Gracinda Soares. Soares claimed that he had given his wife "permission" to start the business but he did not become involved with the Company on a full-time basis until 1982. The operations of Gracinda Fashions were conducted at St. Francis Street, Newark, New Jersey, and the machinery used in the operations had been purchased at some point from Cortland, the company for which Gracinda Fashions manufactured coats and jackets. This machinery, which appeared to be the only asset of Gracinda Fashions, was owned jointly by Alfred and Gracinda Soares.

Gracinda Soares, Company president, directed the work of the production employees and handled the customer, Cortland. She was assisted in these duties by her daughter, Rosa DaSilva, who acted as an interpreter for her parents, Alfred and Gracinda Soares, because they did not speak English. Alfred Soares was primarily responsible for the maintenance of the machinery and it does not appear that he directed or supervised the employees or had contacts with the customers. Gracinda Fashions had a collective-bargaining agreement with Local 144 for its production employees by virtue of its membership in the Association, which Gracinda Soares had joined in April 1978.

During the period between 1979 and September 1985, Cortland, as a union jobber, made contributions for pension and welfare benefits for the Gracinda Fashions employees as required by the collective-bargaining agreement between the Association and Local 144. However, in September 1985, Cortland went out of business and ceased its contributions to Local 144 for benefits for the Gracinda employees. Gracinda Fashions was unable to pay the employee benefits and was also unable to secure a union jobber. Soares testified that because their effort to secure union work was unsuccessful, "we had to open a new firm, Grace Fashions. So it was not to have a union." After consultation with an attorney, Kenneth Samson, Soares and his wife and daughter decided that Soares and his wife would not appear as officers of Grace but their daughter, DaSilva, would be listed as an officer.

The new corporation was located at the same address as Gracinda Fashions and utilized the same machinery,

[3] Gracinda Fashions, allegedly, went out of existence in September 1985.

which had been owned by that Company. In addition, Gracinda Soares continued to direct the day-to-day operations and to supervise the same employees who had been employed by Gracinda Fashions and these employees performed the same type of work, although it was now being performed for nonunion companies. DaSilva continued to act as an interpreter for her mother. Soares testified that his daughter, DaSilva, had an accountant prepare a document to show that Gracinda Fashions had sold its machinery to Grace, but Soares denied that there had been such a sale or that he had signed any document transferring the machinery to Grace. No document was produced to establish such a sale and there was no evidence that Soares received money for his share of this machinery.

According to Soares, about September 1985, his wife told the employees that they were now working for a new firm, the firm was nonunion, there was no need for a union.

The Regional Director issued a complaint wherein he alleged that the new firm, Grace, was a disguised continuance of Gracinda Fashions and that, therefore, it had an obligation to recognize and bargain with Local 144. As noted, Gracinda Soares and Rosa DaSilva executed a settlement agreement in January 1986 to settle the allegations of that complaint.

Soares testified that after the settlement agreement was executed, he had a conversation with his wife, Gracinda, during which she told him that they would have to form another company to avoid the union. Thereafter, at the request of her parents, Rosa DaSilva met with their attorney, Kenneth Samson.[3] According to Soares, DaSilva told her parents that the attorney had advised her that they would have to put the new corporation in the name of a person who was not a member of the family and they would have to move to a new location. In the second week of February 1986, Soares, with the help of his wife, daughter, and some truckmen, who were paid by Soares, moved the machinery that had been owned by Gracinda Fashions and then used by Grace to a new location, 397 Market Street, Newark, New Jersey. Soares testified that he installed the machinery at the new location and made the electrical connections and, during the months of February, March, and April, he continued to install the machines. He further testified that he approached a cousin and he requested this cousin to allow his name to be used for incorporation purposes for the new Company but, after some consideration, his cousin rejected his request.

At this point his wife approached a neighbor, Francilina Palmer, and asked her to allow her name to be used for incorporation purposes and this neighbor agreed to the arrangement. The new Company was called Starlite. Soares maintained that he accompanied his wife to court where they received the corporate records from Samson and paid him for them.[4] Soares testified that production began at Starlite in early June with 12 employees, about 4 of whom had been employed by Gracinda Fashions and Grace. Soares claimed that Gracinda Soares hired these employees and during the time that he was there she directed the work of these emloyees. Palmer performed only production work and she did not direct or supervise other employees. It appears that within a few days after production started at Starlite, Soares and his daughter and wife had an argument and Soares was locked out of the plant and his home. It was Soares' testimony that he owned stock in Starlite because he owned half of the machinery.

[3] Samson represented both Gracinda Fashions and Grace during the hearing in the instant case and he was present during the hearing.

[4] Soares stated that they paid Samson $500: $400 for the incorporation of Starlite and $100 to defend Soares on an assault charge.

Discussion

The Board has held that a settlement agreement will be set aside if its provisions are breached or if postsettlement unfair labor practices are committed. *Cambridge Contracting*, 259 NLRB 1374, 1381 (1982); *Ann's-Schneider Bakery*, 259 NLRB 1151, 1152 (1982). The Board also has held that presettlement conduct may be considered as background evidence in determining the motive or object underlying a respondent's postsettlement conduct. *Vore Cinema Corp.*, 254 NLRB 1288, 1291 (1981); *Laborers Local 185 (Joseph's Landscaping)*, 154 NLRB 1384 (1965). In the instant case, it is the General Counsel's contention that the provisions of the settlement agreement were breached and that unfair labor practices were committed and, therefore, the agreement should be set aside. The settlement agreement was executed by Gracinda Soares, on behalf of Gracinda Fashions, and by Rosa DaSilva, on behalf of Grace. Both of those corporations, allegedly, have ceased to exist and the only operating corporation, Starlite, was not in existence at the time the settlement agreement was executed. Therefore, in order to determine whether the contention of the General Counsel has any validity and whether the principles enunciated above have any application to this case it is necessary to decide what relationship, if any, existed among the corporations.

It is the position of the General Counsel that the real principles in all three corporations were Gracinda and Alfred Soares and that these two individuals first formed Grace to avoid their bargaining obligation to Local 144 and when that effort was unsuccessful they improved their "methodology" and created Starlite. Counsel for Gracinda Fashions and Grace did not file a brief. The brief filed on behalf of Starlite claims that the facts show that neither Gracinda or Alfred Soares or their corporation, Gracinda Fashions, owned stock in either Grace or Starlite and neither Gracinda or Alfred Soares were officers in either Grace or Starlite. Counsel further argues that the General Counsel has "an affirmative burden of proof and must show by a preponderance of the affirmative evidence on the record as a whole that the allegations of the complaint are in truth supported," mere suspicion alone will not suffice to prove an unfair labor practice. Counsel contends that there is no evidence to support the following allegations of the complaint; Gracinda Fashions created Grace or Starlite, Alfred and Gracinda Soares are coowners of Grace and Starlite. DaSilva was an agent of Grace and Starlite, a majority of

employees of the Companies designated Local 144 as their bargaining representative, and there have been a succession of collective-bargaining agreements with Local 144.

As noted, the only witness who testified in this proceeding was Alfred Soares and the only documents admitted into evidence were the settlement agreement, the membership form in the Association executed by Gracinda Soares, and the certificate of incorporation for Starlite. Thus, the first issue to decide is whether Soares testified truthfully, or whether he fabricated a story in retaliation against his wife and daughter for their actions against him. The next issue is whether his testimony, even if credited, is sufficient to support the affirmative burden placed on the General Counsel with respect to the allegations of the complaint.

There are several factors that convince me that Soares testified truthfully. In the first place, I observed Soares throughout his testimony and my observation of his demeanor convinces me that he told the truth about the events surrounding the formation of the two corporations. Second, it should be noted that outside events support Soares' testimony. Thus, long before Soares was locked out of the plant by his wife and daughter, or had any reason to retaliate against them, Gracinda Soares and Rosa DaSilva entered into a settlement agreement to resolve the charge that Grace had been formed in an effort to avoid the bargaining obligation of Gracinda Fashions. Third, Gracinda Soares, Rosa DaSilva, Kenneth Samson, and Francilina Palmer, implicated by Soares in the scheme to deceive Local 144, failed to testify and no explanation was offered for their failure to testify. Kenneth Samson was in the hearing room during the proceeding, but he did not testify and refute Soares' testimony. Palmer, the alleged owner of Starlite, the only corporation presently in existence that could bear the burden of remedying the unfair labor practices, did not testify to protect her alleged independent corporation. It is highly unlikely that a disinterested owner would have acted in such a fashion. It is well established that when a witness is not produced to deny or explain the testimony given by witnesses for the General Counsel an adverse inference is warranted that they could neither refute nor deny that testimony. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980); *Siligman & Associates*, 273 NLRB 1216, 1218 (1984), *Earle Industries*, 260 NLRB 1128 (1982).

Therefore, based on the testimony of Alfred Soares, I find that Gracinda and Alfred Soares, officers of Gracinda Fashions, with the assistance of their daughter, Rosa DaSilva, and their attorney, Kenneth Samson, formed Grace as a disguised continuance of Gracinda Fashions in order to avoid their bargaining obligation with Local 144. I also find that Gracinda Soares continued to direct and control the day-to-day operations of Grace and to supervise the same employees at the same location. Further, I find that when these initial efforts to avoid their collective-bargaining relationship with Local 144 were unsuccessful the Soares, with the assistance of Francilina Palmer and their attorney, Kenneth Samson, formed Starlite as a disguised continuance of Grace and Gracinda Fashions and, thereafter, Gracinda Soares, as she had at the two former corporations, directed the day-to-day operations of Starlite, supervised the employees, and handled the customers. The fact that only 4 of the 12 Starlite employees had been employees of the former corporations is insufficient to establish that Starlite was a totally separate and independent Company. In this connection, it should be noted that the only tangible asset of all three Companies was the machinery, which was owned in part by Alfred Soares. Contrary to assertion by Starlite's counsel, the record does disclose the basis on which Starlite used that equipment. Soares testified that he personally paid for the delivery of that equipment to Starlite premises and he installed it. Soares made it clear on the record that he was not paid by Starlite for his share of that machinery and he credibly denied that he had authorized the transfer of that machinery to Grace or Rosa DaSilva.[5]

In the circumstances of this case, I do not consider that the certificate of incorporation for Starlite, which lists Palmer as owner, is sufficient to outweigh the testimony by Soares concerning the reason why she was so listed. This is particularly true in view of Palmer's failure to testify. Nor do I consider the fact that Gracinda Soares and Alfred Soares were not listed as officers or stockholders of either Grace or Starlite to be dispositive of the issue in view of the credible testimony by Soares that they were not listed as part of the scheme to deceive Local 144. Further, in view of my finding that the true principles in the corporations were Gracinda and Alfred Soares, I do not consider that Soares' testimony concerning conversations he had with his daughter about her discussions with Samson are hearsay. DaSilva acted as an agent for her parents when she discussed the formation of both Grace and Starlite and when she relayed the attorney's instructions to her parents she did so in her capacity as their representative. Soares had the right to disclose those instructions during his testimony. Moreover, assuming arguendo that the testimony was hearsay the Board has stated, "Administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies." *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

In *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), the Board stated that in deciding whether one company is an alter ego of another, it would consider whether there was common ownership and management, common business purposes, common premises and equipment, common customers, and the nature of the operations and supervision. The Board also stated that it would consider "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade its responsibilities under the Act." If the factors outlined above are considered in relation to Grace and Starlite, it is evident that both corporations are alter egos of Gracinda Fashions. Thus, Gracinda and Alfred Soares were the owners of Gracinda Fashions

[5] In fact, counsel, in effect, admitted that Soares had not been paid for the machinery. Counsel claimed that Soares testified against his wife and daughter because he thought that was the way that he could secure his share of the machinery.

and Grace, they are the owners of Starlite, and they are equal owners of the equipment. The business purpose of Gracinda Fashions and Grace was to manufacture coats, and that is also the purpose of Starlite. And the direction of the day-to-day operations of the three corporations was and is within the control of Gracinda Soares. Further, as Soares testified, both Grace and Starlite were formed for the purpose of evading the Soares' responsibilities under the Act.

In these circumstances, I find that the settlement agreement was breached and was properly set aside. However, contrary to the General Counsel, I do not find a basis to set aside the agreement although at the same time directing the parties to abide by one of the terms of that agreement (i.e., the collective-bargaining agreement attached to the settlement agreement). However, I do note that Starlite, as an alter ego of Gracinda Fashions, is a member of the Association and as such is obligated to recognize and bargain with Local 144 for its production employees and to abide by the terms of the collective-bargaining agreement in existence between the Association and Local 144.[6] The contention by counsel for Starlite that the record does not disclose the employees represented by Local 144 or that there were a series of collective-bargaining agreements is without merit. Soares testified that all production employees were represented by the Union and that they had been from the beginning of Gracinda Fashions "until last year when Gracinda Fashions was closed and Grace Fashions was opened."

CONCLUSIONS OF LAW

1. Gracinda Fashions, Inc. (Gracinda Fashions), Grace Fashions, Inc. (Grace), and Starlite Fashions, Inc. (Starlite) are employers engaged in commerce and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 144, International Ladies Garment Workers Union, AFL–CIO (Local 144) is a labor organization within the meaning of Section 2(5) of the Act.

3. Grace Fashions, Inc. and Starlite Fashions, Inc. for the purpose of this proceeding are the alter egos of Gracinda Fashions, Inc.

4. All nonsupervisory production, maintenance, packing, and shipping employees employed by employer-members of the Association of Rain Apparel Contractors, Inc. (the Association), including Gracinda Fashions, Grace, and Starlite, constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act.

5. Since about 24 April 1978, Local 144 has been and is the exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

6. By failing and refusing to bargain in good faith, since about 15 August 1985, with Local 144 as the collective-bargaining representative of their employees in the aforesaid appropriate unit, and by failing and refusing to abide by the Association contract, effective from 1 June 1985 to 31 May 1988, Gracinda Fashions, Grace, and Starlite have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Gracinda Fashions, Grace, and Starlite have engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Gracinda Fashions, Grace, and Starlite be required to bargain with Local 144 as the exclusive representative of the employees in the unit found appropriate herein. I shall further recommend that Gracinda Fashions, Grace, and Starlite be required to abide by the terms of the collective-bargaining agreement in effect between the Association and Local 144 covering the aforesaid employees and reimburse Local 144 for all health, welfare, pensions, and other moneys due to the employees in the aforesaid unit, since about 15 August 1985, with interest thereon, in the manner established in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondents, Gracinda Fashions, Inc., Grace Fashions, Inc., and Starlite Fashions, Inc., their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Local 144, International Ladies Garment Workers Union, AFL–CIO as the exclusive representative of the employees in the following unit:

> All nonsupervisory production, maintenance, packing and shipping employees employed by employer-members of the Association of Rain Apparel Contractors, Inc. (Association), including Gracinda Fashions, Grace and Starlite, but excluding office clerical employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to abide by the terms of the collective-bargaining agreement in existence between Local 144 and the Association of Rain Apparel Contractors, Inc.

[6] The evidence in the record establishes that Gracinda Fashions became a member of the Association in 1978. There is no evidence that Gracinda Fashions resigned from the Association. Thus, Starlite as an alter ego of Gracinda Fashions is bound to honor the collective-bargaining agreement in existence between the Association and Local 144.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with Local 144, as the exclusive representative of the employees in the appropriate unit set forth above.

(b) Honor the terms of the collective-bargaining agreement in effect between the Association and Local 144 and reimburse Local 144 for all health, welfare, pensions, and other moneys due to employees in the above-described unit, from about 15 August 1985, under the terms of that agreement with interest on those moneys in accordance with the formula described above under the remedy section.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Newark, New Jersey Facilities, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Local 144, International Ladies Garment Workers Union, AFL–CIO as the exclusive collective-bargaining representative for employees in the bargaining unit described below.

WE WILL NOT fail and refuse to abide by the terms of the collective-bargaining agreement in existence between Local 144 and the Association of Rain Apparel Contractors, Inc.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with Local 144, as the exclusive representative of our employees in the appropriate unit described below:

> All nonsupervisory production, maintenance, packing and shipping employees employed by employer-members of the Assocation of Rain Apparel Contractors, Inc., including Gracinda Fashions, Grace and Starlite, but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL abide by the terms of the collective-bargaining agreement in existence between Local 144 and the Association and will reimburse Local 144 for all health, welfare, pension, and other moneys due from about 15 August 1985 to employees in the above-described unit under the terms of that agreement, with interest.

GRACINDA FASHIONS, INC., A/K/A GRACE FASHIONS, INC., A/K/A STARLITE FASHIONS, INC.

Trico Industries, Inc. *and* **John Jay Clark.** Case 6–CA–18816

30 April 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 6 August 1986 Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Trico Industries, Inc., Bradford, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that personnel records fail to reflect "a single incident" where an employee was warned or otherwise disciplined for engaging in excessive conversation or any conduct resembling Clark's conversations with Union President Baxter on 14 and 15 January 1986. The record shows that on one occasion an employee received a written warning for "visiting with" Baxter for a prolonged period of 10 to 15 minutes without permission. As found by the judge, however, the record shows that the Respondent does not ban all idle conversation between employees during working time and the Respondent did not demonstrate that an interference with production resulted from the conversations of 14 and 15 January. Having considered this evidence, we agree with the judge that the Respondent's discharge of Clark violated the Act. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), approving *Wright Line*, 251 NLRB 1083 (1980).

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in Bradford Motor and Mechanics Lodge No. 1286, International Association of Machinists and Aerospace Workers, or any other labor organization, by discharging or in any other manner discriminating against employees with respect to their wages, hours, or terms and conditions or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer John J. Clark immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify John J. Clark that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

TRICO INDUSTRIES, INC.

Matthew Franckiewicz, Esq., for the General Counsel.
William R. Tait Jr., Esq. (McNerney, Page, Vanderlin & Hall), of Williamsport, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This proceeding was heard by me in Bradford, Pennsylvania, on 30 April 1986, on an initial unfair labor practice charge filed on 27 January 1986, and a complaint issued

on 28 February 1986, alleging that the Respondent independently violated Section 8(a)(1) of the Act by stating that employee inquiries concerning working conditions should be addressed to management, rather than the exclusive bargaining representative. The complaint further alleged that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging John Jay Clark in reprisal for his union and/or protected concerted activity. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed by the General Counsel and the Respondent.

On the entire record in this proceeding, including consideration of the posthearing briefs, and my opportunity directly to observe the witnesses while testifying and their demeanor,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation, with a place of business in Bradford, Pennsylvania, from which it is engaged in the manufacture and nonretail sale of oil well pump parts. In the course of the operations, during the 12-month period ending 31 December 1985, a representative period, the Respondent received goods and materials at the location valued in excess of $50,000, shipped directly from points outside the Commonwealth of Pennsylvania, and also shipped from the facility, goods and materials valued in excess of $50,000, directly to points outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and it is found that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and it is found that Bradford Motor and Mechanics Lodge No. 1286, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Principally at stake in this proceeding is the question of whether the Charging Party, John Clark, was terminated for reasons prescribed by the Act.

Clark was hired on 16 December 1985. He worked for only about 1 month, all on the second shift, from 3:30 p.m. to midnight. According to his immediate foreman, "Smokey" DeGolier, Clark was a good worker, who gave him no trouble. Clark's discharge occurred on 16 January 1986[2] in the context of an established bargaining relationship that dated back several years. At the time a collective-bargaining agreement, scheduled to expire on 9 October 1987, was in effect. The discharge occurred prior to Clark's completion of the 45-day probationary period set forth in article VII, section 2 of the contract.[3]

The General Counsel contends that Clark was discharged because he was observed conversing with a union official on 14 and 15 January, activity that according to the General Counsel is protected by Section 7 of the Act. The Respondent defends essentially on the claim that Clark was terminated for legitimate cause; namely, his poor attitude and demonstrated lack of initiative.

The dispute centers on the last week of Clark's employment, when Gerald M. Alexander Jr., the Respondent's plant superintendent, soured on Clark. During that week Alexander learned of Clark's frustration with his inability to advance to a higher paying job on sophisticated, computerized machinery. The equipment in question is known in the trade as "Numerical Control" or NC machines. In previous employment, Clark had acquired experience on the automated machinery and personally owned tools, apparently having special utility on the numerical control equipment. This type of equipment was mentioned prominently in the newspaper advertisement that lured Clark to apply with the Respondent.[4]

Clark, prior to his discharge, was not afforded the opportunity to operate any NC equipment. He discussed the possibility of doing so with his supervisor, Smokey DeGolier, as well as Alexander and the assistant plant manager, Al Harris. He was encouraged by management to pursue his interest in this respect. For example, Supervisor DeGolier demonstrated the numerical control machine called the "Mazak," giving Clark a copy of the manual. Apparently this led to disappointment, when DeGolier informed Clark that an employee hired after Clark had been transferred to the day shift to begin training on the "Mazak."

The first real opportunity for Clark to formally declare his interest in this respect arose on 6 January, when the Company posted job vacancies. This represented the initial bidding since Clark's hire. Of the four jobs posted on that occasion, only one involved a computerized machine. That job drew eight bids. It was the only position bid by Clark. Needless to say, his seniority was too limited and the competition too intense; he did not get the job.

A second round of bidding on new vacancies was later scheduled for Monday, 13 January. The events of that day are central to the defense. That evening Alexander, with knowledge that Clark was a disappointed bidder, made a personal effort to preserve Clark's interest in seeking other jobs. He approached Clark at the latter's work station, offering to show Clark certain machines that would be put up for bid that evening. In accepting Alexander's offer, Clark indicated that he felt useless running the machines that he had been assigned to,

[1] Credibility resolutions hereinafter made may be accompanied by objective rationale. This is merely intended to reenforce, not discount, perceptions gained through my firsthand observation of the witnesses. Furthermore, unmentioned testimony is rejected to the extent that it is irreconcilable with expressly credited evidence.

[2] Unless otherwise indicated all dates refer to 1986.

[3] See G.C. Exh. 5, p. 12.

[4] See G.C. Exh. 2.

adding that he had a toolbox worth $500 to $700 just sitting collecting dust.[5]

Alexander first showed Clark a "five spindle" machine. Clark apparently displayed a lack of enthusiasm for this job by stating that an employee with several years seniority was expected to bid on it. Alexander then took him to the "eight spindle" machine. While Alexander was showing Clark the equipment, the operator thereof asked Alexander a question. When the latter responded, a conversation ensued, whereupon Clark simply walked off, returning to his workplace.

Alexander testified, in this instance, believably, that his conversation with the operator was short, and when he discovered that Clark had left, he was outraged.[6]

On the basis of this incident, and despite Foreman DeGolier's positive evaluation of Clark, Alexander claims to have reached the following conclusions with respect to Clark:

> . . . John had a poor attitude, didn't take interest, he was finished as far as I was concerned, unless something really great that he did during the week he was finished.

That evening, Clark worked the balance of his shift apparently without incident. In the course thereof he registered unsuccessful bids for two jobs.[7]

Despite Alexander's reaction, not only did Clark continue to work, but at no time did Alexander, or any other supervisor, discuss with Clark or call his attention to any impropriety in his conduct of 13 January. The next day, Tuesday, 14 January, at approximately 3:45 p.m., Clark initiated a conversation with John Baxter, the president of Local 1286. Baxter was off duty. Clark was working. His machine was in full operation. Clark quizzed Baxter about (1) job bidding procedure; (2) the Company's financial assistance policy concerning the purchase of safety boots; (3) participation in the credit union; (4) eligibility for health insurance benefits; and (5) the Company's practice of requiring two different machines to perform simultaneous operations on a particular wrench.

Alexander observed them, but testified that at first he thought nothing of it and continued on making his rounds through the plant. According to Alexander, later, when he observed that the conversation was continuing, he approached, inquiring about whether there were any problems. At the time, Clark and Baxter were discussing the drilling and deburring required under the Respondent's manufacturing scheme with respect to the "sucker-rod wrench."[8]

Throughout the conversation, Clark was working, running back and forth to and from his machine to tend the parts being cut. It does not appear that Alexander criticized or made any comment concerning the appropriateness of this arrangement.

The complaint alleges that in the course of this exchange the Respondent violated Section 8(a)(1) of the Act through an alleged remark by Alexander that questions concerning wages, hours, and working conditions should be addressed to the Respondent and not to union representatives. In support, Baxter claims that on Alexander's arrival, he informed Alexander that Clark was asking about health insurance, wrench handles, and some other things. In response, Alexander allegedly stated, "[t]hat these were things that he should be asking his supervisor." Clark failed to testify to any such remark and it does not appear that any such comment was carried beyond Baxter.[9] Baxter, however, on cross-examination, confirmed that as Alexander approached he and Clark were discussing the procedure for processing the "wrench handles" that required two operations at once, running two different machines. At the time, Baxter admittedly was studying the route sheet describing the manufacturing process. This, according to Alexander, was the limited focus of his remark. Thus, he testified that it was during their reference to the drilling and deburring route within the wrench manufacturing cycle that he told Baxter that questions of this nature should be addressed to the foreman. In this instance, I am inclined to give benefit of the doubt to Alexander. Baxter's capacity for recollection of detail was unimpressive. In any event, neither version suggests anything beyond a passing, innocent expression of opinion, as distinguished from a remark having any mandatory connotation. Because Alexander was addressing an issue that obviously had been raised by Clark, if an "instruction" were intended, he certainly would have sought out Clark to "direct" him about the appropriate procedure. Thus, Baxter's account merely evidences a remark that was subject to evaluation as an expression of viewpoint not phrased as instruction or direction or having any tendency to impede employees in the exercise of rights guaran-

[5] The foregoing is based on the testimony of Clark. Alexander gives a slightly different version. He claims that Clark stated that "if he did not get a NC, that he might as well take his tools home." Although Alexander did not impress me as entirely trustworthy, it is entirely possible that in this instance he provided an honest recollection of either what was said, heard, or understood. Note that according to Foreman DeGolier, immediately after the incident in question, Alexander informed him of his anger at Clark, while repeating that Clark had stated that "he would take his tools and go home, if he didn't get an NC." Quite plainly, this version is more offensive than that related by Alexander. In any event, the conflict derives significance from further testimony by Alexander that he took umbrage at Clark's comment. Considering Alexander's own version of the remark, together with his testimony that he "did not show any outward signs of reaction to this," I am convinced that he recognized Clark's statement for what it was—an appeal in support of advancement and not an attempt to demean his job or management. Alexander's attempt to portray his reaction to the remark differently was so strongly disbelieved as to lessen confidence generally in his reliability as a witness.

[6] Foreman DeGolier confirmed that shorly after the incident, he was confronted by Alexander who inquired as to the whereabouts of Clark, explaining that while he was showing Clark around, Clark walked off. Alexander remarked to DeGolier that he was "pissed-off," commenting that Clark had said that he would take his tools and go home if he did not get a numerical control job. When DeGolier told Alexander that he had experienced no trouble with Clark and that he was a good worker, Alexander stated that as far as he was concerned Clark was "done." DeGolier indicated that he did not agree that Clark should be let go.

[7] See G.C. Exh. 7(b).

[8] Apparently, Alexander participated in a discussion concerning a possible bid on a Mazak machine, informing Alexander that if he had the requisite seniority there should be nothing to prevent him from securing such a position.

[9] Clark, while moving back and forth between his machine, perhaps did not hear the entirety of what transpired between Baxter and Alexander.

teed by the Act.[10] Moreover, on the credited testimony of Alexander, it is clear that his comment was addressed to a manufacturing method or process, an area of acute familiarity to supervision. He was free to make that point without offending statutory interests. There being no indication that the production process involved was viewed by Clark as impacting on him adversely, or that he intended to grieve or complain about it, Alexander's remark was a perfectly legitimate expression that a request for information concerning work flow procedures be addressed to those responsible for the initiation and implementation of that process. Accordingly, the Respondent did not in this respect violate Section 8(a)(1) of the Act.

Alexander does not appear to have manifested any degree of hostility toward the Clark/Baxter conversation of 14 January. However, at the start of the second shift on Wednesday, 15 January, Alexander again observed Clark and Baxter in conversation. On this occasion, Baxter approached Clark to deliver a union calendar and to express his opinion about possible health insurance coverage of a pregnancy in Clark's family. Workwise, Clark, at the time, had completed his first "part" and had turned off his machine to take the part to his foreman for inspection. This time it was with immediacy that Alexander approached them, angrily asking what the problem was, stating "we don't want to start any bad work habits." On that note, all three went their separate ways.

Later that day, according to Alexander, he discussed Clark with Walt Harris, and recommended as follows:

> Nothing good is going to happen with this fellow, he's engaged in poor work habits now and tomorrow's pay-day we might as well do it [terminate Clark] tomorrow.

Harris reportedly was in total agreement.[11] Accordingly, when Clark reported to work at 3:30 p.m. on Thursday, 16 January, he was not given his regular assignment, but was instructed to report to Alexander. In their meeting, Alexander expressed dissatisfaction as to Clark's "initiative," while also criticizing Clark's "attitude." Clark was informed that he would be let go as Harris and Alexander did not feel it was going to work out for him. Clark then became provocative to the point of inviting Alexander to discuss the matter "outside."[12] The termination form completed by Alexander defined the reason for discharge as "poor attitude & lack of initiative."[13]

On analysis it should be apparent from the foregoing that Clark's conversations with Union President Baxter furnish the only causation possibly warranting statutory intervention. If protected by Section 7, and if the General Counsel has shown that those incidents were at least "a" motivating factor in the decision to discharge Clark, under the Board's *Wright Line* test,[14] the burden will shift to the Respondent to convincingly demonstrate that it would have taken the same action against Clark even if those conversations had not occurred.

The threshold issue is whether the Baxter/Clark encounters constituted activity protected by Section 7 of the Act. Both occurred while Clark was on duty and supposedly working. During that which occurred on 14 January, Clark admittedly was running back and forth from his machine some 5 feet away. Though witnessed by Alexander, he voiced no objection to Clark's dual involvement at that time. In the second conversation, according to Clark, he had just completed his first unit of production, had turned his machine off, and was preparing to take the part to Foreman DeGolier for inspection when Baxter appeared. On this occasion, Alexander did caution against "poor work habits."

As an abstraction, discussions between a union representative and an employee concerning terms and conditions of employment entail assertion of a fundamental statutory right. Section 7 of the Act fosters the right of employees to know[15] and obligates union agents to educate,[16] as essential links in the representational scheme whereby benefits are negotiated, identified, and pursued. Inquiries concerning benefits as a preliminary to grievance activity is indispensable to, and hence "reasonably directed toward the enforcement of a collective bargaining right." *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Any interpretation that would allow management to terminate with impunity those who participate in such exchanges would seriously undermine this phase of the overall congressional scheme.

At the same time, however, the Act does not interfere with management's rights to assure through reasonable restrictions that employee interests are asserted under conditions that do not impede production and efficiency. For many years the idea that "work time is for work" has provided a helpful reference in the attempt to reconcile the tension between employee rights in this area and the right of employers to maintain discipline. See, e.g., *Peyton Packing Co.*, 49 NLRB 828, 843 (1943); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983). This does not mean, however, that all employee activity on working time is beyond the protective mantle of the Act.[17] Board

[10] The Board's recent decision in *Tenn-Tom Constructors*, 279 NLRB 465, 469 (1986), is inapposite. In that case, an 8(a)(1) violation was found when employees *as a group* were confronted and told by a general foreman that "from then on they should bring their problems to him." This "direction" under the circumstances was distinguishable from the off-the-cuff expression of opinion passed on by Alexander to Union President Baxter, apparently beyond earshot of Clark and any other employees. The evidence here shows that the remark was neither intended to establish a standard, nor conveyed as a direction, instruction rule, or policy. Another case, *R.J. Liberto, Inc.*, 235 NLRB 1450, 1451, 1453 (1978), is distinguished on the same ground.

[11] Subsequently, Harris was discharged from the Respondent's employ and apparently was unavailable to testify.

[12] The above is based on testimony of Alexander. Clark testified that he was told that things were not working out and that they were going to let him go because he "[D]idn't seem to be interested in job bids" Clark denied that any other reasons were offered in explanation of the discharge. The conflict need not be resolved.

[13] See G.C. Exh. 4.

[14] *Wright Line*, 250 NLRB 1083, 1089 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[15] "[T]he Act protects an employee in seeking the advice and assistance of a union steward . . . ." See *Tenn-Tom Constructors*, supra at 465.

[16] The duty of fair dealing imposed by the Act on labor organizations includes the obligation "to inform employees about the terms and conditions that could affect there employment." See *Teamsters Local 896 (Anheuser Busch)*, 280 NLRB 567 (1986).

[17] See, e.g., *PPG Industries*, 251 NLRB 1146, 1168 (1980).

precedent strongly suggests that when an employer has failed to adopt and publish a valid rule regulating union activity during working time, discipline for that reason will be upheld as lawful only when the employer demonstrates that it *acted in response* to an *actual* interference with, or disruption of work. See, e.g., *Zack Co.*, 278 NLRB 958 (1986), Chairman Dotson dissenting on other grounds; *Greensboro News Co.*, 272 NLRB 135, 138 (1984); *Foley-Wismer & Becker*, 263 NLRB 793 (1982); *Selwyn Shoe Mfg. Corp.*, 172 NLRB 674, 676 (1968). Consistent therewith, the Board has stated that "A discharge based on work time . . . [activity] . . . in the absence of a valid rule is suggestive that the employer was reacting to the protected aspect of the employee's conduct, rather than considerations of plant efficiency." *Greentree Electronics Corp.*, 176 NLRB 919 (1969). In other words, when there is no published rule regulating working time, the assumption is that the employer tolerates incursions until they reach disruptive levels.[18]

In this case, plant policy regulating working time is evident in both the employment manual maintained by the Respondent and the negotiated collective-bargaining agreement. Insofar as relevant, the latter recites as follows:

> . . . There shall be no solicitation for union membership or collection of union dues or other payments on Trico time. Nor shall there be any other union activity on Trico time that will interfere with production or violate Trico's rules with regard to visiting between departments in the plant.[19]

The Respondent's published employment guide offers a further restraint, as follows:

> Engaging in excessive conversation or in any way disturbing or interfering with the work of other employees is prohibited.[20]

Beyond the foregoing, the Respondent has not communicated that employee participation in union or other activity during their working time is restricted or might result in discipline.

As the published rules imply, the Respondent does not ban all idle conversation between employees during working time. Moreover, personnel records fail to reflect a single incident in which an employee was warned or otherwise disciplined for engaging in excessive conversation or any conduct resembling Clark's role in the conversations with Baxter on 14 and 15 January.[21] While a conversation when one should be working is commonly regarded as "a bad work habit," no claim is made by the Respondent that any published rule was violated by the conversations in question or that an interference with production resulted. In these circumstances, the record does not warrant a finding that Clark's attempt to ascertain his employment rights lost protected status because asserted on working time. See, e.g., *International Packings Corp.*, 221 NLRB 479, 482 (1975).

The question remains about whether in accordance with *Wright Line*, supra, a finding is warranted that Clark was discharged for this reason. There can be little dispute that the timing of Clark's termination was influenced by his conversations with the union president. Alexander conceded as much on cross-examination by the General Counsel, as follows:

> Mr. Franckiewiez: So, on January 13th you did not decide to discharge him on the spot?
>
> Mr. Alexander: No. I decided to discharge him on the spot, unless he showed me something really spectacular.
>
> Q. And assuming that he did not show you something spectacular, the discharge would be effective when?
>
> A. The end of the week.
>
> Q. Friday?
>
> A. Friday, normally. It's not a normal procedure to discharge people around Trico Industries.
>
> Q. Friday was the 17th of January, is that correct?
>
> A. Yes.
>
> . . . .
>
> Q. You discharged him after you saw him speaking to the union president on two consecutive days?
>
> A. I discharged him after I saw him displaying poor work habits for two days in a row.
>
> Q. Which in fact consisted of him talking to John Baxter?
>
> A. No matter who he was talking to, he was displaying poor working habits.
>
> Q. What he was in fact doing was talking to John Baxter, is that correct?
>
> A. That's correct.
>
> Q. On those two particular days did he demonstrate poor work habits in any manner other than by being observed conversing with Baxter?
>
> A. It wasn't the fact that he was conversing with Baxter, it was the fact that he was operating on the first day a piece of equipment and he was trying to run back and forth between his equipment, John Baxter, and even myself. You can't successfully operate equipment on that basis over long periods of time. And I don't expect probationary employees to display poor work habits like that. And, it's just not acceptable.
>
> Q. Was there anything, now, you observed him on Tuesday with Baxter?
>
> A. Yes, sir.
>
> Q. You observed him on Wednesday with Baxter for a period of time?
>
> A. Yes.
>
> . . . .
>
> Q. So as a result of what you observed on Tuesday and Wednesday, you excellorated [sic] the discharge decision.

---

[18] In contrast a properly phrased, published, nondiscriminatory rule will be deemed presumptively lawful since *inherently* necessary to the maintenance of production and discipline. As in the case in which no rule exists, specific proof of justification is required when the published restrictions are overly broad and extend to nonworking time. See, e.g., *Stoddard-Quirk Mfg. Co*, 138 NLRB 615 (1962).

[19] See G.C. Exh. 5, art. II, p. 7.

[20] See the R. Exh. 1, item 7(c), p. 9.

[21] See Jt. Exhs. 1–10, and 12 inclusive.

A. That would be a fair statement.

Considering the hostility with which Alexander greeted Clark and Baxter on 15 January, together with the sudden discharge of a good worker the very next day in the midst of a payroll period,[22] it is concluded that Alexander's admission in the above colloquy is sufficiently indicative of a union-related causation to compel the Employer to come forth with evidence that Clark would have been terminated even if the protected conversations had not occurred.[23]

The defense depends vitally on Alexander's testimonial account of his state of mind in effecting the discharge. In examining whether an employer has met its burden under *Wright Line*, the Board does not "rubber stamp" such testimony without scrutiny. Instead, the assigned reason for the discipline will be carefully examined for internal consistency and logical acceptability. See *Heck's, Inc.*, 280 NLRB 475 (1986). When considered in that light, Respondent's case is unpersuasive.

First it is noted that personnel records bear out Alexander's admission that discharge is not "normal procedure" at Trico. Only eight employees suffered such a fate during the 6 years prior to Clark's termination. Half were based on attendance. (See Jt. Exhs. 1, 3, 4, and 6.) The remainder were founded on the employee's lack of suitability to perform the work. (See Jt. Exhs. 7, 8, 9, and 10.)

Concerning the specific grounds assigned, Alexander's admission that the Clark/Baxter conversations gave impetus to the discharge did not fit the umbrella of "initiative" or "attitude" and presented a marked shift from his original description of the reasons for the discharge. Indeed, the details about Alexander's dissatisfaction with Clark's attitude are not clearly defined, but left to conjuncture. In any event, critical to the defense is Alexander's testimony that Clark's fate was virtually sealed on 13 January in consequence of his remark concerning his tools,[24] the fact that he merely bid *one* job on 6 January and his having walked away from Alexander at the eight-spindle machine. Despite DeGolier's defense of any professed evaluation of Clark as a good employee, Alexander testified that on this basis he elected to terminate Clark on Friday if he did not show some spectacular achievement or "complete turnabout" during the balance of the week. When questioned, however, about just what he expected of Clark, he indicated as follows:

> Well, if he'd made double rate for a day, or had come and said to me, that he really was interested in the machines, or that he had had other things on his mind yesterday, and that he was sorry, you know, that he was rude and walked away from me, and that he was interested in the machines and the other things.
>
> If something like that would have happened, I probably would have changed my mind.

Several undeniable facts of record show that the foregoing constituted little more than a transparent dodge to obscure the reality that Clark was not discharged on 13 January because Alexander did not regard Clark's conduct that evening as a justifiable basis for discharge. That conclusion, together with the fact that the protected activity of 14 and 15 January furnished the decisive stroke was evident not only in Alexander's reference to "poor work habits" in his 15 January recommendation to Harris, quoted above, but from his conduct during the balance of that week.

Alexander neither warned, counseled, nor otherwise alerted Clark to the possibility that Alexander considered him to have been guilty to misconduct on 13 January. Simply put, despite several confrontations between them prior to the discharge, the matter was never even broached. In this light, it is particularly difficult to understand how Alexander could have expected an apology.

Also lacking was any followup prior to the discharge to ascertain whether Clark had met Alexander's alleged, secretly held demands. First, Alexander, not being the immediate supervisor of Clark, was not in a position to evaluate routinely, the latter's performance. Prior to the discharge, he had no way of knowing and made no effort to check Clark's productivity.[25] Moreover, as the discharge occurred on Thursday, 15 January, Clark was preempted from working that day and on Friday, the last day of the payroll period, and hence Clark was denied the balance of the workweek to rejuvenate himself as Alexander claims to have intended.

As for Clark's attitude toward the machines, which, according to Alexander established his "lack of initiative," Alexander admittedly did not check or know whether Clark on 13 January had bid on additional jobs. In fact, that evening Clark bid two of the five jobs that were posted on 13 January. (See the G.C. Exh. 7(a).) This reflected a greater interest in advancement than shown by any of the other probationary employees on payroll status at the time. (See the G.C. Exh. 6.) Moreover, this asserted ground for discharge is difficult to reconcile with the fact that the Respondent maintains no requirement that employees bid on jobs. Finally, all the

[22] Although Alexander's admission makes this element somewhat cumulative, the fact that Thursday was payday would not alter the suspicion generated by the midweek discharge. Respondent's payroll period ends on Friday. Thus the Thursday termination failed to serve management's convenience. As is clear from testimony of both Clark and Alexander, the check given Clark that day was not his final paycheck, but only covered the "last full week of work."

[23] The fact that the General Counsel has failed to prove that the Respondent held an overarching or general union animus is by no means fatal to its case. The unlawful motive sought to be proven here does not rest on the Employer's attitude toward union membership or unionization as an institution. The fact that an employer might accept collective-bargaining does not necessarily mean that it welcomes every vestige of union activity, including those to which managers might understandably take affront. Quite clearly, the General Counsel's position with respect to the discharge of Clark is founded on Alexander's reaction to Clark's successive conversations with a union official, rather than any concern for Clark's basic allegiance.

[24] As heretofore indicated, Alexander's testimony that he took offense at this remark was not believed. In any event, I have difficulty reconciling Alexander's position in this regard with his accusation that Clark's lack of initiative was demonstrated by his disinterest in other jobs.

[25] It is noteworthy that the record fails to suggest that Clark had any type of productivity problem. DeGolier's rating of him implies that there was no such problem.

best copy available

evidence in this record reflects that Clark's difficulty stemmed from his strong desire for, rather than any indifference toward advancement.[26]

It is true that an employer may judge employees during their probationary period with greater stringency and perhaps even less rationality than that which obtains in the case of permanent employees. Nonetheless, probationary employees are entitled to no less protection under the Act. In either case, the issue will turn on the true motive for the discipline.

Alexander's rage on 13 January was perfectly understandable. However, his silence concerning the matter, the delay in acting on it, and the fact that the incident did not refute DeGolier's evaluation of Clark as a good worker, combine to suggest that explanation for the discharge lay elsewhere. All credible proof points to the fact that Alexander, irritated with Clark's consecutive conversations with Baxter, lost control, and precipitously terminated him. From Alexander's own testimony, it is apparent that if any preconceived formula for preservation of Clark's job existed it was abandoned after those developments. Thus, despite his alleged plan to give Clark until Friday to prove his metal, the discharge occurred at shift-start on Thursday, cutting the workweek short by 2 days. More importantly, after the supervening events of 14 and 15 January, Alexander lost interest in any "spectacular" achievement on Clark's part and opted for discharge without verification or knowledge of Clark's subsequent performance. Had Alexander shown any interest he would have learned at a minimum that the asserted lack of initiative on Clark's part was impossible to reconcile with the Respondent's own records, which demonstrate that as of 15 January, Clark had bid more jobs than any other probationary employee.

Simply put, the Respondent's assertions concerning lack of initiative are incomprehensible on the face of this record. This, together with vagaries engulfing Clark's alleged unsatisfactory "attitude" tend to confirm the empirical causative influence generated by Alexander's renewed anger at the conversations between Clark and the union president. In this light and on the total record, it is concluded that the Respondent has failed to persuade "by a preponderance . . . that the same action would have taken place even in the absence of union activity." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *Centre Property Management*, 274 NLRB 190 (1985). For these reasons, as Clark's inquiry to the union official constituted union activity of a protected nature, it is concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging him on 16 January 1986.

[26] In a further attempt to deflect attention from the events of 14 and 15 January the Respondent argues that a report from two employees, Giordano and Ackley, influenced Alexander's decision to terminate Clark. The assertion, however, was not substantiated by Alexander. The report apparently originated with Giordano, who claims to have heard Clark complain in the men's room about the Company's bidding procedure while stating that the Company "sucked." According to Giordano and Ackley, Giordano reported the remark to Ackley, who later informed Ackley's brother-in-law, Alexander. On behalf of the Respondent, it is argued that on receiving his information from Ackley Alexander elected to finalize the termination. Alexander, on the other hand, appears to deny that this was the case. Although one would expect Alexander to enjoy full command of the basis for his actions, Alexander could not recall whether he received the reports before or after the discharge. Indeed, he related that on matters of this kind, he does not rely on input from coworkers. From the testimony of Alexander, it is impossible to conclude that these reports had any relevance to the issue of motivation in this case.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employee John Jay Clark on 16 January 1986 because he engaged in union activity the Respondent engaged in, and is engaging in, an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.

4. The unfair labor practice found above constitute an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practice, it shall be recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged John Jay Clark, shall be ordered to offer him reinstatement and make him whole for any loss of earnings and other benefits by reason of the discrimination against him. Backpay shall be computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[27] It also shall be recommended that the Respondent be required to remove from its records and files all reference to the discharge, notifying Clark in writing that this has been done and that the discharge will not be used against him in the future.

The General Counsel's request for a visitatorial clause is denied as there is no showing that such relief is warranted in the circumstances of this case. See *O. L. Willis Co.*, 278 NLRB 203 (1986); *Nathan's Furniture Store*, 278 NLRB 268 (1986); and *Rebel Coal Co.*, 279 NLRB 141 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Trico Industries, Inc., Bradford, Pennsylvania, its officers, agents, successors, and assigns, shall

[27] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Discouraging membership in a labor organization by discharging or in any other manner discriminating against employees with respect to wages, hours, and terms and conditions or tenure of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer John Jay Clark immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his other rights and privileges, and make him whole for any loss of earnings and benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Remove and delete from its files any reference to the unlawful discharge of John Jay Clark and notify him in writing that this has been done and that the discharge, in the future, will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Bradford, Pennsylvania, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Stor-Rite Metal Products, Inc. *and* **Paul W. Martin.**
Case 25–CA–17234

30 April 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, STEPHENS, AND CRACRAFT

On 18 February 1986 Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed exceptions, a supporting brief, and a brief in answer to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

I.

The judge found the Respondent did not violate Section 8(a)(3) and (1) by reducing its powder-line employees' hours after employee Paul Martin contacted the Indiana Human Rights Department and filed charges with the National Labor Relations Board contending that the Respondent unlawfully denied powder-line employees contractual wages and benefits, and that the Union failed properly to represent them.[2] We disagree.

The parties' contract limits the contractual unit to full-time production and maintenance employees and plant clericals. Part-time employees are not included in the unit. The contract also contains a 45-day probationary period. According to Union Chief Shop Steward Dwayne K. Norman's uncontradicted testimony, an employee would be regarded as part of the unit only if he or she worked 40 hours or more each week for 45 days. Norman regarded employees who work 40 hours or more each week, but for less than 45 days, as excluded from the unit.[3]

The Respondent established its powder line in 1983 to powder-coat the display shelving that it manufactures with a pigment finish.[4] The Respondent expected that it would powder-coat products far faster than it would produce them and thus intended to seek contracts with other manufacturers to powder-coat their products as well. Even with outside contracts, however, it did not operate the line full time. When it hired employees to work on the powder line, it told them they would be part-time employees. The Respondent did not regard the powder-line employees as part of the contractual unit, did not pay them the contractual minimum wage, and did not provide them with contractual holiday pay, insurance, pension, or other contractual benefits.

The Respondent hired employee Paul Martin for its powder line in September 1984. From the time the Respondent hired Martin through at least February 1985, the Respondent's powder-line employees, including Martin, often worked for 40 hours or more per week, although none did so for 45 consecutive days. The powder line did not always operate full time during this period. Finishing Department Supervisor Gregory Jaques, who was responsible for hiring and scheduling powder-line employees, gave the employees extra hours by assigning them to maintenance and cleanup work and work in other departments.

Martin believed almost from the start of his employment that because the powder-line employees often worked 40 hours or more each week, they should be included in the contractual unit. Martin repeatedly complained to Union Steward Norman, to two other powder-line employees, and to Supervisor Jaques. The Union contacted the Respondent in mid-October 1984 following Martin's complaints and the Respondent thereafter established one full-time unit job on the powder line: powder-line "operator." Norman told Martin he could not otherwise help him. He said he "couldn't get him in the union because of the contract."

Employees Rick East and Tim Slayden, the powder-line employees with whom Martin discussed his complaint, declined to help Martin press the matter further. East, who expected to transfer

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. IV,B, in the sixth paragraph under the heading "Analysis," the reference to November 1973 in the second sentence should read "November 1983." In that same sentence, the word "now" should read "nor." We correct these inadvertent errors.

[2] The General Counsel did not allege that the Respondent violated Sec. 8(a)(4).

[3] Thus, Norman testified that two part-time employees in the Respondent's packing department worked 40 hours per week when enough work was available. When asked if they were therefore considered full-time employees, Norman stated, "No, sir, they were part time."

[4] The complaint, the judge, and some of the witnesses at the hearing described the operation as a "paint-line" or as the "painting department." In fact, the Respondent does not paint the components. It instead "powder coat[s]" them, electrostatically bonding a powder finish to the metal.

into a unit position, told Martin he "didn't want to get involved and mess his chances up of getting in the union." Slayden told Martin he "didn't really want to get involved because, at that time, he was . . . averaging about 40 hours a week, and he didn't want to mess that up."

When Martin again complained to Union Steward Norman in January 1985, Norman suggested that Martin file a complaint with the Indiana Department of Human Rights. In February, Martin decided to do so and again asked East and Slayden to help him. Both declined.

Martin had an appointment with the department for the evening of 26 February 1985. That day, he told Supervisor Jaques of his plans and told many other employees as well. Jaques told Martin, "Go ahead and do what you have to do."

Jaques discussed Martin's plans with East and Slayden. Jaques told them that if Martin filed a complaint with the human rights department, Jaques would "just have to reduce the hours" because he "was just doing [them] a favor by letting [them] work that many hours a week because he knew [the employees] needed the money."

Martin went to the Indiana Human Rights Department alone on 26 February. A department attorney told Martin her department could not handle his complaint, but that she would help him fill out a National Labor Relations Board charge. Martin made plans to return to the department at a later date to sign a Board charge.

The next morning, when Martin and Slayden reported to work, Jaques told Martin, "You fucked up by going to Human Rights. [Respondent Treasurer and Controller] Frank O'Brien told me I had to cut everybody's hours." Jaques also said, "It would not have been so bad if he hadn't gone and blown off his mouth to everyone before he went, but he had to do it, so nobody could work forty hours."

Martin signed a Board charge against the Union on 7 March 1985, contending the Union denied him representation "unfairly." The Regional Director for Region 25 dismissed Martin's charge and, on 23 May 1985, Martin filed a charge against the Respondent.

When Respondent Treasurer and Controller O'Brien in March 1985 received a copy of the charge Martin filed against the Union, he again contacted Jaques about the hours the powder-line employees worked. This time O'Brien told Jaques to eliminate unnecessary maintenance work and to hire more employees. O'Brien reminded Jaques that the powder-line employees were supposed to be part time and said, "[L]et's try to keep it that way."

In April, Martin and Slayden complained to Jaques about the fact that their hours had been cut. Jaques told them that they had been working too many unproductive hours. He also stated that it had been Martin who had brought to O'Brien's attention that Jaques had been letting them work unnecessary hours. He told Martin, "[Y]ou made your bed, you're going to have to lie in it."

The Respondent through January and February 1985 operated its powder line with four employees and the employee complement averaged just under 40 hours per week per employee. In early March, Jaques hired more employees and the average number of weekly hours per employee fell to 30. In April the employee complement dropped to four and the weekly hours per employee briefly exceeded 40, but Jaques quickly hired more employees and the average dropped to less than 25. By June the Respondent had nine employees for its powder line. In July it had seven or eight and the average number of weekly hours per employee dropped to below 20. When asked why he hired the additional employees, Jaques could not recall.

The judge found Martin had not engaged in concerted activity within the meaning of Section 7 of the Act, relying on the Board's decision in *Meyers Industries*.[5] The Board in *Meyers* held that an employee who, by and on behalf of himself only, contacted a state agency to make a statutory safety complaint, had not acted concertedly. There was no applicable collective-bargaining agreement in *Meyers* and the Board specifically distinguished the facts in *Meyers* from those to which the Board's *Interboro* doctrine[6] might apply. Under the *Interboro* doctrine, an employee who honestly and reasonably asserts a right grounded in a collective-bargaining agreement acts concertedly within the meaning of Section 7, even if the employee acts alone. The United States Supreme Court approved the *Interboro* doctrine in *NLRB v. City Disposal Systems*.[7]

Although Martin contacted a state agency, he did so contending the Respondent wrongfully denied its powder-line employees contractual wages and benefits and that the Union did not properly represent them when it failed to secure for them their contractual rights. Martin based his contention on the fact that full-time employees were included in the contractual unit and thus entitled to contractual benefits. The Respondent's powder-line employees, who often worked more

[5] 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

[6] *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[7] 465 U.S. 822 (1984).

than 40 hours each week, Martin argued, were full-time employees. We find Martin's claim objectively reasonable and there is no contention Martin pressed his claim in bad faith. Accordingly, the Board's decision in *Meyers Industries* does not apply in this case. Instead, we find Martin was engaged in concerted activity when he went to the Indiana Human Rights Department and when he filed a charge with the Board, pursuant to the *Interboro* doctrine. Because we also find Martin acted for the employees' mutual aid or protection, we find Section 7 protected Martin when he individually pressed his claim.[8]

Although the judge found that the Respondent reduced the powder-line employees' hours in response to Martin's claim, he concluded the Respondent had not done so unlawfully because he found the Respondent had an economic justification. The judge found the Respondent lawfully intended to keep the powder-line employees part time from the start because its business did not justify operating the line full time. The Respondent, the judge found, was fearful Martin might succeed in his effort to have the powder-line employees included in the unit.

Jaques, however, did not simply reduce the employees' hours to just below 40 to make it clear they were not full-time employees. By July he had instead reduced their weekly hours to below 20. In light of Jaques' statements to Martin that he had "fucked up by going to Human Rights" and that he had "made [his] bed" and was "going to have to lie in it," we find that Jaques reduced the powder-line employees' hours so drastically in retaliation for Martin's protected claim.[9] Accordingly, we find the Respondent violated Section 8(a)(3) and (1).[10]

II.

The judge concluded the Respondent did not violate Section 8(a)(5) and/or (1) or Section 8(d) by "fail[ing] and refus[ing] to assign full-time employment to certain of its [powder-coating] department employees," as the complaint alleged. We agree, but we do not rely on the judge's factual analysis.

The judge found the Respondent and the Union agreed that powder-line employees would be excluded from the unit. More precisely, the parties agreed that powder-line employees would be part-time employees and, for that reason, would be excluded from the unit.[11]

In finding the parties agreed to exclude powder-line employees from the unit, the judge evidently relied on his further finding that the Union had dropped its demand in contract negotiations that the powder-line employees be included. In fact, according to both Union Chief Shop Steward Dwayne K. Norman's and Respondent Treasurer and Controller Frank O'Brien's uncontradicted testimony, the Union proposed that all part-time employees be included in the unit. Both O'Brien and Norman testified that they understood that the contract excluded powder-line employees from the unit because they were part time. There is no indication they ever agreed that the contract excluded powder-line employees whether or not they worked full time.

We nevertheless agree that the Respondent did not unlawfully fail or refuse to apply the contract to the powder-line employees. As discussed above, the parties' contract included a 45-day probationary period and Union Steward Norman understood the Respondent could thus work employees for 40 hours per week for less than 45 days and properly exclude the employees from the unit. None of the powder-line employees worked 40-hour weeks for 45 consecutive days.

The Union, in any event, acquiesced to the Respondent's excluding the employees from the unit. Norman became aware powder-line employees worked 40 hours or more as early as mid-1984 and employee Paul Martin from September 1984 through February 1985 persistently demanded they be included in the unit. Although the Union met with the Respondent in mid-October 1984, after which the Respondent established a full-time

---

[8] *City Disposal*, supra, 465 U.S. at 830.

[9] In sec. III,B, par. 18 the judge found that O'Brien "credibly" testified that he had not retaliated against the powder-line employees in response to Martin's claim. Whether we would be bound by that credibility determination if contradicted by other evidence independent of O'Brien's testimony is questionable. Nonetheless, Jaques, not O'Brien, carried out O'Brien's instructions and it is Jaques whom we find tainted by unlawful motives.

Because we find that Jaques reduced the powder-line employees' hours so drastically solely in retaliation for Martin's protected claim, and not for any lawful reasons, we further find that the Respondent necessarily failed to carry its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to establish that it would have taken the same action even absent the protected conduct.

[10] The judge attempted to distinguish *Akron General Medical Center*, 226 NLRB 953, 956 (1976), but we find the facts in that case strikingly similar. The contract in that case excluded part-time employees who worked less than 20 hours per week. By practice, "oncall" employees also were not covered by the contract. The employer placed a freeze on adding further unit jobs early in 1975, but began to work oncall and other part-time employees more than 20 hours per week after the freeze. When the union and oncall and part-time employees filed grievances seeking contractual wages and benefits, the employer cut their weekly hours to less than 20. A hospital administrator said she had "tried to be a nice guy" in giving the employees extra hours, but that the hospital administration insisted she cut their hours because of the grievances. 226 NLRB at 954–955. The Board found the employer violated Sec. 8(a)(3) and (1). Id. at 956.

[11] As discussed above, only full-time employees are included in the unit.

powder-line position, the Union did not further pursue the matter.[12]

Accordingly, we shall dismiss this part of the complaint.

CONCLUSIONS OF LAW

1. By reducing its powder-line employees' work hours because an employee honestly and reasonably asserted a right grounded in the Union's collective-bargaining agreement with the Respondent, the Respondent violated Section 8(a)(3) and (1) of the Act.

2. The Respondent has not otherwise violated Section 8(a)(5), (3), and (1) or Section 8(d) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make its employees whole for any loss of earnings and other benefits, to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[13]

ORDER

The National Labor Relations Board orders that the Respondent, Stor-Rite Metal Products, Inc., Michigan City, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Reducing its employees' work hours because an employee honestly and reasonably asserted a right grounded in the Union's collective-bargaining agreement with the Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make its employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Michigan City, Indiana facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER STEPHENS, dissenting in part.

I agree, for the reasons stated by my colleagues, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by declining to apply the contract to the powder-line employees. I also agree that employee Martin's series of activities aimed at securing the benefits of the collective-bargaining agreement for himself and other powder-line employees was protected concerted activity. For the reasons stated below, however, I would affirm the judge's dismissal of the complaint.

I am willing to assume that the General Counsel made out a prima facie case of discrimination in violation of Section 8(a)(3), i.e., she produced evidence from which we could infer that the Respondent was motivated, at least in part, by a desire to penalize the powder-line employees for Martin's protests when it reduced their hours. Certainly the remarks of Supervisor Jaques provide strong evidence of a discriminatory motive. Controller O'Brien, however, is the official who made the decision to reduce the employees' hours, and the judge credited O'Brien's testimony that receipt of the Board charge that Martin had filed regard-

[12] See *City Hospital of East Liverpool*, 234 NLRB 58 (1978); *Clarkwood Corp.*, 233 NLRB 1172 (1977).

[13] We find that the violation began in early March 1985 when Finishing Department Supervisor Jaques hired additional employees and reduced the average number of weekly hours he assigned to powder-line employees to 30.

The General Counsel has requested that the Order include a "visitatorial clause" authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure with supervision by the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ing denial of the contract benefits induced him to order the reduction of hours because it then became clear to him that Jaques was giving those employees the equivalent of full-time work. Even assuming (contrary to the judge's finding) that O'Brien was also motivated by annoyance at Martin's activities, I would find that the Respondent has carried its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–403 (1983), of showing that it would have taken the action in question even in the absence of the protected concerted conduct. Specifically, the record evidence persuades me that it is more probable than not that the Respondent would have reduced the powder-line employees' hours even if the potential liability for contractual benefits had come to its attention from nonemployee sources and no employee had ever protested the matter. It seems clear that the Respondent wanted to protect what it regarded as its bargain with the Union to exclude the powder-line employees from the unit, and the evidence indicates to me that, for example, it would probably have reduced the powder-line employees to the status of irrefutably part-time employees even if it was simply advised by its counsel that giving the powder-line employees the equivalent of full-time employment might raise a question whether they should be included in the definition of "full-time employees" entitled to contractual benefits.

That the Respondent did not reduce the hours before Martin's protests does not, in my view, defeat the *Wright Line* defense. It seems clear to me that not until then did O'Brien have reason to think there was any serious issue about the powder-line employees' status, and hence he had no reason to believe until then that changing their hours might be advisable as a means of ensuring that the Respondent's contractual bargain with the Union over their status would be protected.[1] The fact that the Respondent eventually reduced the powder-line employees' weekly hours to a greater extent than was strictly necessary to reduce them below the 40-hour average similarly does not persuade me to join my colleagues in the majority. The record shows that the Respondent put in place a procedure designed to ensure that it would not thenceforth ever find itself in a position of needing to ask powder-line employees to work 40 hours a week or more. This procedure resulted in much less work for powder-line employees in July, but in earlier months it simply fulfilled the goal of keeping the employees' weekly hours below 40. The institution of such a procedure is not inconsistent with an aim of simply assuring that the powder-line employees would not appear to be full-time employees, arguably subject to the collective-bargaining agreement.

[1] The union steward and O'Brien had discussed the matter in October and the result was the creation of one full-time position in the painting department that would be deemed within the contractual unit. At that point O'Brien reasonably could feel assured that the matter had been resolved and that the powder-line painting work could be done by the full-time employee and the other six powder-line employees working part time.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT reduce your work hours because one of you honestly and reasonably asserts a right grounded in General Service Employees Union Local No. 73's contract with us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make our powder-line employees whole for any loss of earnings and other benefits resulting from our discrimination against them, plus interest.

STOR-RITE METAL PRODUCTS, INC.

Walter Steele, Esq., for the General Counsel.
J. Charles Sheerin, Esq. (Hoeppner, Wagner & Evans), of Valparaiso, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on 30 September and 1 and 2 October 1985 at Michigan City, Indiana. The charge was filed 28 May 1985 by Paul W. Martin. Complaint issued 31 July 1985 alleging that Stor-Rige Products, Inc. (Respondent or Company) violated Section 8(a)(1), (3), and (5)[1] and Section 8(d) of the National Labor Relations Act. More particularly the complaint alleges that:

[1] Respondent, at the hearing, moved for dismissal of certain allegations contained in the complaint on grounds that they had not been included in the original charge. However, as stated in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307–308 (1959):

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is

Continued

6(a)[2] Certain painting department employees are full-time production employees as described in and covered by the existing collective-bargaining agreement.

(b) Full-time employees in the painting department did not receive the benefits received by other full-time employees as required by the existing collective-bargaining agreement.

(c) Between 25 September 1984 and 26 February 1985 certain employees of the painting department requested the Union to represent them and obtain for them the benefits accorded other employees under the existing collective-bargaining agreement.

(d) Between 25 September 1984 and 26 February 1985 the Union registered grievances with Respondent in an attempt to obtain for certain employees of the painting department the collective-bargaining agreement benefits.

(e) On 26 February 1985, Charging Party Martin filed a National Labor Relations Board[3] charge to obtain for the employees of the painting department, the benefits accorded other employees under the existing collective-bargaining agreement.

(f)[4]

(g) About 27 February 1985, Respondent reduced the work hours of certain of its painting department employees.

(h) Since about 27 February 1985, Respondent failed and refused to assign full-time employment to certain of its painting department employees.

(i) Respondent reduced the work hours of and failed and refused to assign full-time employment to certain of its painting department employees because Charging Party Martin and other employees requested the Union to represent them and obtain the benefits of the existing collective-bargaining contract for them; because Martin filed the National Labor Relations Board charge; and because the Union registered grievances with Respondent on behalf of Martin and other painting department employees.

(j) Respondent reduced the work hours of certain of its painting department employees and failed and refused to assign them full-time employment in order to avoid its obligation under the collective-bargaining agreement to grant to all employees employed in its painting department, all the rights and benefits accorded to full-time employees under the existing collective-bargaining agreement.

In its answer, Respondent admitted some and denied others of the above allegations. It denied, however, the commission of any unfair labor practices.

The General Counsel and Respondent were represented at the hearing and were afforded full opportunity to be heard, present evidence, and argument.[5] Both the General Counsel and Respondent[6] filed briefs. On the entire record, my observation of the demeanor of the witnesses, and after giving due consideration of the briefs, I make the following:

---

merely to set in motion the machinery of an inquiry. *NLRB v. J. & M Electric Co.*, 318 U.S. 9, 18. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed on the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. . . .

Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed on it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.

The Supreme Court, in an earlier case, had remarked that it could find no warrant in the language or purposes of the Act for saying that it precluded the Board from dealing adequately if initially with unfair labor practices in the complaint and hearing stages of proceedings where those unfair labor practices are related to those alleged in the charge. *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940).

In the instant case, the charge was filed by an ordinary citizen, a working man, neither a lawyer nor a legal scholar. In sec. 2 of the charge he laid out fully and clearly the basis for his charge, quite sufficient to apprise the Respondent of the underlying causes for the filing of the charge. The fact that he failed to identify the specific subsections of the Act under which his alleged cause of action might fall does not warrant the dismissal of his claim. Moreover, the inclusion in the complaint of the identifying subsections cured the initial defect and adequately alerted Respondent to the basis for all allegations. The motion is denied.

[2] The numbered paragraphs conform to those numbered paragraphs in the complaint, each of which denotes a specific allegation.

[3] Filed through the Indiana Human Rights Department.

[4] Par. 6(f) was conclusionary and was not a substantive allegation.

[5] Respondent at the hearing moved for dismissal of pars. 5 and 6 of the complaint on grounds that these allegations "do not describe a violation of the Act." Because the very purpose of these proceedings, i.e., the taking of testimony and adducing of evidence at the hearing and the issuance of a decision based thereon, is to determine whether the incidents alleged actually occurred and, if so, whether singly or collectively they amount to a violation of the Act, the motion, when made, was premature, and, if granted, would have deprived the General Counsel of his right to try his case. Whether the complaint describes a violation will be decided herein. Motion denied.

[6] Counsel for Respondent, in his brief, complained that his client was "denied due process from the outset of the hearing," stating that "while the Administrative Law Judge (ALJ) stated that the complaint was confusing, thereafter General Counsel refused to described and the ALJ declined to compel the General Counsel to described how the allegations of the complaint described the violation of the Act."

According to the record, the General Counsel offered the formal documents and counsel for Respondent objected on several grounds including his belief that the complaint was confusing and the allegations did not state a violation within the meaning of the National Labor Relations Act. In order to help Respondent's counsel understand the theory of the General Counsel, the General Counsel was invited to and in fact did make an opening statement explaining his theory (Tr. 13–15). The fact that his explanation was more than adequate to apprise Respondent of his theory of the case is reflected in the adequacy of Respondent's own brief in which he capably argued his client's position. Moreover, if counsel for Respondent found the complaint confusing, the time to do something about it was at the time of receipt of the document when a motion for a bill of particulars would have been in order. The day of the hearing is a bit late.

Another complaint voiced by counsel for Respondent in his brief was that he had obtained certain documents from the General Counsel that were identified and admitted, then withdrawn by the General Counsel for copying. Respondent's counsel complains in his brief that he never received copies of these documents: R. Exh. 5, G.C. Exh. 7, G.C. Exh. 8, G.C. Exh. 5(a), and G.C. Exh. 12. However, under standard Board hearing procedures each attorney submitting exhibits is required to submit a sufficient number of copies to supply the administrative law judge and each of the parties. That Respondent's counsel failed to submit a sufficient number of R. Exh. 5 can hardly be blamed on anyone but himself. Regarding the General Counsel's exhibits, the time to bring such deficiencies are first discovered so that the needed documents can be obtained in time to be used in preparation of the brief. Respondent's counsel took no steps and made no attempt to communicate to me the fact that he had not received copies of these documents. Because he chose to submit his brief without benefit of these documents, he can hardly effectively complain in his brief about their absences.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, an Indiana corporation,[7] maintains its principal office and place of business in Michigan City, Indiana, where it is engaged in the manufacture, sale, and distribution of metal shelving and related products. During the past 12 months, a representative period, Respondent sold and shipped from its Michigan City facility products, goods, and materials valued in excess of $50,000 directly to points located outside the state of Indiana and purchased and received at its Michigan City facility, products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Indiana. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that General Service Employees Union Local No. 73 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Facts

A. *Background*

The Respondent is a manufacturer of display shelving and related products. Its operation is divided into four departments: manufacturing, packaging, shipping and receiving, and finishing or painting. Management personnel chiefly involved in the instant proceeding include Frank O'Brien, controller and treasurer, who is in charge of the day-to-day operations of the Company, and Gregory Jaques, who is in charge of the painting department.[8]

Respondent and the Union have negotiated and entered into a succession of collective-bargaining agreements since 1977 pursuant to the Union's certification that year by the National Labor Relations Board. The unit for which the Union is the bargaining representative is described in the most recent (1983) contract as:

> All full-time production and maintenance employees and plant clerical employees at the facilities and unit described in the NLRB Certification Consent Election Agreement Case 13–RC–14474, dated August 2, 1977. Excluded office clerical shall include executive secretaries, accounting clerks, payroll and timekeepers, receptionists, order control clerks, sales, designers and computer workers. Set-up men shall be included in the unit effective November 9, 1983, with full seniority credit from date of hire for incumbent employees currently holding those positions for all purposes.

In 1982 the plant moved from Chicago, Illinois, to Michigan City, Indiana. Shortly after relocation, the Respondent decided that it would create its own finishing or painting department that previously had not existed. It had been contracting out the painting of the parts it manufactured. In addition to painting its own parts, Respondent also planned to seek contracts to paint parts manufactured by other manufacturers. Even so, it was recognized that there would not be sufficient work available for painting department employees to keep them operating on a full-time basis. Indeed, it was expected that the painting department would probably operate only 2 or 3 days per week because under ordinary circumstances that amount of time would be sufficient to paint all the parts manufactured by Respondent in a week. Consequently, from its inception, and according to plan, the new painting department operated on a part-time basis, almost exclusively, running parts only 2 or 3 days per week. This occurred despite Respondent's efforts to obtain outside contracts to increase production in its painting department.

As noted above the Union represented all full-time employees of Respondent since its certification in 1977. The various departments employed a few part-time employees who were neither represented by the Union nor granted the wages and other benefits provided to the full-time employees covered by the contract. However, these part-time employees were permitted to bid on full-time union jobs as they became available and were usually given preference over outsiders or union full-time employees, who under the contract, were not permitted to bid laterally on job openings.

In early 1983, when the painting department was being set up, Gregory Jaques was hired to supervise that department. He was told at the time by O'Brien that there was no need for the painting department employees to work over 40 hours per week and that he should keep the nonproductive hours down. Jaques, in turn, advised each employee as hired that he would be working part-time outside the unit but would be permitted to bid on unit jobs as they became available. This procedure was followed and as each painting department employee quit, was terminated, or transferred into the unit, a new employee would be hired to take his place. Similarly, as production fluctuated the painting department complement of employees would increase or decrease accordingly between three and seven throughout 1983. The same procedure was followed throughout 1984 during which the complement of painting department employees remained relatively steady, usually at four or five for the first several months, then at six in the last few months when production was high. Toward the end of December production dipped as did the available number of hours. From late December through early March 1985 the complement of painting department employees remained rather steady at four. When work was available they worked over 40 hours and no attempt was made by Jaques to keep them below 40.

As noted earlier, the Union represented only full-time employees. The part-time employees in all departments remained outside the unit. From its very inception, the

[7] Respondent amended its answer at the hearing to admit the state of incorporation.

[8] Both O'Brien and Jaques are admitted supervisors.

painting department was considered by both the Union and Respondent to be outside the unit, primarily because it was in operation only 2 or 3 days per week, it being quite capable of finishing all Respondent's manufactured production in that period of time. In 1983, although occasionally a painting department employee might work 40 hours or more, the entire department averaged far fewer hours. Therefore, when the parties negotiated a new collective-bargaining agreement in November 1983 and the Union initially requested the inclusion of the painting department in the unit and Respondent rejected this demand, it was finally agreed that the entire painting department would remain outside the bargaining unit with its employees unrepresented and not subject to the contractual provisions.

In mid-1984 the chief steward for the Union became aware that occasionally some painting department employees would work over 40 hours. He approached management about bringing those employees into the unit, but was told that there was still not enough work in the painting department to make it full time. Although the steward brought the subject up on several occasions with management and informed his business agent about the situation, the matter was never formally pursued through the contractual grievance procedure.

B. *The Alleged Unfair Labor Practices*

On 25 September 1984[9] Jaques hired Paul Martin to work on the paint line. Jaques told Martin, upon being hired, that there would be some weeks when he would not work 40 hours, that he would be considered a part-time employee with a wage rate of $4 per hour. He also advised him that, although his job was nonunion, he would be eligible to transfer into a unit job as openings occurred and that he would be considered for any available unit job before anyone on the street.[10] Thereafter, Martin worked on the paint line as needed, sometimes 40 hours or more, sometimes less, depending on production requirements.

In September or early October Martin, who at the time was working 40-hour weeks, began to complain to the union steward that although the painting department employees were working full time, they were still considered part-time employees being paid less than union scale and receiving none of the contractual benefits of the contract. He wanted to know why they were not included in the unit. The steward advised Martin that they were not included in the unit because of the contract, that he was trying to get them in but there was nothing he could do. Despite the steward's explanation of the situation, Martin continued persistently to complain to him about the situation almost daily.

Possibly as a result of Martin's complaints, a meeting was held between the Union and management during which the steward advised O'Brien that he was getting flack about the part-time employees not being in the Union. Shortly thereafter, and probably as a result of this meeting, and the fact that production in the painting department dramatically increased and its complement expanded, a new position was created in the department. This position, a full-time paint operator, was to be the only union job in the painting department. Clearly, management felt that the number of hours being worked by the painting department, at the time, was sufficient to support one full-time position, but that because of the erratic nature of the paint department's production, it would be economically more feasible to keep the rest of the painting department employees working on a part-time basis. Coinciding with the creation of the new full-time position was the increase in October in the number of painting department employees to an average of six. As noted earlier, production hours increased dramatically at this time and the increase in the number of employees became necessary if the department were to remain part-time.[11]

From early October through mid-December production in the painting department remained high but in late December it fell off dramatically. The complement in the painting department fell to an average of four. With the drop in paint line production some of the employees would be sent home early. For those who did not want to go home, Jaques would try to find work in other departments for them in order to increase their hours. Others would be given cleanup work to perform.

For 2 weeks in October, Martin worked in the packaging department, still as a part-timer. When he returned to the painting department, he began to discuss with other employees, Ron East and Tim Slayden, their not being in the Union and not getting union wages and benefits. He argued that because he had been doing a unit job in packaging, he should have received the benefits of the contract. When he suggested talking to the shop steward about it, however, East said that he did not want to get involved because he was in the process of becoming a union member and did not want to mess up his chances of doing that. Slayden said he did not want to get involved because he was working a 40-hour week and was satisfied. Martin also aired his complaint to Jaques, but to no avail.

In November Martin again talked to the chief steward several times about getting the painting department into the Union. The steward told Martin that there was nothing he could do until contract time, that his hands were tied.

In mid-November one of the painting department employees quit. Jaques, however, did not replace him as was the usual practice in the past. Instead he had some of the other remaining employees report in more often, thus resulting in a greater number of hours worked, frequently over 40. Instead of waiting to be called, these employees were told to report every day. This continued until Christmas. In mid-December Martin again complained to Jaques about working 40 hours and not being in the Union, but then with the sudden drop in production around Christmas at least one painting department

[9] Hereinafter all dates are in 1984 unless or until otherwise indicated.

[10] Jaques gave similar explanations of job conditions to other new hires.

[11] In early October employees in the department averaged over 40 hours but with the hiring of additional employees in mid-October, the average dropped below 40.

employee, Slayden, was laid off for lack of work and the complement dropped to three.

In January 1985[12] painting department production again increased, but Jaques did not hire new employees, although he did recall Slayden back.[13] The complement remained steady at four and with the increased number of hours available Martin and the other painting department employees began again to work a regular 40-hour week.[14] This prompted Martin once again to complain to the steward that the paint department employees were being discriminated against by allowing only one of them to be in the Union when all were working over 40 hours per week. The steward suggested that Martin take his case to the Indiana Human Rights Department. Martin also once again discussed getting into the Union with East and Slayden. Slayden agreed with Martin that it would be nice to get into the Union and receive the wages and benefits of the contract, but stated that he was not going to protest his situation because he was working a 40-hour week and was lucky to have a job at all because a lot of people did not have one. East agreed with Slayden.

In January the Company installed some new equipment in the painting department that made the paint line run more efficiently. This, in turn, reduced the number of available hours. The four painting department employees therefore shared fewer hours resulting in their receiving over 40 hours in just 1 week of 4 in February. About 5 February, however, before the decrease in available hours, Martin confided to Slayden that he had talked to the chief steward once again about getting the painting department employees into the Union, but that the steward had done nothing about it and was not going to do anything about it. Martin said that because the steward was doing nothing he was going to go to the Indiana Department of Human Rights about the matter and file charges against the Company and the Union to get the paint line employees into the Union because they were already working a 40-hour week.

In mid-February, the full-time paint operator was fired for absenteeism and East was in line to replace him. Slayden had been working over 40 hours in January and averaging close to that in February. Therefore, when Martin announced to Slayden and East about 26 February that he was going to file charges with Human Rights and asked them to come with him, Slayden refused, stating once again that although it would be nice to be in the Union and have all the benefits he was happy to be working 40 to 45 hours per week. East also refused to accompany Martin because he was in the probationary period in the full-time paint operator's position and did not wish to get involved.

In addition to telling East and Slayden of his intention of going to Human Rights, Martin, on 26 February, also told a number of other employees of his intentions. He told Jaques that he had an appointment there later that day to file a complaint against the Union and the Company. He explained to Jaques that he felt it was discriminatory to have one painting department employee in the Union and the rest of the painting department out of the Union, and the Company doing what it wants and the Union letting the Company get away with it. Martin argued that the painting department employees work 40 hours and just as hard as the union employees. Jaques replied that he would like to see the whole finishing department in the Union to end the bickering about it, but that it was because the painting department could paint parts faster than they could be produced that there was no need to have it operating 40 hours per week. When Martin stated that he was nevertheless going to file a charge, Jaques replied, "Go ahead and do what you have to do."

Slayden, East, and Jaques discussed Martin's plans to file charges against the Respondent and the Union. Jaques told Slayden that if Martin filed the complaint with Human Rights he would just have to reduce the hours of the painting department employees because he had been just doing them a favor by letting them work so many hours a week, knowing that they needed the money. Later Slayden told Martin that if he went to the Human Rights Department he would just mess it up for all the painting department employees because their hours were just going to be cut. He told Martin that the Company would cut their hours so that the painting department employees would not be considered full time.

On the evening of 26 February Martin went down to the Indiana Human Rights Department in Michigan City to file his charge. He explained the situation to the individual in authority who told him that her department did not cover the problem but that she would obtain and fill out for Martin the proper charge form for the National Labor Relations Board.

On the morning of 27 February, when Martin and Slayden reported for work Jaques told Martin, "You fucked up by going to Human Rights. Frank O'Brien told me I had to cut everybody's hours."[15] Jaques said that he had gotten a phone call the night before and that he had been told to reduce the hours and hire more people because Martin was stirring up such a ruckus by taking the matter to Human Rights. He added, "It would not have been so bad if Martin hadn't gone and blown off his mouth to everyone before he went, but he had to do it, so nobody could work 40 hours." Jaques went on to explain that the painting department jobs were part-time jobs and painting department employees were not supposed to be working more than 40 hours per week.

On 7 March Martin returned to the Indiana Human Rights Department and signed the charge against the Union. The charge was forwarded to the Board's Indianapolis Regional Office, where on 13 March 1985 it was docketed.[16] Shortly thereafter a copy of the charge was received by Respondent.

Meanwhile, whereas Martin had been averaging well over 40 hours per week since the second week of January, and the painting department, as a whole, had been

[12] Hereinafter, all dates are in 1985 unless otherwise indicated.

[13] A few employees were hired for a couple of hours at night to work on special orders.

[14] Much of the work was maintenance and cleanup.

[15] Martin's and Slayden's testimony is credited over Jaques' denial.

[16] Case 25–CB–5667.

averaging just under 40 hours since then, beginning in the first week in March, average hours for painting department employees including Martin dropped so that the average in March was approximately 30 hours per person. Although the drop in average hours is partly due to a decrease in production it was also, in part, due to the increase in the number of painting department personnel from four in January and most of February to five or six and at one time seven in March. Though in January and February the four painting department employees ran the paint line, as usual only two or three times per week, they were given sufficient maintenance, cleanup, and/or work in other departments on other days to get their 40-hour, 5-day workweek in. However, after 27 February Martin and the other painting department employees were told by Jaques that because everybody's hours had been cut, they would no longer automatically report every day for work but would report in accordance with a work schedule he intended to set up. The schedule would advise his employees which of them were scheduled to work on what days.[17] It is thus quite clear that beginning in March available hours were distributed among a larger number of painting department employees. In the first half of April Respondent maintained a complement of five or six painting department employees who averaged less than 30 hours per week. When, however, in mid-April the complement dropped to four and the average number exceeded 40 hours, Respondent quickly hired two additional employees and the average hours worked dropped below 25. Thereafter, when the average number of hours worked approached or exceeded 40 hours Respondent hired additional employees.[18] In June there were as many as nine painting department employees and in July, seven or eight were employed, who averaged less than 20 hours each.

Whereas in 1984 Respondent maintained a sufficient number of regular employees in the paint department to get the work done, hiring additional employees to meet production or to replace quit, terminated, or transferred employees, and working them over 40 hours whenever necessary, and whereas in late January and February 1985 Respondent consistently employed the same four employees working them 40 or close to 40 hours per week. By May and June Respondent had devised a rotating system whereby between six and nine employees would be kept on the payroll, working one group on Mondays, Wednesdays, and Fridays and another group Tuesdays and Thursdays, reversing the procedure the following week.[19] This type of scheduling guaranteed that rarely would any painting department employee work a 40-hour week except for the union paint operator.

On several occasions after the painting department employees had their hours reduced, Slayden asked Jaques if they could get their 40 hours back. Each time Jaques replied that he was only supposed to work them part-time because they were hired part-time. Indeed, O'Brien testified that after receiving a copy of the charge that Martin filed against the Union in which Martin claimed to have been working 40 hours, he asked Jaques about this claim. When Jaques explained that he had been short-handed and had a lot of maintenance, O'Brien told Jaques to cut out the unnecessary maintenance and hire more employees. He told Jaques to remember that the paint department employees were supposed to be part-time, and "let's try to keep it that way." O'Brien testified credibly that his instructions to Jaques on this occasion were not in retaliation for Martin's filing of the charge against the Union but rather as a result of O'Brien's getting a copy of the charge and thus becoming more aware of the problem; the problem being that Jaques had been working painting department employees' hours he should not have been working them. Following O'Brien's instructions to Jaques, Jaques began hiring new employees. This began in March and continued, at least, through July.[20]

On one occasion in April, Martin and Slayden complained to Jaques about the decrease in their hours. Martin stated that they had not been making anything before and with the cut in hours they were now making even less. He asked why the hours had been cut. Jaques replied that the painting department had been working too many unproductive hours and that it had been Martin who brought to O'Brien's attention that Jaques had been letting them work unnecessary hours. He added, "You made your bed, you're going to have to lie in it."

As of the date of the hearing negotiations for a new contract had begun. The Union, according to the chief steward, was proposing, as it had in the past, inclusion in the unit of the painting department employees.

Analysis

Substantively, the General Counsel alleges[21] that Martin and certain other employees in the Respondent's finishing/painting department have been full-time production employees within the meaning of the unit description set forth in the 1983 collective-bargaining agreement. The record reveals, however, that the status of the painting department employees was the subject of negotiations prior to the execution of the 1983 agreement. During those negotiations, the Union proposed the inclusion of the painting department employees within the unit of "All full-time production and maintenance employees," which it represented. Respondent, however, took the position that because the painting department only operated two or three times per week and available work fluctuated so drastically, it was never certain how

[17] Jaques denied that there was any change in scheduling. When his testimony differs from that of Martin and Slayden on this point, the latter are credited.

[18] Although Jaques did all the hiring of the new paint line employees in March and thereafter, he could not explain his reasons for doing so.

[19] In his testimony O'Brien implied that a rotating system had historically been used and that six to eight employees were always kept on-call to ensure there would be four or more available at any given time. Payroll records supplied by Respondent do not support this testimony.

[20] There is no inconsistency in finding, as I have, that O'Brien learned of Martin's planned visit to the Human Relations Department on 26 February and took some action based thereon and learned additional facts later in March upon receiving a copy of the charge against the Union and thereafter took additional action based thereon.

[21] Par. 6(a) of the complaint (G.C. Exh. 1(c)).

many hours the painting department employees would work, the entire department should be regarded as composed of part-time employees, outside the unit, not subject to the collective-bargaining agreement, and unrepresented. The Respondent's position prevailed and the contract was executed and ratified with the mutual understanding, never formally nor seriously challenged by the Union, that the painting department employees were not covered by the contract. It is not the Board's province to insert itself in the bargaining process by redefining the terms of a lawfully negotiated collective-bargaining agreement in a way totally contrary to the intentions of the parties. I find that the painting department employees are not and never were intended to be covered by the contract.

The General Counsel alleges[22] that Respondent has failed and refused to afford Martin and certain other painting department employees all the rights and benefits accorded full-time employees by the collective-bargaining agreement. The record indicates that Respondent did, in fact, refuse to afford painting department employees the wages and benefits that were provided for by the contract. However, inasmuch as I have found that, by mutual agreement of the parties, these employees were not covered by the contract, there was and is no requirement that Respondent extend its provisions to the painting department employees.

The General Counsel alleges[23] that on several occasions Martin and certain other painting department employees requested that the Union assist them in obtaining contractual rights and that the Union through the chief steward registered grievances[24] with Respondent in pursuance of these requests. The record reveals, however, that Martin, acting alone, made numerous unsuccessful requests of the steward to try to obtain for painting department employees the contractual benefits that unit personnel were receiving, but was informed by the steward that nothing could be done, that his hands were tied until it was time to renegotiate a new contract. Granted that there occurred in late 1984 a meeting between the Union and management in which it was agreed that one new unit position be created in the painting department, in my opinion Respondent was not obligated by the contract to grant this concession, and its having done so reflects well on its desire to negotiate in good faith. I find that the Union did not file formal grievances as alleged and Martin did not act in concert with other painting department employees on this matter.

The General Counsel alleges that Martin on 26 February registered a complaint with the Indiana Human Rights Department[25] as a continuation of his previous efforts[26] to obtain contractual rights for the painting department employees and that thereafter the hours of these employees were reduced.[27] The record clearly supports these allegations to the extent that it reflects that Martin did seek the aid at the Michigan City office of the Human Rights Department for the purposes alleged. Further, I find that following Martin's visit to the Human Rights Department the hours of painting department employees were reduced by the expedient of hiring additional employees to work in the painting department and dividing the available work along the larger complement, thus reducing the number of hours that would have been worked had the total number of painting department employees not been enlarged.

The General Counsel alleges[28] that Respondent reduced the hours of its painting department employees and has since about 27 February failed and refused to assign full-time employment to these employees because Martin and his fellow employees requested the Union to assist them in obtaining contractual rights, because Martin registered a complaint with the Indiana Human Rights Department, and because the Union through the chief steward registered grievances with Respondent on behalf of Martin and other painting department employees to obtain contractual rights for them.[29] But the record contains no evidence that the hours of the painting department employees were reduced, as described, in retaliation for Martin's seeking to obtain contractual rights for the painting department employees, either through the Union or through the Indiana Human Rights Department. If retaliation were the motivating factor for the reduction in hours, I would find a violation. *Akron General Medical Center*, 226 NLRB 953 (1976). However, I do not find it so. Rather, the reason for the reduction in hours through the expansion of the painting department complement appears to be economic and most easily understood through an analysis of the factual history of the problem as discussed above.

Thus, the Respondent and the Union have enjoyed a long history of amicable labor management relations as reflected in successive collective-bargaining agreements dating from 1977. In negotiating their most recent contract in November 1973, the Union and Respondent agreed that the employees in the painting department would be considered part-time and therefore neither represented by the Union now subject to the provisions of the contract. Jaques was instructed not to work his people over 40 hours.

In 1983 and the first half of 1984 Respondent ran its painting department with whatever number of employees were necessary to run the parts, do proper maintenance, and cleanup. Although occasionally a painting department employee might work a full 40-hour, 5-day week, this was the exception rather than the rule. In September 1984 business and production increased markedly, new employees were hired and most of them worked over 40 hours. This continued through mid-December when business and production once again dropped off. The drop in production necessitated the layoff of one employee and a decrease in the number of hours worked. In the second week in January, production again increased. Jaques re-

[22] Id., par. 6(b).
[23] Id., par. 6(c).
[24] Id., par. 6(d).
[25] Id., par. 6(e).
[26] Id., par. 6(f).
[27] Id., par. 6(g).
[28] Id., par. 6(h).
[29] Ibid.

called the laid-off employee but did not hire any new people. Instead, he worked the four regular employees regularly over 40 hours per week or very close to 40 hours. To ensure that the painting department employees received a maximum number of hours Jaques assigned them maintenance and cleanup work that, in some cases, was not absolutely necessary, and occasionally had some temporarily assigned to other departments, again for the purpose of giving them additional employment.

On 26 February, when Martin announced to East, Slayden, Jaques, the chief steward, and anyone else who would listen that he was going down to the Indiana Human Rights Department to file a charge because he and the other painting department employees were working 40 hours but not receiving the contractual benefits received by unit employees, word of his intention must have gotten back to O'Brien because the following day Jaques told Martin and Slayden that he had been told the night before that he should reduce the number of hours worked by the painting department employees and hire additional employees because Martin was causing such a ruckus by filing the charge with the Human Rights Department and blowing off his mouth to everyone before he went. Clearly, from the very beginning O'Brien intended the painting department to be part-time so that it could remain flexible and meet the peculiar demands of the erratic nature of its production. The Union had agreed to this. But then Jaques, out of the kindness of his heart, decided to give the painting department people 40 hours and more because they needed the work. That was all right until Martin announced to his fellow workers, management, and the Union that because the painting department employees were working 40 hours they should be considered full time, placed in the unit, and given all the contractual benefits. Fearful that Martin's activity would result in demands by the Union that the paint line be made full time, thereby losing its capacity to deal with the fluctuations in production, O'Brien ordered that the hours worked by the painting department employees be cut below 40 hours, by decreasing the number of nonproductive hours, and by hiring additional employees and spreading the available work out among the greater number so that each employee worked fewer hours. I conclude that the reduction of hours of the employees in the painting department was economically motivated and not in retaliation for the filing of the charge by Martin. Indeed, if retaliation were the motive, the discriminatory act would most likely have taken the form of an action against Martin, not against all the employees in the department, all of whom refused to join Martin in his singular crusade. I find no violation of Section 8(a)(5) or Section 8(d) because from its very inception the painting department was considered by the Union and Respondent to be part-time, unrepresented, and not subject to the provisions of the collective-bargaining agreement; the reduction of the work hours of the painting department employees was not violative of the Act; and the Respondent was never obligated to assign full-time employment to the painting department employees. Further, I find no violation of Section 8(a)(3) because the reduction of the hours of the painting department employees and the hiring of additional painting department employees were economically motivated.

Finally, I find that although Martin acted on behalf of the welfare of all the employees in the painting department when he sought the help of the Union and of the Indiana Human Relations Department to obtain for them the benefits of representation and of the collective-bargaining agreement, he did so without obtaining authority to act on their behalf. Indeed, both Slayden and East rejected his overtures to have them act in concert with him, stating explicitly that they did not wish to become involved. I find, therefore, that *Meyers Industries*[30] is controlling and that Martin's activity was not concerted. Moreover, even if it were so considered, there is no evidence that Respondent was aware of any employee other than Martin who was so engaged and therefore no violation can be found. *Center Ridge Co.*, 276 NLRB 105 (1985).

I have found that Respondent did not violate the Act in any manner alleged in the complaint. Consequently, I shall recommend that the case be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) and Section 8(d) of the Act.

[Recommended Order for dismissal omitted from publication.]

[30] 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

Pony Express Courier Corp. *and* Phillip Nye. Case 4–CA–15151

5 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 30 December 1985 Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We agree with the judge that Branch Manager Pentheny restrained and coerced employee William Daros, in violation of Section 8(a)(1) of the Act. Pentheny invited Daros, a union adherent who had solicited other employees to sign authorization cards, for a cup of coffee at a restaurant near the plant. What began as a friendly chat soon took an ominous turn when Pentheny banged his fist on the table and asked Daros, "Why are you doing this to me?" Then he called Daros a "sneak" and a "snake." Daros responded that he was trying to better himself. Although Pentheny did not identify Daros' union activity expressly as the source of his irritation, the circumstances, including the absence of any other identifiable cause for his rancor, reasonably led Daros to believe that it was. Further, the total effect of these outbursts could hardly have failed to be threatening to the employee. In addition to the coercive interrogation concerning the reason for Daros' union activity, we find, in agreement with the judge, that Pentheny's remarks reasonably tended to create the impression that Daros' activities, which were not shown to have been open and notorious, had been under surveillance.

We do not find, however, that an additional coercive interrogation occurred when Supervisor Castoria asked employee Morrison whether he had been approached by anyone regarding unions. Morrison answered that he had not been approached personally, but had received a union card (which had been mailed to him for signature) and that he had overheard rumors about unions. Neither Castoria nor Branch Manager Raucci, who was also present, followed up this response, and the conversation just ended. We are unable to find that the totality of circumstances added up to a reasonable tendency to restrain or coerce. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Castoria's single question lacked any intrinsically threatening quality, and the supervisors' passing up of the opportunity to press Morrison any further on his response to the question made it unlikely that Morrison would have left the conversation feeling coerced. We conclude that the General Counsel has failed to prove the requisite tendency to restrain or coerce and, accordingly, dismiss that allegation.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pony Express Courier Corp., Colwyn, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(g).

"(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Remove from the Respondent's files any reference to the unlawful discharges and notify the employees in writing that this has been done and

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

As we agree with the judge that the Respondent unlawfully solicited grievances when Branch Manager Raucci spoke to employees at a Saturday morning meeting soon after he took over as branch manager, we find it unnecessary to pass on the judge's cumulative finding that Regional Manager O'Neal also unlawfully solicited grievances.

[2] The General Counsel excepts to the judge's recommended Order to the extent that it does not include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

We further find that the unfair labor practices committed here do not warrant a broad cease-and-desist order under *Hickmott Foods*, 242 NLRB 1357 (1979). We therefore shall narrow the judge's recommended Order.

[3] Member Johansen finds it unnecessary to pass on the judge's finding of a violation with respect to Morrison's questioning as it is cumulative and does not affect the remedy or the Order.

that the discharges will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT create in the minds of employees the impression that their union activities are the subject of company surveillance.

WE WILL NOT solicit employee grievances for the purpose of adjusting them.

WE WILL NOT promise employees benefits if they abandon their union activities.

WE WILL NOT coercively interrogate employees concerning their union sympathies and activities.

WE WILL NOT threaten to close the plant if employees become unionized.

WE WILL NOT discourage membership in or activities on behalf of Highway Truck Drivers and Helpers Local Union No. 107, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discharging employees or otherwise discriminating against them in their hire or tenure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Phillip Nye and Janet Dordell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL notify Phillip Nye and Janet Dordell that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

PONY EXPRESS COURIER CORP.

Bruce G. Conley, Esq., for the General Counsel.
Thomas Franklin, Esq., of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY JR., Administrative Law Judge. This case came on for hearing before me at Philadelphia, Pennsylvania, on an unfair labor practice complaint, amended at the hearing,[1] which alleges that Respondent Pony Express Courier Corp.[2] violated Section 8(a)(1) and (3) the Act. More particularly, the amended complaint alleges that the Respondent created among its employees the impression that their union activities were the subject of company surveillance, coercively interrogated employees, solicited employee grievances with a view toward remedying them, promised employees benefits if they would abandon their union activities, and threatened to close the plant if it became unionized. The amended complaint also alleges that the Respondent discriminatorily discharged employees Phillip Nye and Janet Dordell. The Respondent denies the commission of independent violations of Section 8(a)(1) and claims that Nye and Dordell were discharged because they failed to report for work as scheduled. On these contentions the issues were joined.[3]

FINDINGS OF FACT

I. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent operates about 100 facilities throughout the United States where it is engaged in the delivery of packages and correspondence within metropolitan areas. Typical of its operation is the transportation of canceled

[1] The principal docket entries in this case are as follows:

The charge was filed by Phillip Nye, an individual, against the Respondent about June 25, 1985; the complaint was issued by the Regional Director for Region 4 on August 7, 1985; Respondent's answer was filed on August 21, 1985; the hearing was held in Philadelphia, Pennsylvania, on November 20, 1985; and the briefs were filed with me by the Respondent and the General Counsel on or before December 23, 1985.

[2] Respondent admits, and I find, that it is a Delaware corporation, which is engaged in the interstate transportation of packages. It maintains an office for this purpose at Colwyn, Pennsylvania. In the course and conduct of its business, Respondent has received in excess of $50,000 for services performed in interstate commerce. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Highway Truck Drivers and Helpers Local Union No. 107, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Certain errors in the transcript are noted and corrected.

I have not attempted to correct all the errors of spelling, punctuation, and sentence formation that appear in this transcript. Suffice it to say that this case has one of the most poorly prepared transcripts that I have had the occasion to review as an administrative law judge.

checks from banks to clearinghouses and the transportation of internal company mail between various business locations that a customer maintains. These items are transported in vans, station wagons, and other passenger-type vehicles that are given by employees it calls courier guards. Courier guards are uniformed drivers who are dispatched from a central location daily with routing slips that direct them to pick up and deliver customer correspondence to and from designated locations. They report back to the dispatch facility each day at the end of their routes. Respondent employs about 30 such employees at its Colwyn, Pennsylvania terminal, a suburb of Philadelphia, from which point they drive a series of routes in and about the Philadelphia metropolitan area. Some of these routes extend as far north as New York City and as far south as the Maryland suburbs of Washington, D.C. The Colwyn facility, formerly located at Lansdowne, Pennsylvania, is unorganized and has no bargaining history. Respondent admits that it is strongly opposed to the unionization of its courier guards, both at Colwyn and throughout its system, and has only a handful of organized plants anywhere in the United States.

Following a regional meeting of Respondent's managers in November 1984, the Respondent announced, both at its Lansdowne (now Colwyn) facility and elsewhere, that it was discontinuing its former practice of paying employees time and a half for hours worked in excess of 40 per week. Apparently it had received a legal opinion that straight time after 40 hours was lawful under exemptions found in the Federal Wage and Hour Act for over-the-road drivers. Shortly after this announcement was made, several employees decided to inquire at the Department of Labor whether this practice was lawful. There is a central meeting place in downtown Philadelphia that serves as an informal clearinghouse for drivers assigned to certain routes. They meet daily near the P.N.B. Bank at Fourth and Market Streets to exchange packages destined for delivery that have been picked up by drivers on other routes. On one such occasion late in December 1984, the six or seven drivers who met at this location selected discriminatee Phillip Nye to go to the Labor Department to inquire about the lawfulness of discontinuing overtime payments.

Nye did so and reported back at a subsequent employee gathering near the P.N.B. Bank that he had been informed that the discontinuance of overtime payments was lawful. On learning this information, the assembled drivers decided to organize a union and once again selected Nye to act on their behalf. Nye first phoned Teamsters Local 107 and then went to its office on Spring Garden Street in Philadelphia. He was told that the Teamsters wanted signatures on designation cards from two-thirds of the members of the 30-member bargaining unit before they would file for an election. He was given cards for this purpose.

At another gathering at Fourth and Market, Nye passed out cards to other drivers for their own signatures and for further distribution. Nye signed a card on December 26. He collected other cards at a later date and turned them in to the Teamsters office. Between December 26, 1984, and February 5, 1985, seven cards had been signed and returned to the union office. Some cards were mailed in and others were turned in by Nye. Nye gave out cards to employees at the Lansdowne facility and mailed cards to other drivers whom he could not reach personally. He even solicited a card from a lead courier, Robert Hines. Hines turned him down on the basis that Hines was a part of management and was not eligible for unionization.[4]

The Lansdowne facility was undergoing a change of management in late January and early February 1985. Former Branch Manager Al Pentheny was being replaced by Richard Raucci. Raucci took over on February 1. This transition was being accomplished by Phillip O'Neal, the Respondent's regional manager, who maintains his office in Richmond, Virginia.

O'Neal had been unhappy with Pentheny's performance for some time, but told Pentheny that he would not be coming to Philadelphia during the fall of 1984 because he was preoccupied at that time with establishing a new facility in Baltimore. Not long before Pentheny was removed as branch manager, he had occasion to engage driver William Daros in a private conversation after Daros had finished his route. Pentheny invited Daros to have a cup of coffee at a nearby cafe and, in the course of their conversation, asked Daros, a union supporter, "Why are you doing this to me?" Pentheny banged his fist on the table and accused Daros of being a sneak and a snake. Daros simply replied that he was simply trying to better himself.[5]

O'Neal came to Philadelphia to interview prospective replacements for Pentheny in January 1985. During the course of his visit he took advantage of the occasion to hold private interviews with several drivers, including Nye. O'Neal testified that the purpose of these interviews with drivers was to give them an opportunity to have some input into the question of Pentheny's fitness as a branch manager. Nye testified credibly that O'Neal asked him how he felt about things in the office and how things could be improved. Specifically, O'Neal asked Nye what he thought of Pentheny as a manager. Nye replied that he did not think well of Pentheny as a manager. He went on to complain about problems involving vehicle safety. He told O'Neal that vehicle safety—or the lack thereof—was the biggest gripe the drivers had. He mentioned such things as bald tires, grinding brakes, the lack of a vehicle maintenance or safety program, and a reply he once received from Pentheny when complaining about the condition of a truck, namely, that he would either have to take a truck out on his route or go home and not work on the day in question. Nye specifically mentioned to O'Neal a couple of times when he was required to drive a vehicle with bald tires. On one occasion, while driving this truck, he slid through an intersection, and on another occasion he went up an embankment because of the slick condition of the tires. O'Neal said he would do what he could and told Nye that there would be some changes coming soon.

---

[4] Later on in the campaign, Nye also solicited signatures on union authorization cards from lead couriers Willie James and Lee Morrison.

[5] Driver Mark Zavitski described Pentheny as being scared of union people. He testified that he never mentioned the Union to Pentheny, but Pentheny kept talking about it anyhow.

O'Neal testified that his conversations with other drivers during this visit were similar to the one he had held with Nye. Several drivers complained to him about vehicle maintenance and stated that the manager did not respond to their needs as he should have done. They also complained about wages and benefits (or lack of benefits), about the fact that they did not get a raise, about the discontinuance of overtime, and some asked about health insurance. O'Neal replied, with reference to Pentheny, that changes would be forthcoming and that he would study the possibility of instituting more full-time positions, meaning more positions that included health insurance as a fringe benefit.[6] He also told complaining drivers that the Company's response to the complaint that overtime payments had been discontinued was that it preferred to allow drivers to maintain their income levels by giving them extra hours to work rather than by cutting them off at 40 hours a week to avoid overtime payments.

Not long after Raucci took over as branch manager, he held a Saturday morning meeting with drivers to discuss problems of mutual concern. Just before this meeting began, head courier Felix Castoria held a conversation with union supporter Leedom Morrison in the company vehicle maintenance area. Raucci was present during this conversation. Castoria asked Morrison if he had been approached concerning the Union. Morrison said that he had not been approached, but had received a union card, meaning that he received one in the mail. He told Castoria that he had heard rumors that unionization was afoot.

At the meeting, Raucci introduced himself and told employees that he had previously worked for various Philadelphia newspapers. He said he had been a teamster himself and had dealt with Teamsters before, noting that he was aware of union activity at the Pony Express terminal. He said he would try to get the employees better wages and working conditions, but that he could do nothing about the discontinuance of overtime. He also said he knew that there was a problem about vehicle maintenance. He asked the employees to put their union activity on a back burner for 6 months and give him a chance to straighten things out. Raucci then went around the room and asked each driver present if he had any grievances. Nye complained about bald tires, about sliding through an intersection because of the poor condition of the tires, and the fact that he had gotten a ticket on this account. Raucci said he would take care of it. Driver David Reed complained about certain routing problems he had encountered with company salesmen. He wanted the Company to eliminate extra stops on his route because he was no longer getting overtime. Again Raucci said that he would look into it. Driver Quails complained about the fact that his schedule had been increased with extra hours that conflicted with his school hours. Other drivers talked about vehicle safety, about defective windshields, defective turn signals, bad brakes, and bad steering equipment. Raucci told them that he would try to improve things and specifically that he would try to create more full-time positions that offered fringe benefits. I credit Nye's testimony that Raucci told employees on this occasion that, if a union came in at the terminal, the Company would close down and padlock the doors.[7]

After listening to Raucci, Nye came to the conclusion that he meant well, so he decided to take him up on his offer to put aside union activities for 6 months. A few days thereafter, Nye turned into Raucci the blank Teamsters cards that he still had in his possession and told Raucci that the drivers were going to give him a chance for 6 months. O'Neal corroborated this event, stating that Raucci had phoned him and informed him that an unnamed driver had turned over unsigned union cards and that the employees were going to allow the Company to recertify the complaints that the employees had voiced without unionization.

About mid-May, Nye had another change of heart. According to Nye, Raucci had come to the conclusion that certain drivers were not paying sufficient attention to their duties so he removed the fuses from the vehicles so they could not listen to the radio while driving. His action had the side effect of knocking out turn signals and taillights and, in some instances, windshield wipers. Nye complained to Raucci, saying that he could not use the turn signs on his vehicle because the fuse had been removed. Raucci told him to use hand signals. Nye objected, telling Raucci that he had to drive on I-95 near Washington and he might as well be a kamikazi as use hand signals on that road. Raucci insisted, telling him to do it anyway. The following day, Raucci again spoke with Nye, referring to him as a "union big mouth." On this occasion, Raucci told Nye that he would allow drivers to put the fuses back in their vehicles if they could go through the day without any more "screw-ups." Shortly thereafter, Nye went back to the Teamsters office, obtained more cards, and renewed his organizing effort.

The events leading up to Nye's discharge took place on Thursday, June 20, and Friday, June 21, 1985. At that time, Nye was assigned to a route that involved a 480-mile round trip each day. He serviced certain customers in Philadelphia and then drove as far south as Gaithersburg, Maryland, making pickups and deliveries at Sears & Roebuck locations in the Metropolitan Washington area. He normally left the Colwyn terminal at 2 p.m. and returned at 2 a.m. the following day. On June 20, he noticed, about 6 p.m., that a yellow light had come on in his vehicle. He also smelled exhaust fumes emanating from the motor. The fumes became so intense that Nye had to drive with the window open. Notwithstanding

[6] Almost all the drivers at the Colwyn terminal were classified as part-time employees. This classification bore no relation to the number of hours they worked. It was merely a company designation indicating that they were not entitled to health insurance or any other company benefit. For instance, Nye worked a 96-hour week during the first week of his employment and averaged 68 hours a week throughout his stay with Pony Express. Nevertheless, he was classified as a part-timer.

[7] Raucci did not testify and was not summoned by the Respondent to present any version of events that contradicted either Nye's account or the testimony of other drivers. I also note that the Respondent also did not produce Al Pentheny, Norris Schier, or Jerry Nichols to substantiate its position, being content to limit its defense to the testimony of Regional Manager O'Neal.

this move, he began to feel nauseous, developed a headache, and noticed that his eyes had become red and watery.

Before leaving for the southern portion of his run, he returned to the terminal and complained to Norris Schier, the lead courier or dispatcher on duty, that the truck was defective and that he was too ill to drive. Schier had no one to finish the route and no other truck at the terminal so he called Raucci at home to report this problem. Raucci asked Nye, through Schier, if he would agree to finish the route that evening if they found him another truck. Nye reluctantly did so. Schier was able to find another truck by calling a customer location and contacting another driver. He asked that driver to return to the terminal and the driver did so. Nye then switched his delivery items to the other vehicle and proceeded to Maryland. Before leaving, he told Schier that, if he had to finish the route that evening, he wanted Friday off so he could go to the doctor. (He would normally report to work on Friday at 2 p.m.) Schier said that this would be no problem because the Company would have almost a full day to round up a replacement. Nye finished his route on Friday morning about an hour late and returned to the terminal about 3:30 a.m.

The other discriminatee in this case is Janet Dordell. She is what was euphemistically referred to on the record as Nye's "fiancee." In fact, they had been living together for some time, and there is record evidence to support a finding that company management was aware of this cohabitation. Dordell had been hired about 3 weeks before as a driver for the summer months and there had been some discussion with management, not yet finalized, that she might continue to work after she returned to college in the fall. She had completed a 40-hour week by Thursday of the week in which Nye was discharged. About 3:30 that afternoon, Raucci called her at her home and asked her if she wanted any more hours that week. She agreed, so he told her to report at 4:30 Friday morning, to go out on a route with driver Dan Fabrizio in order to learn Fabrizio's route.

When Nye returned to the terminal early Friday morning from his route in Maryland, Jerry Nichols was the lead courier-dispatcher on duty. Nye asked Nichols when Dordell was due to report. Nichols replied that she had been asked to train on an additional route and was supposed to report at 5 a.m., to go out with Fabrizio. When Nye arrived home, he turned off the alarm that Dordell had set and informed her that she did not have to report for work until 5 a.m., therefore she had an extra half-hour to sleep. Nye called Nichols at 4:30 to say that Dordell was on her way. Nichols then informed him that Fabrizio had come and gone and had refused to wait for Dordell. He then gave her the option of coming in at 5 or 5:30 a.m. to go out on a training route with another driver, Robert Hines. Dordell declined, saying that Hines was a dangerous driver and that she did not want to ride in the same vehicle with him. Nichols then told Nye that Dordell did not have to come in at all, so both of them went to sleep.

At 10 o'clock Friday morning, Nye went to see his physician, Dr. Joel Snyder. He told Dr. Snyder about his symptoms, which had improved since the preceding evening, and was informed by the doctor that he was suffering a toxic reaction to exhaust fumes. He advised Nye to take a lot of liquid, flush out his system, and continue to take Tylenol and use cold compresses.[8] After leaving the doctor's office, Nye went to his mother's home. That afternoon they went shopping together.

About 3:30 on Friday afternoon, Dordell received a call at her home from Raucci's secretary, who asked if Nye had left for work. Dordell said he had not, adding that she did not think he was supposed to report that afternoon. Raucci got on the phone and she repeated the same statement to him, saying that Nye was supposed to go to the doctor and had told the dispatcher the previous evening that he was going. Raucci then told Dordell to get in touch with Nye to tell him to report for work, adding that if he did not report, he would be fired. She immediately called Nye's mother's house but Nye was not there, so she left a message for him to call. Nye did not get the message until it was too late to report for work, so he did not go to the terminal until his regular starting time the following Monday afternoon.

On arriving at the terminal on June 24, Nye noticed that his timecard was not in the rack so he went in to speak to Raucci. Raucci told him that he had not been excused from reporting to work on Friday and was fired. Nye argued that Schier, the dispatcher, had approved his absence while talking over the phone with Raucci on Thursday evening. Raucci replied he did not remember this conversation. They argued at some length. Nye also complained that this was his first offence and that he had not even received a previous verbal warning about his work. Raucci held fast, saying that it did not matter what kind of offense it was. He asserted that, by not showing up on Friday evening to cover the Maryland route, Nye might have cost the Company its account with Sears & Roebuck. He ended by telling Nye that Nye was out of a job and that Raucci "had no more union problems."

On the same afternoon, Dordell called the company office to inquire about her schedule for the coming week. Raucci took the call and told her that she did not work there any more because she had not reported for work on Friday morning as scheduled. Dordell replied that she had spoken with Jerry Nichols, the dispatcher, and he had said that she did not have to come in because the driver she was supposed to go out with, Fabrizio, had already left. Raucci told her that this did not make any difference and that she should have reported anyhow. They argued at length. She told Raucci that Nichols himself was frequently late and nothing was done about it. She also charged that she was being fired because of her association with Nye. Raucci denied the charge and refused to change his decision.

Immediately thereafter, Nye engaged private counsel respecting this discharge. His attorney, John P. Williamson, wrote a letter to Raucci, dated June 24, which stated:

[8] A few days after he was discharged, Nye obtained a medical slip from the doctor evidencing the fact that he had sought medical attention. He presented this slip to Raucci. Raucci said it made no difference with respect to the discharge.

> Please be advised that I represent Phillip Nye, who was illegally terminated by you today. My client is sincerely interested in retaining his position with your company. I am, therefore, preparing a complaint against you and your company to be filed in Federal District Court. Should you care to settle this matter by offering Mr. Nye his old position, then kindly advise immediately.

This letter was referred to Marc P. Katz, Respondent's vice president, for reply. In a reply to Williamson, dated July 10, Katz stated:

> Your letter of June 24, 1985 addressed to Mr. Raucci, our Philadelphia branch manager, has been forwarded to me for response. Please be advised that I have investigated the situation raised in your letter and find that Mr. Nye was terminated properly pursuant to the Company's work rules. He apparently missed work on Wednesday, Thursday, and Friday of the week in question and did not call in regarding his absence. The Company has suffered a loss of business due to this action and could not tolerate such conduct on the part of Mr. Nye.

II. ANALYSIS AND CONCLUSIONS

Respondent's regional manager O'Neal testified that the Respondent has a strong policy of resisting the unionization of its employees, either by Teamsters or any other labor organization,[9] and this policy is set forth in a lengthy statement found in its employee handbook. All employees are required to read this handbook and to sign a statement acknowledging that they have read it. The statement is as follows:

> This is a non-union facility and we feel very strongly that a union is not necessary. Without a union, you as an individual are free to deal directly with Pony Express without some third party representing or speaking for you. It is not necessary for you or anyone else to belong to a union in order to work at Pony Express.
>
> Pony Express has always tried to deal fairly with its employees in every way and provide everything that goes toward making a good job and good working conditions for any employee who sincerely and honestly deserves such an opportunity.
>
> We are convinced that our employees prefer to deal directly with Pony Express rather than through a union. We are also convinced that whatever unions come in, they generally bring trouble, strife, and discord. Because of this, it is our belief that a union here will *not* work out for your benefit or for the benefit of other employees. We believe that employees of Pony Express have been better off, and will always be better off in the future, without a union. Therefore, it is our policy to oppose unionism at Pony Express by every proper and legal means.
>
> . . . .
>
> If anybody threatens you or puts you under an undue pressure to join a union, this is illegal and you may protest it to the U.S. Government. If requested, Pony Express will provide you with the address and phone number of the government agency that enforces our Federal labor laws. No person will be allowed to solicit or carry on union organizational activities during that employee's working time. Anyone who does so and who thereby neglects his own work or interferes with the work of others will be subject to disciplinary action.

The General Counsel levels no complaint at the legality of these statements per se. Instead, they form the context for evaluating the balance of the evidence in this case and should be looked to in determining whether, in this instance, Respondent has gone about its business of opposing unionism by every proper and legal means, or whether it resorted to improper and illegal means to keep Nye and his associates from organizing its Philadelphia branch office.

III. INDEPENDENT VIOLATIONS OF SECTION 8(A)(1) OF THE ACT

Just before he left the employment of the Respondent, Pentheny took employee Daros aside, bought him a cup of coffee, and asked him why he was "doing these things to me." In the course of the conversation, Pentheny banged his fist on the table and accused Daros of being a sneak and a snake. Although the word "union" was not uttered, Daros' reply, namely, that he was just trying to better himself, makes it clear that Pentheny was referring to Daros' efforts on behalf of the Teamsters, which had included participation in the informal meetings that generated the union drive, signing a union card, distributing cards to other employees, and soliciting support from lead courier Hines. Both the text and the context of Pentheny's statements make it clear that he was letting Daros know that he was aware of Daros' union activities. Moreover, he was coercively interrogating him concerning these activities. By these acts, the Respondent violated Section 8(a)(1) of the Act.

Soliciting employee grievances when a union is organizing a plant with a view toward adjusting them is a violation of Section 8(a)(1) of the Act. *Reliance Electric Co.*, 191 NLRB 44 (1971); *Hi-Lo Foods*, 247 NLRB 146; *Montgomery Ward & Co.*, 253 NLRB 196 (1980); *Berger Transfer & Storage Co.*, 253 NLRB 5 (1980). It is of little consequence that, in the course of such solicitation, an employer makes an express disclaimer of doing anything about the grievances he uncovers, if, in fact, he moves to remedy the grievances or if he promises to look into the problems that have been brought to his attention. *Illinois Central Community Hospital*, 224 NLRB 632 (1976); *Western, Inc.*, 251 NLRB 1547 (1980); *Stride-Rite Corp.*, 228 NLRB 224 (1977); *National Micronetics*, 277 NLRB 993 (1985). Early in 1985, O'Neal came to Philadelphia and, in the course of his visit, spoke privately to Nye and to other drivers in order to give them input into a pending decision to discharge the branch manager. Penth-

[9] In light of O'Neal's testimony on this point, Respondent's defense that it did not fear a Teamsters organizing effort because only a plant guard union could represent its "courier guards" is frivolous.

eny's statement to Daros, discussed above, indicates that the Respondent was well aware at that time that a union effort was underway at this facility. O'Neal indicated in the course of these confidential interviews that he planned to take some action concerning complaints against the branch manager, and in fact he did so shortly thereafter. Other complaints were also voiced. With respect to safety complaints, O'Neal said that he would see what he could do. With respect to complaints about wages and fringe benefits, O'Neal replied that he was contemplating the establishment of more full-time positions, a move that would carry with it more widespread entitlement to fringe benefits.

Not long thereafter, at his first encounter with unit employees, Raucci did the same thing. Noting that he was aware that union efforts were afoot and that he had dealt with the Teamsters before, Raucci went around the room and asked each driver in attendance to express himself on the subject of what was wrong with the Company. Raucci got an earful. He told Nye he would take care of his complaint concerning bald tires. He told Reed that he would look into a burdensome scheduling problem. Others complained about wages and benefits as well as a multitude of safety problems concerning the company vehicles. Raucci said he would look into them. He reiterated O'Neal's words that the Company would try to create more full-time positions carrying with them fringe benefits. Both of the above-recited series of conversations amount to unlawful solicitations of grievances with a view toward adjustment and violate Section 8(a)(1) of the Act. Raucci's promise to create more full-time positions constitutes an unlawful promise of benefit in violation of Section 8(a)(1) of the Act. Any lingering doubt about these violations can be laid to rest by Raucci's request to assembled employees that they put unionization on the back burner for 6 months in order to give him a chance to straighten things out.

During the course of this meeting, Raucci also told employees that, if the Union came into the Philadelphia facility, the Company would close it down and padlock the doors. This statement is a clear and flagrant threat to violate rights protected by Section 7 of the Act and, as such, is a violation of Section 8(a)(1) of the Act.

Castoria asked Daros a few minutes before this meeting, in the presence of the branch manager, whether he had been approached by the Union. Morrison replied that he had not been personally approached but had received a union card. This statement constitutes illegal interrogation and is a violation of Section 8(a)(1) of the Act. It does not constitute a solicitation of grievances nor a promise of benefits, so any allegations in this regard pertaining to Castoria should be dismissed.

In many particulars, Katz' statement to Nye's lawyer was factually false and totally at odds both with O'Neal's testimony and company documents. Nye did not miss work on Wednesday or Thursday of the week in question, nor did the Company suffer a loss of business due to Nye's absence on Friday. Sears was angry that the Pony Express driver was late on his rounds but it did not cancel its delivery contract. O'Neal reorganized the division of Sears work between the Philadelphia branch and the new Baltimore branch, transferring a delivery run in Gaithersburg, Maryland, to the Baltimore office and removing it from Philadelphia's responsibility. He also volunteered to Sears that he was firing the driver who came late, but Sears did not request such action. Sears remains a Pony Express customer with respect to its Gaithersburg business, Katz' statement to the contrary notwithstanding.

The operating rule that Nye assertedly violated was rule 17: "Tardiness or absence without prior notification and approval." Nye testified credibly that he was excused from reporting on Friday afternoon and that this excuse was given to him on Thursday evening by the lead courier, Schier, with Raucci's approval. The occasion of this approval was Nye's agreement to take the balance of his Thursday run to Maryland despite an illness due to inhaling exhaust fumes from one of the Respondent's vehicles. Neither Schier nor Raucci appeared at the hearing to contradict this testimony.

Nye was the leader of the in-house movement to organize a union at the Philadelphia branch. He obtained union cards, signed a card, passed them out, turned them in, and disclosed his union affiliation to Raucci early in Raucci's career as branch manager when he turned unused union cards over to Raucci as a gesture of good faith following Raucci's meeting with company drivers. This latter act was corroborated by O'Neal, although O'Neal professed not to know the identity of the union supporter who had tipped his hand by surrendering union cards. Later, Raucci referred to Nye as a "union big mouth" and told him, on the occasion of his discharge, that by removing Nye he was getting rid of a union problem. In light of this uncontradicted testimony, it clearly appears that the Respondent admitted to Nye that it was firing him for union activities and that its contrived responses to Nye's lawyer and to the amended complaint in this case were merely pretexts clumsily put together. In light of these circumstances, including declared animosity to unionization and demonstrated animus to organizing at the Philadelphia facility, I conclude that, by discharging Phillip Nye, the Respondent violated Section 8(a)(1) and (3) of the Act.

The discharge of Dordell need give only scant pause. It took place in the context of the intense antiunion animus outlined above and the several violations of Section 8(a)(1) and (3) already found. It also took place in the context of an operation that was haphazard at best, that experienced enormous turnover, and that treated courier guards as fungible commodities to be assigned and reassigned with ease and little concern for any consideration except that a route be covered on the day in question by drivers who had a working knowledge of where pickup and delivery points were located. Raucci told Dordell on the occasion of her discharge that not showing up for a scheduled run was the "biggest sin" in the courier business. The above-recited evidence makes it abundantly clear that the biggest sin in the Respondent's courier business was engaging in union activities. The record in this case in replete with numerous instances of courier guards failing to show up and giving no notice, yet being allowed to resume their duties as if nothing had happened. The record is also clear that the standard

of acceptable practice at the Philadelphia branch when Dordell was discharged was that a courier guard would be excused if he gave 3 hours' or more notice that he was not coming to work.

In the case here at issue, Dordell was scheduled to take only a training run. In fact, the run she was originally scheduled to take, as well as the run she was later offered by Nichols, were both covered by regular drivers. Her presence was for instructional purposes only. The original offer from Raucci to go on a training run with Fabrizio was an offer that was optional on her part to accept. In fact, she did accept. The substituted offer of a training run with Hines was likewise optional on her part. In fact, when she told Nichols she did not want to ride with Hines, Nichols told her that she did not have to come in at all. As he was the lead courier and dispatcher on duty at 4:30 a.m. on the Friday in question, he was the chief spokesman for the Company at the facility at the time, and Dordell had the right to rely on his assurance. As with other supervisors, Nichols did not appear to testify, and the Respondent presented no evidence to contradict her account of what transpired.

Having been fired for an asserted misdeed that was of little consequence, both in fact and as the Company regarded employee behavior, the next question to be posed was why Raucci took this step. Although he denied that her discharge had anything to do with the discharge of Nye, in point of time they were accomplished almost simultaneously. Her close affinity to Nye was well known at the Company. Indeed, Raucci had spoken to her on Friday afternoon when he called Nye's apartment to locate Nye, and he utilized Dordell's services to transmit a message to Nye. The economic impact on Nye of discharging an individual who shared Nye's apartment and presumably his rent is obvious, as is the emotional impact of such a discharge both on Nye and other employees. Dordell's own union activities were admittedly nominal. She discussed unionization with Nye and in fact had signed an authorization card. However, it is clear that the Respondent took this action for the purpose of punishing Nye for his well-known and hostilely regarded union leadership. Having been discriminated against in the hire and tenure of her own employment in order to discourage the union membership and activity on the part of Nye, Dordell is herself a discriminatee and her discharge is a violation of Section 8(a)(1) and (3) of the Act. I so find and conclude.

On the foregoing findings of fact and on the entire record herein considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Respondent Pony Express Courier Corp. is now and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Highway Truck Drivers and Helpers Local Union No. 107, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Phillip Nye and Janet Dordell because of their sympathy with and activities on behalf of the Union, the Respondent has violated Section 8(a)(3) of the Act.

4. By the acts and conduct set forth above in Conclusion of Law 3; by creating in the minds of employees the impression that their union activities are the subject of company surveillance; by soliciting employee grievances for the purpose of adjusting them; by promising employees benefits if they abandon their union activities; by coercively interrogating employees concerning their union sympathies and activities; and by threatening to close the plant if employees become unionized, the Respondent has violated Section 8(a)(1) of the Act.

5. The unfair labor practices set forth above in Conclusions of Law 3 and 4 have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has committed certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act. Having found a repeated and continuing disposition on the part of this Respondent to violate the Act in serious ways, I will recommend to the Board a broad 8(a)(1) order designed to suppress any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). I will also recommend that the Respondent be required to offer full and immediate reinstatement to Phillip Nye and Janet Dordell to their former or substantially equivalent employment, and to make them whole for any loss of pay or benefits that they may have suffered by reason of the discriminations found, in accordance with the formula set forth in the *F. W. Woolworth* case,[10] with interest thereon at the adjusted rate used by the Internal Revenue Service for the computation of tax payments. *Olympic Medical Corp.*, 250 NLRB 146 (1980); *Isis Plumbing Co.*, 138 NLRB 716 (1962). I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Pony Express Courier Corp., Colwyn, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating in the minds of employees the impression that their union activities are the subject of company surveillance.

---

[10] 90 NLRB 289 (1950).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Soliciting employee grievances for the purpose of adjusting them.

(c) Promising employees benefits if they abandon their union activities.

(d) Coercively interrogating employees concerning their union activities.

(e) Threatening to close the plant if employees became unionized.

(f) Discouraging membership in or activities on behalf of Highway Truck Drivers and Helpers Local Union No. 107, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other labor organization by discharging employees or otherwise discriminating against them in their hire or tenure.

(g) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Phillip Nye and to Janet Dordell full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at Respondent's Colwyn, Pennsylvania place of business copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED insofar as matters set forth in the amended complaint have not been found herein to be violations of the Act, the amended complaint is dismissed.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Carpenters & Joiners of America Local 283 (NISCO Nuclear Installation Services) *and* Herbert Currie. Case 10–CB–4740

5 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 17 September 1986 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief. The Respondent further filed a motion to reopen record for the purpose of introducing certain records, and the General Counsel filed a response to the motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

[1] The Respondent in its motion to reopen urges that the record be reopened to permit the introduction of certain records regarding hiring hall referrals in January 1986. The Respondent does not state any reason why this evidence could not have been presented at the hearing nor does the Respondent state that this is evidence that has become available only since the close of the hearing. The Respondent's motion is therefore denied.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Concerning the Respondent's hiring hall procedure, Chairman Dotson finds, as the record establishes, that as individuals come in to report they are out of work, the Respondent's secretary, Linda Corbin, has a practice of placing their names, along with the date, at the bottom of out-of-work lists, one for carpenters, another for millwrights. As companies call requesting millwrights or carpenters, referrals are made from the top of these lists. In January 1986 Herbert Currie was second on the millwrights out-of-work list. After Currie accepted referral 2 January for a millwrights job with NISCO beginning 6 January, the Respondent's business agent referred two other employees that ranked below Currie on the list to the NISCO position, without first informing Currie. Later that day the Respondent offered, but Currie declined, a night-shift job with Multi-Craft. Currie testified he understood the Multi-Craft position was canceled before it began. The judge found Corbin confirmed this fact.

The Respondent contends that Corbin's testimony on the subject of the Multi-Craft job being canceled was indecisive. Chairman Dotson agrees. Nonetheless, he finds Currie's credibility is not undercut by his possibly mistaken belief in this regard. Further, even if the Multi-Craft job was not canceled, the fact remains, as the judge found, that for reasons which were arbitrary, invidious, or irrelevant to legitimate business interests, the Respondent deviated from its established referral procedure by taking the NISCO job away from Currie. Accordingly, Chairman Dotson, in agreement with his colleagues and the judge, finds that this conduct, and the Respondent's failure to refer Currie on 5 February to a job at Westinghouse at a time he was first on the millwrights out-of-work list, violates Sec. 8(b)(1)(A) and (2).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carpenters & Joiners of America, Local 283, Augusta, Georgia, its officers, agents, and representatives, shall take the action set forth in the Order.

Sharon E. Howard, Esq., for the General Counsel.
Charles W. Wilkinson, Esq., of Augusta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Augusta, Georgia, on 25 June 1986. The complaint, which issued on 9 May 1986, and is based on a 27 March 1986 charge, alleged that Respondent failed to refer Herbert Currie for employment since 6 January and 5 February 1986 "in disregard for Currie's proper placement on Respondent's referral list."

The complaint alleged, and Respondent admitted, that Respondent is a labor organization and is party to a collective-bargaining agreement with various employers including Pullman Power Company, that that collective-bargaining agreement provides that its party-employers hire all classifications of journeymen and others exclusively through Respondent's referral procedures;[1] and that Pullman[2] is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Evidence

The General Counsel's case is based on evidence that Respondent unlawfully withdrew a 6 January referral of member Herbert Currie to a job with NISCO and that Respondent unlawfully failed to refer Currie to a 5 February 1986 job with Westinghouse.

Herbert Currie testified without rebuttal that he is a millwright member of Respondent. Pursuant to established procedure, Herbert Currie was included on Respondent's out-of-work list before and on 6 January and 5 February 1986.

On 2 January 1986, according to Currie's testimony, he was visiting relatives in Tabor City, North Carolina, where he received a message that Respondent needed him for a job on Monday, 6 January. Currie called Respondent's hall on 2 January and spoke with Business Agent David Frambes.[3] Frambes told Currie that Respondent needed millwrights on a job with NISCO be-

[1] Respondent's answer further alleged that the exclusive referral procedure in the collective-bargaining agreement also provides "if Respondent does not provide the required manpower within 48 hours, employers can hire needed workers from off the street or through any other source."

[2] The record evidence illustrated that other employers party to the exclusive hiring hall contractual provisions included NISCO and Westinghouse at Plant Vogle.

[3] As business agent, Frambes was the ultimate authority on all job referrals. Frambes, who was business agent during material times, has since been replaced.

ginning Monday, 6 January 1986. Currie told Frambes that he would take the job. Due to the requirement that Currie begin work at 7 a.m. on Monday morning, Frambes told Currie that he would leave Currie's referral slip under a floormat outside the door of Respondent's hall.[4] After talking with Frambes, Currie telephoned him later on 2 January,[5] and asked Frambes if Respondent could also refer Currie's son, an apprentice, to the NISCO job. Frambes agreed that he would refer both Herbert Currie and Currie's son Bill to the 6 January NISCO job.

Linda Corbin testified that Herbert Currie ranked number 2 on Respondent's January 1986 out-of-work list and number 1 on Respondent's February 1986 out-of-work list. Corbin, when first called by the General Counsel, testified that she usually handled referrals for Respondent, but she did not know if she called Herbert Currie about the 6 January NISCO job. Later, when called by Respondent, Corbin testified, "I think I remember calling [Currie] and he couldn't quite—he hadn't made up his mind yet (regarding whether to accept the referral to the 6 January NISCO job)." Subsequently, Corbin admitted that she could not remember whether she talked to Currie before 6 January regarding the NISCO referral. Corbin admitted that Business Agent Frambes sometimes personally handled referrals.

Currie drove back from Tabor City, North Carolina. At 4:30 a.m. on 6 January, he checked by Respondent's hall but the referral slips were not under the floormat as promised by Business Agent Frambes.[6]

Shortly after Respondent opened its hall on 6 January, Herbert Currie phoned and asked to speak with Business Agent Frambes. Currie was told by Linda Corbin that Frambes was not there. A few minutes later, Currie telephoned again and asked Corbin to have Frambes telephone him. Currie telephoned again after lunch, but was told that Frambes was not in. Currie then drove back to Respondent's hall where he found and talked to Frambes. Currie asked Frambes if the NISCO job had been canceled. Frambes replied that the job had been filled. Frambes mentioned day- and night-shift jobs with Multi-Craft. Currie asked for the day shift but Frambes said the day-shift jobs had been filled. Currie told Frambes to send the out-of-towners to the Multi-Craft night shift and send Currie "where he was supposed to have sent me." Frambes replied that the Multi-Craft night shift was all he had open. Currie said the night shift would be very temporary.[7]

Paul Cobb testified that he was referred to the NISCO job where he started work on 6 January. Cobb admitted that Linda Corbin told him on Friday, 3 January, that Herbert Currie and Currie's son were going on the 6 January NISCO job with Cobb.[8] However, Cobb testified that two "out-of-towners" showed up at NISCO on 6 January and worked instead of Currie and Currie's son.

Respondent's out-of-work list plus notes of Linda Corbin and Corbin's testimony show that two "out-of-towners" (i.e., members of locals other than 283) were referred to the 6 January NISCO job along with Paul Cobb, even though the out-of-towners should have been referred after Currie. The two out-of-towners, Carl McNeil and Gale Thompson, reported to the NISCO job and worked on 6 January 1986.

On 5 February, Currie visited Respondent's hall after his nephew, a foreman for Westinghouse at Plant Vogle, phoned him that Westinghouse had asked Respondent to refer two millwrights. As shown above, Currie was number 1 on Respondent's referral list on 5 February. Currie testified that he contacted Respondent and was told by Linda Corbin that Respondent had referred two out-of-towners to the Westinghouse job, and that those employees had not been specifically requested by Westinghouse. Respondent's February referral list and notes prepared by Linda Corbin in the normal course of her work were received in evidence. Those documents support Currie's testimony. The two "out-of-towners" referred to the 5 February Westinghouse job were Gary Stonecipher and James O'Mahoney.

Discussion

I find that Herbert Currie was a credible witness as to material questions regarding the alleged unfair labor practices. Currie's testimony was not rebutted. Moreover, his testimony regarding the allegedly violative action was supported by Respondent's records including Respondent's January and February 1986 referral lists and notes prepared by Respondent's secretary Linda Corbin.

The testimony of Linda Corbin to the effect that she may have talked to Currie about the 6 January NISCO referrals cannot be credited. Corbin admitted that she could not recall talking with Currie on that occasion. Currie denied that he told Corbin that he had not made up his mind regarding the NISCO job. I credit Currie's denial.

Additionally, I do not credit the testimony of Paul Cobb regarding his telephone conversation with Currie on the night of 6 January. Cobb admitted at the beginning of his testimony that he did not think it was right for Currie to sue the Union. Moreover, I was not impressed with Cobb's demeanor. Additionally, Cobb's testimony, especially in response to the General Counsel's questions, illustrated an eagerness to testify in a manner harmful to Currie. For example, when asked if Currie told him that Currie had turned down a night-shift job

[4] Both Currie and a secretary for Respondent, Linda Corbin, testified that it was normal procedure for Respondent to leave referrals under the floormat when referral employees were required to pick up the referral slips while Respondent's hall was closed.

[5] Currie's telephone bill shows phone calls from Tabor City, North Carolina, to Respondent's hall that were charged to Currie's home phone at 10:24 a.m. and 10:27 a.m. on 2 January 1986.

[6] There was no dispute, but referral slips were required before an employee would be accepted on a job.

[7] Currie testified and Linda Corbin confirmed that the Multi-Craft night-shift job was subsequently canceled before it began.

[8] According to Cobb, Currie expressed concern with passing a urine test. Cobb testified that Currie told him in a telephone conversation on the night of 6 January that Currie had been "smoking pot." Cobb recalled that he told Currie that NISCO required a urine test and that Currie would have failed the test if he had been smoking pot. Currie testified in rebuttal that he did telephone Paul Cobb on 6 January, but that nothing was said about not passing a urine test because Currie had been smoking marijuana. According to Currie, he phoned Cobb to ask who had been referred to the NISCO job in his place.

with NISCO, Cobb replied, "How can they offer it to him if they can't get in touch with him." Despite Cobb's testimony, there was no probative evidence that Respondent expressed difficulty contacting Currie regarding the 6 January job with NISCO. I credit Currie's testimony that he did not tell Cobb that he had been smoking marijuana.

In view of my credibility findings, I find that the evidence shows that Respondent told Currie that he was being referred to the 6 January NISCO job. Subsequently, without first informing Currie, Respondent, through its Business Agent Frambes, referred two other employees that ranked below Currie on Respondent's referral list. Respondent's refusal to refer Currie to the 6 January NISCO job was contrary to Respondent's established referral procedure.

Additionally, I find that the evidence shows that Respondent's refusal to refer Currie to the 5 February 1986 Westinghouse job at Plant Vogle was contrary to Respondent's established referral procedure.

Conclusions

In *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, 425 (1984), the Board found:

> The Board has held that a union which operates an exclusive hiring hall must represent all individuals who seek to utilize the hall in a fair and impartial manner. The labor organization conducting [an exclusive hiring hall] has a duty to conform with and apply lawful contractual standards in administering the referral system, and any department from the established procedures resulting in a denial of employment constitutes discrimination which inherently encourages union membership. This discrimination constitutes a violation of Section 8(b)(1)(A) and (2) of the Act.

In *Stage Employees IATSE Local 646 (Parker Playhouse)*, 270 NLRB 1425 (1984), the Board sustained findings of an administrative law judge that a union must use objective criteria or standards for referring employees pursuant to exclusive referral provisions of a collective-bargaining agreement.

The law does not require a showing of specific intent to discriminate to support a finding of an unfair labor practice in the improper operation of a hiring hall. *Carpenters Local 25 v. NLRB*, 769 F.2d 574, 580 (9th Cir. 1985). No evidence illustrated that Business Agent Frambes had a legitimate reason to deny the material referrals to Currie. Respondent refused to refer Currie "for reasons which were arbitrary, invidious, or irrelevant to legitimate union interest." *Operating Engineers Local 478 (Stone & Webster)*, 274 NLRB 567 (1985).

The record proves that Respondent refused to refer Currie to the NISCO and Westinghouse jobs in contravention of its established policies and procedures. Respondent used no objective criteria or standards in denying those referrals to Currie. I find that Respondent's failure to refer Currie to those positions on 6 and 5 February 1986 constitutes unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act.

Conclusions of Law

1. Pullman Power Company is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Carpenters & Joiners of America, Local 283 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, NISCO, Westinghouse, and other employers are parties to a collective-bargaining agreement whereby Respondent operates an exclusive hiring hall for the referral of employees by Respondent to the employers.

4. By failing and refusing to refer for employment Herbert Currie in the manner established by Respondent's collective-bargaining agreement and its own policies and procedures, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) of the Act.

The Remedy

Having found that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully failed and refused to refer for employment Herbert Currie in accord with its established policies and procedures and in accord with its collective-bargaining agreement, I recommend that Respondent be ordered to make Currie whole for any loss of earnings or other benefits resulting from Respondent's discrimination in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), together with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).[9]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Carpenters & Joiners of America, Local 283, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to refer employees for employment in accordance with the hiring hall practices and procedures established pursuant to its collective-bargaining agreements.

---

[9] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Operate its exclusive hiring hall in accordance with its established practices and procedures pursuant to its collective-bargaining agreements.

(b) Refer Herbert Currie to positions to which he is entitled pursuant to the terms of its collective-bargaining agreement.

(c) Make whole Herbert Currie for any loss of earnings or other benefits resulting from its discrimination against Currie in the manner prescribed in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its hall copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to refer employees for employment in accordance with our hiring hall practices and procedures pursuant to our collective-bargaining agreements.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL operate our exclusive hiring hall in accordance with our established practices and procedures pursuant to the terms of the collective-bargaining agreements.

WE WILL refer Herbert Currie and all other signatories to our referral list to positions for which they are entitled pursuant to the terms of our collective-bargaining agreements.

WE WILL make whole Herbert Currie for any loss of earnings of other benefits resulting from our discrimination against him, less any net interim earnings, plus interest.

CARPENTERS & JOINERS OF AMERICA,
LOCAL 283

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

International Association of Machinists and Aerospace Workers, District Lodge 94, Local Lodge 575 (McDonnell Douglas Corporation) *and* **Ramon Fuentes** *and* **Juliet Pena Rosales** *and* **Glen Van de Sande.** Cases 31–CB–4259, 31–CB–4809, and 31–CB–4837

5 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 1 February 1984 Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Parties filed cross-exceptions and supporting briefs, and the Charging Parties filed a brief in response to the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided, for the reasons set forth below, to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

This case involves nine employees who resigned their union memberships and returned to work during a strike against the Employer. The judge's decision issued before the Board's decision in *Machinists Local Lodge 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984) (*Neufeld*), the Supreme Court's decision in *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), and their progeny. Accordingly, while we adopt most of the judge's conclusions, we do so only for the reasons set forth below.

1. The judge found that the restriction on resignations contained in the Respondent's constitution[3] is unlawful and that the Respondent violated Section 8(b)(1)(A) by maintaining that restriction. We agree. *Neufeld*, supra; *Sheetmetal Workers Local 73 (Safe Air)*, 274 NLRB 374 (1985).

2. The judge also found that the Respondent violated Section 8(b)(1)(A) by bringing internal union disciplinary proceedings, imposing fines, and prosecuting state court lawsuits[4] to collect the fines against employees Fuentes, Rosales, Van de Sande, Miller, Vargas, Morales, Melendez,[5] Gehr, and Barrios because of those employees' postresignation conduct in working at McDonnell Douglas Corporation's Monrovia facility during the strike that began on 25 March 1981. *Neufeld*, supra; and *Pattern Makers*, supra.[6]

3. In accord with our decisions in *Food & Commercial Workers Local 1439 (Allied Employers)*, 275 NLRB 995 (1985), and *Laborers Northern California Council Local 294 (Baker Co.)*, 275 NLRB 278 (1985), we shall order the Respondent, inter alia, to make the nine employees whole for any loss of earnings, benefits, travel expenses, or any other expenses incurred as a result of their need to defend themselves against the charges preferred against them, including any such losses that resulted from the Respondent-initiated state court action to collect the unlawfully imposed fines.

---

[1] The Charging Parties have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The constitutional provision at issue defines "improper conduct of a member" as follows:

> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration. [Art. L, sec. 3.]

[4] The complaint does not allege and the General Counsel does not contend that the Respondent violated Sec. 8(b)(1)(A) by barring the nine employees from holding union office for 5 years.

[5] The record shows that employee Melendez returned to work during the strike before her resignation was received by the Union. It is also clear, however, that Melendez was fined for both preresignation and postresignation conduct. Because only the fines that were imposed for postresignation conduct are unlawful, we shall leave to the compliance stage the determination of the amount Melendez was unlawfully fined.

[6] A substantial portion of the record and the judge's decision deal with the issue of whether the employees had actual notice of the Respondent's rule restricting resignations. Although the notice issue, at one time, was important in this type of case, see, e.g., *Auto Workers Local 1384 (Ex-Cell-O Corp.)*, 227 NLRB 1045 (1977), that issue is no longer determinative inasmuch as the Board has ruled that any restriction on resignations is unlawful. Accordingly, we find it unnecessary to pass on the judge's findings concerning the employees' notice of the rule and the exceptions to those findings. In addition, we find it unnecessary to decide whether the judge was correct in concluding that the Respondent violated Sec. 8(b)(1)(A), independently of the other violations, by taking action against the nine employees "without legally sufficient notice" of the resignation restrictions.

4. In all other respects, we affirm the judge's findings, rulings, and conclusions.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Association of Machinists and Aerospace Workers, District Lodge 94, Local Lodge 575, Monrovia, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Maintaining or giving effect to the following rule, of the constitution of the International Association of Machinists and Aerospace Workers, to the extent it defines 'Improper Conduct of a Member' as:

> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration."

2. Insert the following as paragraphs 2(d) and (e) and reletter the subsequent paragraphs.

"(d) Make whole the above-named employees for any loss of earnings, benefits, travel expenses, or any other expenses incurred as a result of their need to defend themselves against the internal union charges preferred against them, including any such losses that resulted from the state court action against them to collect the unlawfully imposed fines.

"(e) Remove from its governing documents any provisions which required adherence to the portion of article L, section 3, of the constitution of the International Association of Machinists and Aerospace Workers set forth above."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain or give effect to the following rule of the constitution of the International Association of Machinists and Aerospace Workers: which defines improper conduct of a member as:

> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

WE WILL NOT restrain or coerce employees of McDonnell Douglas Corporation (MDC), at its Monrovia, California plant, who have duly resigned from, and are no longer members of, this labor organization, in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act by bringing internal union proceedings, imposing fines, and filing lawsuits to collect the fines against them because of their postresignation conduct in crossing a picket line and working for MDC during the strike which began 25 March 1981.

WE WILL NOT threaten employees that they will be discharged unless they pay membership dues, or the equivalent thereof, where such is otherwise lawfully required as a condition of employment, during a period in which they have been prohibited from holding office in this labor organization for

[7] The judge did not order the Respondent to remove the unlawful restriction from the governing documents under its control. In accord with our decision in *Auto Workers Local 73 (McDonnell Douglas)*, 282 NLRB 466 (1986), we will order the Respondent to remove from the governing documents under its control any provision which requires adherence to the portion of art. L. sec. 3, of the International union's constitution quoted above in fn. 3.

exercising their Section 7 rights to refrain from continuing to honor and support a strike against their Employer.

WE WILL NOT fail to inform members who are prohibited from holding office in this labor organization of their obligations under the contractual union-security clause.

WE WILL NOT continue to demand from employees of MDC the payment of membership dues, or the equivalent thereof, where such is otherwise lawfully required as a condition of employment, during a period in which they have been prohibited from holding office in this labor organization for exercising their Section 7 rights of refraining from continuing to honor and support a strike against their Employer.

WE WILL NOT threaten employees of MDC that we will demand their discharge if they do not pay us a reinstatement fee without initially having notified the employees of their membership duties giving rise to their obligation to pay such fee as a condition of employment.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our governing documents any provisions which require adherence to the portion of article L, section 3, of the constitution of the International Association of Machinists and Aerospace Workers set forth above.

WE WILL rescind the unlawful fines levied upon former members Ramon Fuentes, Juliet P. Rosales, Glenn Van de Sande, Alice Vargas, Patricia Miller, Stella Melendez, Amalia Morales, William A. Gehr, and Harlan C. Barrios for their respective postresignation conduct of having worked for MDC during the period of the strike which began 25 March 1981, and WE WILL remove from our files and records any references to the internal proceedings, respective fines, and lawsuit to collect the fines against the former members for the above conduct.

WE WILL refund to Fuentes, Rosales, Van de Sande, Miller, Vargas, Morales, Melendez, Gehr, and Barrios any membership dues and fees, including reinstatement fees or the equivalent thereof, paid to date, with interest, and collected after our failure to advise them, subsequent to the imposition against each of them of a prohibition from holding office in this labor organization, of their respective obligations under the contractual union-security clause.

WE WILL make whole the above-named employees for any loss of earnings, benefits, travel expenses, or any other expenses incurred as a result of their need to defend themselves against the internal union charges preferred against them, including any such losses that resulted from the state court action against them to collect the unlawfully imposed fines.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 94, LOCAL LODGE 575

Ann Reid Cronin, Esq., for the General Counsel.
Robert M. Simpson, Esq. (Rose, Klein & Marias), of Los Angeles, California, for the Respondent.
Raymond J. LaJeunesse Jr., Esq. (National Right to Work Legal Defense Foundation, Inc.), of Springfield, Virginia, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The above-captioned matters were tried before me on June 1 and 2 and July 20 and 21, 1983, in Los Angeles, California. On April 27, 1983, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a second consolidated amended complaint, based on an unfair labor practice in Case 31–CB–4259 filed by Ramon Fuentes, an individual, on June 30, 1981; an unfair labor practice charge in Case 31–CB–4809 filed by Fuentes and Juliet Pena Rosales, an individual, on October 19, 1982; and original and first amended unfair labor practice charges in Case 31–CB–4837 filed by Glenn G. Van de Sande, an individual, on November 15, 1982, and April 19, 1983,[1] respectively, alleging that International Association of Machinists and Aerospace Workers, District Lodge 94, Local Lodge 575 (Respondent), engaged in acts and conduct violative of Section 8(b)(1)(A) of the National Labor Relations Act (the Act). Respondent filed an answer, denying the commission of any unfair labor practices. At the hearing,[2] all parties were permitted to examine and cross-examine witnesses, to offer any relevant evidence, and to argue their positions orally. Additionally, all parties filed posthearing briefs that have been carefully considered. Accordingly, on the entire record, the posthearing briefs, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, McDonnell Douglas Corporation (MDC) has been, and is now, a corporation duly organized under the laws of the State of Maryland, with an office and place of business located in Monrovia, Califor-

[1] Besides Van de Sande, the named Charging Parties on the first amended charge are Alice Vargas, Patricia Miller, Stella Melendez, and Amalia Morales.

[2] The General Counsel moved and was permitted to extensively amend the second consolidated amended complaint at the hearing. The amendments were substantively denied by Respondent.

nia, where it is engaged in the manufacture and sale of aircraft and related items. In the course and conduct of its business operations, MDC annually sells and ships goods and services valued in excess of $50,000 from its Monrovia, California facility directly to customers located outside the State of California. Respondent admits that MDC is now, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that it is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. Did Respondent engage in conduct violative of Section 8(b)(1)(A) of the Act by instigating and prosecuting internal union disciplinary proceedings against Fuentes, Rosales, Miller, Vargas, Morales, Melendez, Van de Sande, William A. Gehr, and Harlan C. Barrios, who were employed by MDC at its Monrovia facility, for crossing a picket line, sanctioned by Respondent, and working for MDC after duly resigning from Respondent; by fining the individuals for the conduct; and by instituting a lawsuit against the individuals to collect the fines?

2. Did Respondent violate Section 8(b)(1)(A) of the Act by, after impairing the membership rights of each of the above nine individuals, as discipline for crossing a sanctioned picket line, failing to advise each that, while his or her membership rights were impaired, the union-security provision of the collective-bargaining agreement between Respondent and MDC would not be utilized to force him or her to continue paying dues or the equivalent under a threat of discharge?

3. Did Respondent violate Section 8(b)(1)(A) of the Act by threatening Fuentes and Rosales with discharge and cancellation of membership and insurance for nonpayment of dues or an equivalent amount?

4. Did Respondent engage in conduct violative of Section 8(b)(1)(A) of the Act by demanding payment of a reinstatement fee from Fuentes and Rosales without having given sufficient notice of such a requirement?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The record establishes that in the mid-1960s MDC purchased an ownership interest in the Monrovia, California facility involved herein from Hycon Manufacturing Company; in 1971 MDC assumed absolute ownership of the plant by purchasing a controlling interest in Hycon and two other companies and by merging them to form Actron, a division of MDC; and on January 1, 1979, the name of the Monrovia facility was changed to McDonnell Douglas Astronautics Company. The record further establishes that Respondent[3] was certified as the exclusive representative for purposes of collective bargaining for the production and maintenance employees at the plant in February 1972, and since that date there have been successive collective-bargaining agreements between MDC and Respondent, the most recent of which is effective from May 4, 1981, until March 18, 1984.[4] The nine individuals involved in these matters (Ramon Fuentes, Juliet Rosales, Glenn Van De Sande, Alice Vargas, Patricia Miller, Stella Melendez, Amalia Morales, William Gehr, and Harlan Barrios) were all employed[5] by MDC at the Monrovia plant, were working in job classifications within the collective-bargaining unit represented by Respondent, and were all members[6] of the latter through March 1981.

During new contract negotiations, the predecessor to the current collective-bargaining agreement between MDC and Respondent expired, by its terms, on March 15, 1981. The latter thereupon gave the requisite 7-day written notice to MDC of its intent to terminate the agreement, and on March 21 the bargaining unit employees voted to reject the Company's final contract proposal and to engage in a concerted work stoppage against MDC in support of their contract demands. The strike commenced on March 25 and continued until May 4, 1981, at which time the employees ratified an MDC contract proposal. During the initial period of the strike, the nine above-mentioned employees honored the picket line; however, apparently due to financial reasons, each decided to abandon the work stoppage and return to work. In this regard, the record discloses that Barrios crossed the picket line and returned to work on April 15, 1981; that Fuentes, Rosales, Miller, Vargas, and Morales returned to work on April 22; that Melendez' first day of work after the strike began was April 25; that Gehr and Van De Sande returned to work on and April 27 and 28, respectively; and that each worked through the remainder of the work stoppage. The record further discloses that each of the nine employees attempted to resign from Respondent's membership before returning to work. Thus, there is no dispute that employees Fuentes, Rosales,

[3] John Pettitt, who is employed by District Lodge 94 of the International Association of Machinists and Aerospace Workers (IAM) as a business representative and who is assigned to Local Lodge 575, testified that District Lodge 94 is comprised of seven local lodges of which Local Lodge 575 is one.

[4] Apparently, each successive contract has contained a union-security provision whereby "all employees covered by this agreement shall, at the expiration of thirty (30) continuous calendar days of employment, become members of [Respondent]."

[5] Of the nine individuals, only Gehr did not testify. Barrios had been employed at the Monrovia facility since September 1980 as a material handler; Vargas since March 16, 1967, as an assembler; Rosales since July 24, 1978, as an electrical assembler; Van de Sande since September 22, 1980, as a tool grinder; Morales since June 7, 1977, as a precision mechanic; Melendez since 1966 as a mechanics assembler; Miller since 1966 as an electrical assembler; and Fuentes since 1980 as an electronic receiving inspector.

[6] The eight employee/members who testified each stated that he or she executed a membership application card for Respondent at some point during his or her tenure of employment, and that they were told either by an MDC employee (Barrios, Rosales, Van de Sande, Morales, and Fuentes) or by an agent of Respondent (Miller and Vargas) that such was required in order to work at the MDC Monrovia facility. Further, each witness denied ever having been informed by a representative of Respondent that rather than becoming a member of Respondent, he or she could fulfill the union-security clause requirements and continue working for MDC by paying an amount equivalent to Respondent's membership dues and fees.

Vargas, Van de Sande, Gehr, Morales, and Miller mailed resignation letters to Respondent and that the latter received each respective letter prior to the date that the writer returned to work, thereby abandoning the strike.[7] Regarding Harlan Barrios, who was on layoff status at the commencement of the strike but recalled during it, he testified, without contradiction, that, on receiving the recall notice and speaking to MDC personnel officials, he hand-delivered a resignation letter[8] to Respondent's office where an official, Al Loop, read it, said it was John Pettitt's decision "whether he wanted to accept [the letter] or not," and warned that Barrios could be "charged" for crossing the ongoing MDC picket line. After arguing with Loop regarding abandoning the strike, Barrios left Respondent's office and, a day or two later, mailed a copy of the same letter to Respondent. Concerning employee Stella Melendez, the parties stipulated that she mailed a resignation letter[9] on April 24 and Respondent received it on Monday, April 27; she testified that she crossed the picket line and returned to work on April 25.

There is no record evidence that on receipt of the resignation letters from the nine MDC employees Respondent's officials made any effort to notify any of them that the resignations might not be effective. Rather, in a series of letters dated April 23 and May 11 and 21,[10] Angel Cruz, president of Respondent, advised each of the nine that internal union charges had been filed against him or her for violating article L, section 3, lines 24 through 40, of the IAM constitution[11] by crossing the MDC picket line and that a committee would be appointed to investigate the allegations. Thereafter, about June 8, John Slavik, the chairman of Respondent's trial committee, in separate letters to Fuentes, Rosales, Van de Sande, Vargas, Miller, Melendez, Morales, Gehr, and Barrios, advised them that "A Trial Committee was appointed to investigate the [respective charge that was enclosed]. An investigation was conducted and the Trial Committee has determined that there is sufficient question to warrant that a trial hearing be held," and that an internal union trial, in accordance with the IAM constitution, would be held, with each employee entitled to be heard and to present evidence in his or her behalf.[12] Trials were held on July 8, 1981, and each of the nine employees were found guilty of having acted in violation of article L of the IAM constitution by crossing a sanctioned picket line and performing bargaining unit work for MDC during the pendency of the March 25 through May 4 strike. By separate letters to the nine employees dated September 2, 1981, Cindy Cliver, Respondent's recording secretary, informed each that as punishment he or she was fined[13] and declared "ineligible to hold any office in the [IAM] for five years." None of the nine employees paid his or her fine, and about March 1, 1982, Respondent filed a lawsuit against the nine MDC employees in the Municipal Court of Santa Anita Judicial District, County of Los Angeles, State of California, seeking to collect the fines. On September 13, 1982, the lawsuit was dismissed "without prejudice"[14] to date, none of the fines has been paid.

It is the position of both the General Counsel and the Charging Parties that the resignations from membership in Respondent, which were tendered by the nine MDC employees, were effective on receipt by Respondent and that, therefore, the subsequent internal union proceedings, fines, and court suit to collect the fines were unlawful. In support of their position and besides asserting that article L, section 3, lines 24 through 40, of the IAM constitution constitutes an unenforceable restriction on resignation, they contend that none of the resignees had notice[15] of the above provision prior to tendering his or

[7] The parties stipulated that Fuentes' resignation letter was mailed on April 16 and received by Respondent on April 17; Rosales' resignation letter was mailed on April 18 and received by Respondent on April 20; that Vargas' resignation letter was mailed on April 16 and received by Respondent on April 17; Van de Sande's resignation letter was mailed on April 20 and received by Respondent on April 24; Gehr's resignation letter was mailed on April 21 and received by Respondent on April 22; Morales' resignation letter was mailed on April 16 and received by Respondent on April 20; and that Miller's resignation letter was mailed on April 20 and received by Respondent on April 21. Analysis of these letters (G.C. Exhs. 18–20 and 22–25) reveals that each is one sentence in length and states the writer's intention to resign from Respondent's membership. In none of the letters does an employee recognize his or her continuing obligation to pay to Respondent the equivalent of the latter's membership dues or fees.

[8] The letter (G.C. Exh. 26) is dated April 8 and states Barrios' intent to resign from the Union. There is nothing therein regarding his obligation to continue paying to Respondent the equivalent of the latter's membership dues and fees.

[9] The letter (G.C. Exh. 21) states Melendez' desire to resign from membership in Respondent, but is silent regarding her obligation to continue paying to Respondent the equivalent of the latter's membership dues and fees.

[10] Apparently, Rosales, Morales, Miller, Vargas, and Fuentes received the April 23 letter; each of the nine employees, except Barrios and Melendez, received the May 11 letter; and Barrios and Melendez received the May 21 letter.

[11] Art. L, sec. 3 of the IAM constitution concerns "improper conduct of a member" and LL. 24 through 40 thereof read as follows:

> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

[12] The letters stated that the trials would be conducted on June 23, 1981. However, the trials were subsequently postponed to July 8. There is some question about whether Van de Sande received notice of this new date inasmuch as the letter, advising of such, was apparently not sent to him.

[13] The amounts of the fines were as follows:

Fuentes	$31,298.00
Vargas	1,662.00
Miller	1,457.30
Morales	1,298.00
Rosales	1,534.00
Barrios	1,376.00
Melendez	1,534.00
Gehr	330.24
Van de Sande	432.00

[14] The record discloses that Fuentes, Vargas, Rosales, Barrios, and Morales jointly incurred court and legal fees in connection with Respondent's lawsuit in the amount of $195.

[15] Gehr did not testify at the hearing, and any conclusions about him would be speculative.

her resignation from membership to Respondent. Initially on this issue, I note that Melendez, Barrios, Vargas, Miller, Fuentes, Rosales, Van de Sande, and Morales all denied ever having been given or ever seen copies of the IAM constitution prior to submitting their resignations and that John Pettitt admitted that not all members are even aware of the existence of this document. Nevertheless, Respondent contends that Pettitt notified the MDC bargaining unit employees of the existence of article L, section 3, lines 24 through 40, by reading the provisions word by word and discussing its meaning at two prestrike meetings—February 2 and March 21, 1981. The record establishes that Pettitt, who was Respondent's agent responsible for conducting the 1981 contract negotiations with MDC and for coordinating any work stoppage, caused a notice to be posted at the Monrovia facility about January 26, informing MDC bargaining unit employees that a meeting would be conducted at 3:45 p.m. on Monday, February 2,[16] to "discuss and formulate proposals for the up-coming negotiations"[17] and to "take our first strike vote." The meeting was to be held at the Immaculate Conception Church, which is located across the street from the MDC Monrovia facility, and there is no dispute that not only did such a meeting occur as scheduled, but also employees Melendez, Vargas, Miller, Fuentes, and Morales had notice of and attended it.[18] The record further establishes that approximately 200 employees were present at the start of the meeting; it began between 3:45 and 4 p.m. and lasted until approximatley 6:15 p.m. in the church's auditorium; Pettitt and the employee negotiating committee were on a stage in the front of the room; and Pettitt conducted the meeting, utilizing a lectern on which he had "just the proposals that the committee and I had gone over." There is no dispute that the major portion of the meeting was consumed by a discussion of the contract proposals that had been formulated by the negotiating committee. There were numerous questions by bargaining unit members and informal approval or disapproval votes on various proposals. While this was ongoing, Fuentes left at approximately 4:15 p.m. as "I got tired of listening to all the bull-shit" and, according to Melendez, she and Miller left between 5:10 and 5:15 p.m. Further, both Morales and Vargas left the meeting at 5:30 p.m.; the former stated that contract proposals were still being discussed, while Vargas insisted that the meeting was over inasmuch as Pettitt had concluded reading the contract.[19] In any event, the record also establishes that when the employees concluded discussion of their contract proposals,[20] the next order of business was a strike vote. According to Pettitt and John Slavik, the former announced that an initial strike vote would be taken but that such did not necessarily mean a strike would "definitely" be called; rather, a vote was necessary to demonstrate that the negotiating committee had the full support of the bargaining unit in presenting its proposed contract. It was at this point, according to Pettitt, that he read the above portion of article L, section 3 of the IAM constitution, reciting from a small yellow sheet of paper[21] (R. Exh. 15). On finishing, several employees asked questions regarding the consequences of crossing a sanctioned picket line, and Pettitt said "that if anybody crosses the picket line they can be fined and this union will charge the members." According to Pettitt, he continued, explaining about a case in which Respondent had gone to court to collect fines for crossing a picket line and had been 4 years in litigation. Someone asked about the amount of such fines and whether Respondent could take the member's house away. Pettitt replied that he could not go that far, but that the fines could equal what the individual earns while working during the strike. After this discussion, stated Pettitt, an initial strike vote by secret ballot was taken.

Analysis of the record discloses that apparently only four of the employee witnesses remained until the conclusion of the February 2 meeting and that, of these, just two, Irma Bullock and Duane Karam, have not served Respondent in some official capacity[22] in the past. According to Bullock, the only topic for discussion at the meeting was the negotiating proposals and, after that, "I think we did take a strike vote, because I remember everybody going around now. But it was not a strike vote; it was supposed to be to see if a strike was going to be favorable." Bullock recalled that the voting was by secret ballot and that such was termed a first strike vote. Concerning whether any portion of article L, section 3 was read out loud, Bullock stated, after reading lines 24 through 40 to herself at the hearing, "I have never heard this read, at that negotiation or any other negotiation."[23]

[16] The meeting at 3:45 p.m. was to be for the day-shift bargaining unit employees; a meeting for the night-shift employees was scheduled for 2 p.m.

[17] Prior to this meeting, an employee negotiating committee had been elected, and its members, along with Pettitt, had formulated various tentative contract proposals.

[18] Employees Barrios, Rosales, and Van de Sande testified that they did not attend the February 2 meeting. Regarding William Gehr, Vargas recalled seeing him at this meeting, but there is no evidence how long he remained if, indeed, he was present.

[19] In insisting that the meeting had concluded, Vargas averred that "the people that were sitting . . . all got up and left" and the subject of a strike was never discussed nor was a strike vote taken.

[20] The record establishes that at least half the employees had left the meeting by the time the discussion of the contract proposals concluded at approximately 5:30 p.m.

[21] Pettitt testified that prior to June 3, 1980, he never quoted the provisions of art. L, sec. 3 to members who were contemplating a strike against their employer. On that date, the IAM transmitted an internal guideline, Official Circular No. 697 (R. Exh. 14), to all local officials. The document concerned the procedure that was to be followed to make sure that members were aware of the resignation provisions of art. L, sec. 3, and instructed local officials, "in all instance," to read the above "at the first strike vote meeting." In order to facilitate the IAM dictate, Pettitt had prepared for his use 8-1/2 inch by 5-1/2 inch sheets of yellow paper on which lines 24 through 40 of art. L, sec. 3 were printed verbatim. Pettitt admitted that the MDC contract situation was his first subsequent to the publication of Circular No. 697.

[22] John Slavik and William Bennett testified on Respondent's behalf, essentially corroborating Pettitt's testimony about the February 2 meeting. Each has served Respondent in an official capacity in the past—Bennett as a chief steward district delegate and Slavik as vice president, recording secretary, and financial secretary—and did not impress me as an entirely reliable witness.

[23] Bullock could not recall any discussion concerning scabs, strikebreakers, crossing a picket line, or the consequences for the latter.

Karam, who stated that he sat at the front due to a hearing problem, testified that the meeting began with a review of the employees' proposed negotiating positions—"to see if the people approve of it, or had any changes or suggestions." These matters lasted approximatley 1-1/2 hours; next there was a secret ballot vote "to authorize the committee to have a strike backing them on their negotiations." He further testified that, prior to the vote, Pettitt spoke on how a strike "would be handled." Then, "he read I guess it was a constitution . . . you couldn't terminate your . . . withdrawal from the union 14 days before the termination of the contract. And then he went on to say about the penalties" for crossing a picket line. Karam added that Pettitt did appear to be reading from something while speaking of the 14-day requirement. At that point, questions were asked about the type of penalties, with one person asking if a member's house could be taken. Pettitt replied that such was never done. In all, according to Karam, this discussion consumed no more than 5 minutes and immediately preceded the strike vote.[24] Finally, regarding this February 2 meeting, there is no evidence that during the 90 minutes prior to allegedly doing so, Pettitt ever alerted the employees that he would read article L, section 3 to them.

Lines 24 through 40 of article L, section 3 of the IAM constitution were next allegedly read, word by word, to the MDC bargaining unit employees at the March 21 prestrike meeting. The meeting was held at the Elks Lodge in Monrovia on a Saturday morning; there is no dispute that such a meeting occurred and was held for two reasons: to accept or reject MDC's final contract proposal and, if rejected, to reaffirm the prior, first strike vote. Of the nine[25] employees involved herein, five (Vargas, Fuentes, Miller, Melendez, and Rosales) were present; Pettitt also conducted this meeting. According to the latter, who was seated on a slightly raised stage along with the negotiating committee and Sid Cohen, a grand lodge representative, the subject of the constitutional provision arose subsequent to the rejection of MDC's final offer. Thus, Pettitt announced the results of the vote and said that the employees would, therefore, have to reaffirm their prior strike vote. The approximately 265 bargaining unit employees began cheering, and Cohen whispered to Pettitt, "[D]on't forget, John, you got to read from the good book, and he was referring to the constitution." Thereupon, Pettitt announced to the group that he was going to read from the constitution as he had at the first meeting, and proceeded to read article L from the constitution itself. After doing so, according to Pettitt, he explained what the provision entailed and explained the consequences of a strike, mentioning its effect on contractual health and welfare payments, unemployment insurance, and IAM strike benefits. Next, questions were asked regarding failures to picket and the consequences of crossing a picket line. Regarding the latter, as he had at the church meeting, Pettitt mentioned the pending court case to collect fines for such conduct. Subsequent to the questions, Pettitt testified, a strike vote by secret ballot was taken. The testimony of witnesses Slavik and Bennett, as with the February 2 meeting, essentially corroborated Pettitt's account of the reading of article L, section 3 at this meeting. Contrary to them, employees Miller, Fuentes, Melendez, Rosales, and Irma Bullock specifically denied that Pettitt either read or paraphrased lines 24 to 40 of that provision at the March 21 meeting, but all testified that Pettitt did answer questions and discussed the consequences of crossing a picket line, with Miller and Rosales recalling that he did mention fines for such conduct on other occasions.[26] Finally, Duane Karam testified that he also attended this meeting and that he again sat near the front of the hall. According to him, subsequent to the vote on accepting or rejecting MDC's contract offer, but prior to the secret-ballot strike vote, Pettitt "picked up a book—and he read it." At the hearing, on reading to himself lines 24 through 40 of article L, section 3, Karam further testified that such was what Pettitt read to the bargaining unit employees on March 21, but that, at the February 2 meeting, "he didn't read it . . . word for word."[27] Next, Pettitt responded to questions regarding the consequences for crossing a picket line.

Subsequent to Respondent's levying of its internal union penalties[28] against the nine MDC employees, four of them (Fuentes, Rosales, Van de Sande, and Vargas), believing that they were under no obligation to pay membership dues to Respondent as a condition of employment, while ineligible to hold any office in Respondent, timely revoked their respective previously executed checkoff authorizations, in writing, whereby MDC was authorized to deduct from their respective wages, and remit to Respondent, union fees and membership dues.[29] The record discloses that with regard to Fuentes, MDC ceased deducting union membership dues and fees in July 1982 and that he admits, thereafter, "I stopped paying" any moneys to Respondent. Approximately 2-1/2 months later, Fuentes received (G.C. Exh. 44), a notice dated September 20, 1982, from Marybelle Egge, secretary-treasurer of Respondent, stating that he was 3

[24] Karam stated that he knew nothing of any 14-day requirement prior to the church meeting and that he heard people talking about it as he departed from the church—while understanding what Pettitt said, "[M]ost of the guys . . . had never heard of it at that time."

[25] There is no evidence regarding Gehr's attendance at this meeting.

[26] Vargas' testimony about whether Pettitt read verbatim or paraphrased article L, section 3 at the March 21 meeting was hardly a model of clarity. However, while again and again denying that Pettitt read art. L of the IAM constitution, she admitted that not only did he mention the provision, but also "He explained it, yes."

[27] Karam added that Pettitt, at the February 2 meeting, read from something, but "he went through it and, I just assumed he hit the highlights of it."

[28] Barrios, Van de Sande, Morales, Vargas, Miller, Fuentes, Melendez, and Rosales each denied ever having been advised, subsequent to being fined by Respondent and prohibited from holding office in it for a 5-year period as punishment for crossing the picket line and returning to work for MDC, by any official of Respondent that he or she would not be required to pay membership dues or fees, or the equivalent thereof, for the time period during which he or she was prohibited from holding internal union office.

[29] Fuentes' revocation letter is dated June 22, 1982; Rosales' revocation letter is dated July 6, 1982; Van de Sande's revocation letter is dated September 1982 and was received by MDC on September 1, 1982; and Vargas' revocation letter is dated January 18, 1983. It is uncontroverted that MDC received the revocations, and Respondent does not assert any are invalid.

months in arrears and warning that "your membership and your insurance will be cancelled at the close of this month." Three weeks later, Fuentes received a letter dated October 8, 1982, from Egge. It reads, in part, as follows:

> Dear Mr. Fuentes,
>
> We regret to inform you that you permitted your membership to lapse August 31, 1982 by allowing your dues to become two (2) months in arrears.
>
> The law, specifically, Section 8 (a) (3) of the National Labor Relations Act permits a Union and an Employer to establish, as a condition of continued employment, covering employees within a bargaining unit covered by a labor agreement, a contract clause which requires membership in the Union on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later. The United States Supreme Court has defined "membership" as the obligation to tender periodic dues and initiation or reinstatement fees uniformly required by the labor organization as a condition of acquiring or retaining membership.
>
> There is a lawful Union Security Clause in the collective bargaining agreement between this Union and your Employer which covers your job. It has been in force and effect at all times pertinent to your employment. We know of no reason why this lawful clause should not apply to you.
>
> Under the terms of that agreement, you are required to pay to the Union the uniformly required reinstatement fee which applies at your shop, which is $100.00. Your obligation to make that payment became effective the first day after the lapsing of your membership.
>
> Further, your obligation also includes the obligation to pay a sum equivalent to uniformly required dues. Under your classification your monthly dues are 19.50. At the present time, you owe dues for October 1982. Accordingly you presently owe to the Union the sum of $119.50, which includes an amount equivalent to the reinstatement fee of $100.00 and an amount equivalent to one months dues.
>
> Please be advised that unless you make arrangements satisfactory to this Union, to fulfill your obligation to it within 10 days from the date of this letter, I will assume that you have no intention of doing so and no bona fide reason for not doing so. In that event, immediately after the 10 days have passed, the Union will demand that your Employer terminate your employment within the bargaining unit represented by us . . . .

Afraid of the possibility of termination, Fuentes paid the required $119.50 to Respondent "under protest" and has since continued to pay all required dues and fees. He testified that prior to the October 8 letter he had been unaware of the necessity that he pay a "reinstatement fee" to Respondent. Regarding Rosales, MDC ceased deducting membership dues and fees from her wages and remitting same to Respondent in August 1982, and she paid no moneys to Respondent for a 3- or 4-month period. Thereupon, she received in the mail a notice (G.C. Exh. 39) from Respondent containing the same warning as received by Fuentes on September 21: "Your membership and your insurance will be cancelled at the close of this month." Shortly thereafter, Rosales received a letter, dated October 8, 1982, from Egge. It reads, in part, as follows:

> Dear Ms. Rosales:
>
> We regret to inform you that you permitted your membership to lapse September 30, 1982 by allowing your dues to become two (2) months in arrears.
>
> The law, specifically, Section 8(a)(3) of the National Labor Relations Act permits a Union and an Employer to establish, as a condition of continued employment, covering employees within a bargaining unit covered by a labor agreement, a contract clause which requires membership in the Union on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later. The United States Supreme Court has defined "membership" as the obligation to tender periodic dues and initiation or reinstatement fees uniformly required by the labor organization as a condition of acquiring or retaining membership.
>
> There is a lawful Union Security Clause in the collective bargaining agreement between this Union and your Employer which covers your job. It has been in force and effect at all times pertinent to your employment. We know of no reason why this lawful clause should not apply to you.
>
> Under the terms of that agreement, you are required to pay to the Union the uniformly required reinstatement fee which applies at your shop, which is $100.00. Your obligation to make that payment became effective the first day after the lapsing of your membership.
>
> Further, your obligation also includes the obligation to pay a sum equivalent to uniformly required dues. Under your classification your monthly dues are $19.50. At the present time, you owe dues for _____. Accordingly you presently owe to the Union the sum of $100.00, which includes an amount equivalent to the reinstatement fee of $100.00 and an amount equivalent to _____ months dues.
>
> Please be advised that unless you make arrangements satisfactory to this Union, to fulfill your obligation to it within 10 days from the date of this letter, I will assume that you have no intention of doing so and no bona fide reason for not doing so. In that event, immediately after the 10 days have passed, the Union will demand that your Employer terminate your employment within the bargaining unit represented by us . . . .

Prior to receipt of this letter, Rosales testified, she had been unaware of any requirement that she pay a $100 "reinstatement fee" to Respondent for becoming arrears

in dues payments. Rosales paid $119.50 to Respondent on October 15 and has continued to regularly pay dues "under protest" each month.

The record further discloses that with regard to Van de Sande, MDC ceased deducting union dues and fees from his wages in October 1982, and he testified that he failed to make any payment to Respondent that month. Thereafter, he received a notice, dated October 28, from Marybelle Egge, warning Van de Sande that "your membership and your insurance will be cancelled at the close of this month." In response, he paid his dues to Respondent for that month and since has continued to do so "under protest." Concerning Alice Vargas, MDC ceased deducting union dues and fees from her wages and remitting same to Respondent in February 1983, and she paid no moneys on her own to Respondent that month. Vargas testified that thereafter she received a three-page document, dated March 10, 1983, from Respondent. The first page is the identical notice, received by Fuentes, Rosales, and Van de Sande; signed by Egge, it warned Vargas "your membership and your insurance will be cancelled at the close of this month." The second page, a "general" information sheet, was also signed by Egge and contains the following warning: "Please be advised that if you allow your membership to lapse due to nonpayment of dues for two (2) months you will be required to pay a reinstatement fee of $100 in order to become a member in good-standing again . . . ." Worried that she might have to pay the same $100.00 fee, paid by Fuentes and Rosales, Vargas paid all moneys "owed" to Respondent and has done so since—"under protest." Finally, Miller and Morales testified that each decided not to revoke her checkoff authorization for fear that the identical consequence that befell Fuentes and Rosales—the necessity of paying a $100 reinstatement fee to avoid possible termination—would happen to her.

B. *Analysis*

The General Counsel and the Charging Parties essentially contend that the resignations from membership in Respondent that were tendered to it in April 1981, during the pendency of the concerted work stoppage against MDC, by employees Fuentes, Rosales, Van de Sande, Miller, Vargas, Morales, Melendez, Gehr, and Barrios were effective on receipt by Respondent; that article L, section 3, lines 24 through 40, of the IAM constitution constitutes an unenforceable restraint on resignation; and that, therefore, as alleged in the second consolidated amended complaint, the internal union disciplinary proceedings, the resulting fines levied against the above nine employees and the lawsuit to collect the fines were all violative of Section 8(b)(1)(A) of the Act. In defense, Respondent argues, based on the asserted approach "uniformly followed by the Supreme Court" that the common law of contracts applies to these types of situations and it will not disturb the express contractual restrictions on the right to resign of voluntary associations, that limitations on resignations, such as article L, section 3, "are enforceable, particularly where the purpose of the limitation, as here, is to preserve group solidarity and mutual reliance in situations in which a collective effort is necessary to achieve a particular result." Accordingly, Respondent's counsel asserts, the nine employees' tendered resignations were not effective and, having crossed a sanctioned picket line and worked for their employer, the resultant discipline of each was lawful internal union activity. The issue, regarding this aspect of the allegations herein, is, succinctly put, as stated by the General Counsel in her posthearing brief—"whether a union may, through an express provision in its constitution, absolutely prohibit an employee for the duration of a strike from changing his or her status from that of a full union member, subject to union discipline . . . to that of a former member, immune from [discipline] imposed by the union . . . ."

The Board and the courts of appeals have long recognized that employees have the Section 7 right to not honor a picket line and return to work for their employer if they have first resigned their membership in their union and to resign from membership in a union absent some valid restriction on such. *Carpenters San Diego Council (Campbell Industries)*, 243 NLRB 147, 148 (1979); *Electrical Workers IBEW Local 1260 (KITV)*, 239 NLRB 923, 927 (1978); *Teamsters Local 439 (Loomis Courier)*, 237 NLRB 220, 221 (1978); *NLRB v. Chemical Workers Local 6-578*, 619 F.2d 708 (8th Cir. 1980); *NLRB v. Machinists Lodge 1871*, 575 F.2d 54 (2d Cir. 1978). However, the Supreme Court has ruled that a labor organization does not act in violation of Section 8(b)(1)(A) of the Act by imposing fines on "members" who decline to honor an authorized strike and by attempts to collect such fines,[30] but that a labor organization commits an unfair labor practice when it levies fines or seeks enforcement thereof after a member has lawfully resigned his membership. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967); *NLRB v. Textile Workers Local 1029, Granite State Joint Board*, 409 U.S. 213, 217 (1972). Specifically left unresolved by the Court in *Granite State* and in a subsequent decision[31] was the issue of to what extent, by an internal rule, can a labor organization curtail a member's freedom to resign. In this regard, the Court has also held that "a properly adopted rule" of a labor organization is not violative of Section 8(b)(1) of the Act if the internal rule "reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against . . . members who are free to leave the [labor organization] and escape the rule." *Scofield*, supra at 430.

Utilizing the foregoing principles as guidelines, the Board has, in the past, examined several union rules restricting members' rights to resign and found them to be unreasonably restrictive and, therefore, invalid. *Electrical Workers IUE Local 444 (Sperry Rand Corp.)*, 235 NLRB 98 (1978); *Auto Workers Local 1384 (Ex-Cell-O Corp.)*, 227 NLRB 1045 (1977); *Auto Workers Local 647 (General Electric)*, 197 NLRB 608 (1972). Turning to consideration of article L, section 3, lines 24 through 40, of the IAM constitution, I note that within the preceding 18-month period, the Board has, on three separate occa-

[30] In a later decision, the Court explained that by union members, it meant "voluntary union members." *Scofield v. NLRB*, 394 U.S. 423, 428 (1969).

[31] *Machinists Lodge 405 v. NLRB*, 412 U.S. 84 (1973).

sions, found the identical provision of the IAM constitution to constitute an invalid, unreasonable, and unenforceable restriction on resignation. *Machinists Lodge 758 (Menasco)*, 267 NLRB 1147 fn. 1 (1983); *Machinists Lodge 160 (Gray Motor)*, 265 NLRB 1049 (1982); *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982).[32] In the latter decision, a two-member plurality decision, with two members concurring and one dissenting (Members Fanning and Zimmerman) in the plurality decision, concluded that "[A] union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign"; while Chairman Van de Water and Member Hunter, concurring, stated that "any union rule that restricts a member's right to resign is unreasonable and any discipline taken by a union against an employee predicated on such a rule violates Section 8(b)(1)(A)." *Dalmo Victor*, supra at 986, 992. Although the plurality decision makes it clear that its findings are the "law of the case only" and, therefore, of no precedential value, the Board, in *Menasco, Inc.*, supra, also adopted the view that the constitutional provision, herein involved, is a restriction on resignation and concluded, "that under either the plurality or concurring views expressed by the Board in *Dalmo Victor*, Respondent's rule in the instant case would also be invalid and unenforceable." Id. at fn. 1. Utilizing *Menasco, Inc.* and *Gray Motors*, supra, as precedent, notwithstanding Respondent's cogent arguments as to the constitutional provision's enforceability and noting that *Dalmo Victor*, supra, is currently pending before the Ninth Circuit, I find that article L, section 3, lines 24 through 40, of the IAM constitution is an unreasonable and invalid restraint[33] on resignation from membership and that, therefore, the resignations of the involved nine employees were valid when received[34] by Respondent. Accordingly, the internal union disciplinary proceedings, the fines, and resultant lawsuit to collect he fines, at issue in these matters, must be found violative of Section 8(b)(1)(A) of the Act as conduct that coerced and restrained the nine former members in the exercise of a Section 7 right—the right not to honor a strike. *Menasco, Inc.*, supra; *Gray Motors*, supra. Furthermore, although not alleged[35] as such, the Board finds, "that the mere maintenance of such a constitutional provision restrains and coerces employees, who may be unaware of the provision's unenforceability, from exercising their Section 7 rights. Its effect is analogous to the effect of an employer's maintenance of an overly broad no-solicitation rule." *Engineers & Scientists Guild (Lockheed Corp.)*, 268 NLRB 311 (1983). Accordingly, by maintaining the foregoing provision as its restriction on resignation, Respondent also restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act.

Both counsel for the General Counsel and counsel for the Charging Parties argue, in the alternative, that assuming arguendo the Ninth Circuit Court of Appeals or, ultimately perhaps, the Supreme Court finds article L, section 3, lines 24 through 40 a permissible restriction on resignation, the internal union disciplinary proceedings, the fines, and the resultant lawsuit to collect the fines against the nine MDC employees, nevertheless, must be found unlawful as none of them had notice of the existence, much less the terms, of the IAM constitutional provision prior to tendering his or her resignation from membership.[36] The existence of a restriction on such

[32] The United States Court of Appeals for the Ninth Circuit reversed a prior Board decision in *Dalmo Victor*, finding the language of article L, section 3, LL. 24 through 40, of the IAM constitution to constitute "a restriction on a member's right to resign" and remanding the matter to the Board for a consideration of the provision's validity as such. *NLRB v. Machinists Local 1327 (Dalmo Victor)*, 608 F.2d 1219 (9th Cir. 1979).

[33] I find it unnecessary to pass on the Charging Parties' argument that any restrictions on resignation are unenforceable and invalid.

[34] It is clear that resignations are normally deemed to be effective when received. *Teamsters Local 610 (Browning-Ferris)*, 264 NLRB 886 (1982). Further, if a constitutional provision unreasonably restricts resignation, a member is free to resign at any time by clearly conveying such to a labor organization. *Teamsters Local 36 (Strong Building Materials)*, 266 NLRB 1057 (1983). Herein, there is no question that the resignations of each of the nine employees clearly conveyed such an intent to Respondent, and I so find.

With regard to the resignation letters of Barrios, I note that he delivered a copy, in person, to Respondent and also mailed a copy. I find that he effectively resigned. *Electrical Workers IBEW Local 66 (Houston Lighting)*, 262 NLRB 483, 486 (1982). Regarding Stella Melendez, the record establishes that Respondent received her resignation 1 day *after* she returned to work. Such, I find, does not invalidate the effectiveness of her resignation, but Respondent should be entitled to fine her for 1 day of work, April 25. *Machinists Local 778 (Whitaker Cable)*, 224 NLRB 580, 581 (1976).

[35] Obviously, the validity of art. L, sec. 3 was extensively argued in the posthearing briefs. Accordingly, there has been no denial of due process by my finding of a violation about the maintenance of the provision.

[36] It is also argued, in the alternative, that the internal disciplinary proceedings, the fines, and the lawsuit to collect such fines are unlawful inasmuch as neither at the time each of the nine employees executed his application for membership in Respondent, or at any time thereafter, did agents of the latter inform him or her that he or she was not required to become a member in order to fulfill the contractual union-security obligation, but rather he or she was only required to pay the equivalent of membership dues and fees to Respondent. At the outset, while the collective-bargaining agreement between Respondent and MDC requires membership in Respondent 30 days after employment, "it is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of dues and fees. 'Membership' as a condition of employment is whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). Both the General Counsel and counsel for the Charging Parties rely on the one Board decision on this issue, *Retail Clerks Local 322 (Ramey Supermarkets)*, 226 NLRB 80 (1976), as support for their contention; while the latter argues, more broadly, that Respondent's failure to advise in this regard meant that the nine MDC employees never became full voluntary members of Respondent so that none were ever bound by the tenets of article L, section 3 of the IAM constitution and that Respondent never had any authority over them. The situation in *Retail Clerks* is similar to the one here—the union refused to honor the resignations of 10 employee/members and instituted internal disciplinary proceedings against each for crossing a picket line and working for his employer. The union's defense was a constitutional restriction on resignation, the terms of which were not adhered to by the 10 employees. Without ruling on the validity of the provision, the administrative law judge, with the Board affirming, held that the union penalties were unlawful, reasoning:

> It has long been clear that Congress intended in enacting the Taft-Hartley amendments that employees should not be required to undertake or maintain any obligation to the labor organization beyond the obligation to "tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership," unless the employee voluntarily assumed other obligations. See *N.L.R.B. v. General Motors Corporation*, 373 U.S. 734 (1963). In the present case, as has been found, both the Union and the Company considered that the employees were covered by a union-shop con-

Continued

rule "prior to tendering his resignation, then the member's resignation becomes effective immediately . . . ." *Dalmo Victor* at 987 fn. 20; *Loomis Courier Service*, supra at 223; *Ex-Cell-O Corp.*, supra at 1048. Moreover, I agree with the proposition set forth by both counsel—that the necessity to give members notice of the existence of any rules or impediments to resignation prior to penalizing them for failing to adhere or comply with such is required by a labor organization's fiduciary duty of fair representation (*Ex-Cell-O Corp.*, supra at 1049), and that the rules for the preciseness of such should be as strict as that required of a labor organization prior to demanding enforcement of a constitutional union-security clause against a delinquent employee. *Pattern Makers League (Rockford-Beloit)*, 265 NLRB 1332, 1334 (1982), enfd. 724 F.2d 57 (7th Cir. 1983); *Western Publishing Co.*, 263 NLRB 110, 111–112 (1982). Further, the burden is on the respondent labor organization to establish that the resigning employees had "proper notice" of language restraining the resignations. *Ex-Cell-O Corp.*, supra at 1049 fn. 21. In the instant circumstances,[37] Respondent contends that actual notice of its restrictions on resigning, in the form of reading article L, section 3, lines 24 through 40, word by word, was given to the MDC bargaining unit employees at the two prestrike meetings held on February 2[38] and March 21, 1981. Inasmuch as I believe that any notice given at the Elks Lodge meeting on the latter date would have been ineffectual and meaningless,[39] the issue is whether employees Fuentes, Miller, Vargas, Morales, and Melendez did, indeed, receive notice of the terms of the constitutional provision at the church meeting on February 2.

Initially, I must determine whether Respondent's agent, John Pettitt, should be credited that he read each word of article L, section 3, lines 24 through 40, to the assembled employees; in this regard, I note that Pettitt himself admits that the document from which he allegedly read was not the IAM constitution itself, but rather a sheet of paper on which lines 24 through 40 are printed verbatim. Analysis of the entire record convinces me that the only truly credible corroborative account[40] of what occurred at this meeting was that of employee Duane Karam, who, at all times, impressed me as an honest and candid witness and who seemed to be forthrightly attempting to recall what was said. According to the witness, Pettitt did seem to be reading from something, saying that withdrawal from the Union was not permitted 14 days preceding the termination of the contract. Karam's honest recollection seems to have been faulty, and I believe, and find, that Pettitt was, indeed, speaking regarding the provisions of article L, section 3. Regarding whether Pettitt read or merely paraphrased the words, Karam's testimony is most revealing—"he didn't read it . . . word for word," merely hitting the "highlights." I credit this rather than Pettitt's asserted version of what he did concerning article L, section 3.[41] Accordingly, I find that, prior to the secret-ballot strike vote on February 2, Pettitt did, to some extent, discuss the provisions of article L, section 3, lines 24 through 40 and the consequences for crossing a picket line and that the discussion, as testified to by Karam, lasted for just a few minutes. However, the record establishes that employees Fuentes, Miller, Vargas, Morales, and Melendez probably had departed by that time, each having left during the contract proposal discussions. Nevertheless, Respondent's counsel contended at the hearing that the notice requirement was satisfied by Pettitt's actions afterward. I do not agree. Respondent's fiduciary duty of fair representation is not to be lightly construed, and the re-

tract, and the employees were informed that they had to join the Union and did so. There is no evidence that the employees were advised that they had the option not to join if they would tender the dues and fees required. Under the circumstances, it must be held that the employees joined under compulsion. However, the record does show that when the employees tendered their resignations, they did advise the Union that they were willing to continue paying such legal dues and fees as might be required. In my opinion, where it is not shown that the employees were clearly advised of their option not to join a labor organization before assuming membership in that union, the most that should be required of the employees as a condition precedent to resignation from membership is a commitment to continue paying the periodic dues and fees which may uniformly be required of members under the Act. In that way, the employee is guaranteed his rights under the Act, while at the same time continuing financial support to the bargaining representative which must represent him.

Id. at 90. Two points are evident from the foregoing. First, contrary to counsel for the Charging Parties, notwithstanding the union's failure to advise the employees of their choices, the Board apparently found them to, in fact, be members who, as members, were able to resign without regard to the union's constitutional restrictions on such. Thus, to the Board, the failure to advise affects the employee's right to resign and *not* the union membership itself of the employee. Second, a condition precedent exists to a member's right to freely resign in circumstances as existed in *Retail Clerks* and as exist in the circumstances herein—he must advise the labor organization of his intent to honor his "financial core" obligations under the union-security clause. None of the nine MDC employees so advised Respondent; therefore, absent the unenforceable constitutional impediment to resignation, Respondent could have lawfully refused to honor the resignations herein under this rationale. Therefore, I place no reliance on this alternative theory of the alleged violations herein.

[37] The testimony of employees Fuentes, Rosales, Van De Sande, Miller, Vargas, Morales, Melendez, and Barrios that each neither possessed nor had examined a copy of the IAM constitution prior to resigning was uncontroverted by Respondent, and the latter offered no evidence that employee Gehr possessed or was familiar with the constitution.

[38] It was uncontroverted that employees Barrios, Rosales, and Van de Sande were not at the February 2 meeting, and the record evidence is inconclusive, at best, that Gehr was present.

[39] If actual notice of the terms of art. L, sec. 3, LL. 24 through 40 was first given at the March 21 employee meeting, bargaining unit employees, if they so chose, would have had just 4 days in which to resign prior to the commencement of the strike against MDC. By its terms the aforementioned constitutional restriction on resignation requires that, to be effective, a resignation must be tendered more than 14 days prior to the start of a strike. Thus, no employee, who desired to take advantage of the "actual notice" given on March 21, could have effectively resigned as "he had no ability to comply with the resignation procedures." *Strong Building Materials*, supra at 1058 fn. 2.

[40] I do not rely on the corroborative testimony of witnesses Slavik or Bennett. Their respective testimony impressed me as being too "pat" to be credited. On the other hand, while Irma Bullock seemed to be a credible witness, her memory of what was done and said by Pettitt at both prestrike meetings was at odds with other accounts sufficiently to convince me that her honest recall was not always accurate and should not be relied on—I do not do so.

[41] I was not at all impressed with Pettitt's testimonial demeanor, believing he attempted to buttress portions of his testimony with fabrication; however, I am not prepared to find his testimony completely unreliable, especially when corroborated by the credible testimony of Karam.

quirement of actual notice, as in the enforcement of a union-security clause, is strictly enforced by the Board. *Distillery Workers Local 38 (Schenley Distillers)*, 242 NLRB 370, 371 (1979). Extended to the instant facts, Respondent was under a duty to ensure that each and every person who attended the meeting was informed of article L, section 3, its existence and provisions. Herein, there is ample evidence that many employees departed the meeting during the discussion of the contract proposals—to the extent that only slightly more than half of the group remained for the initial strike vote. Yet, there is no evidence, and no contention by Respondent, that Pettitt made any earlier announcement that article L, section 3 would be read to them at some later point—in order to forestall the departures. This is highly significant; for the matter of resignation and restrictions thereon would seemingly have been a matter of vital concern to employees involved in a potential strike situation. Indeed, the IAM apparently recognized this by publication of its Circular No. 697. Simply put, fundamental fairness dictates that employees, who probably had no reason for being aware that any restriction on resignation existed in the constitution, should not bear the burden in these circumstances, especially when to force such directly impairs the exercise of a Section 7 right. Id. at 371. Rather, Respondent's strict fiduciary duty herein extended, at least, to the point of notifying everyone in attendance at this February 2 meeting that an important announcement, regarding his resignation rights and the consequences thereof, would be made later. In such circumstances, perhaps an argument could successfully be made that Pettitt's discussion of article L, section 3 fulfilled Respondent's notice requirements in that regard to all those at the meeting—even those who had left, including Fuentes, Miller, Vargas, Morales, and Melendez. Such, however, is *not* the case, and I find that neither these five employees nor employees Van de Sande, Barrios, or Rosales had sufficient[42] notice of the provisions of article L, section 3, lines 24 through 40, at the time they tendered their resignations to Respondent.[43] Therefore, notwithstanding the assumed validity of that section of the IAM constitution, and I have found such to be unlawful, Respondent's subsequent internal disciplinary proceedings, fines, and attempted collection of them, were violative of Section 8(b)(1)(A) of the Act. *Strong Building Materials*, supra.

The record is uncontroverted that neither at or subsequent to the imposition of the intraunion sanctions, prohibiting each of the nine MDC employees from holding office in Respondent for a 5-year period for having crossed the picket line and working for MDC at the time of the 1981 strike, by Respondent did its agents or officials explain to each one that, during this period of impaired membership rights, the union-security provision of the current MDC-Respondent collective-bargaining agreement would not be utilized to force him or her to continue paying dues, or its equivalent, under a threat of discharge. Equally, there is no dispute that Respondent threatened employees Fuentes and Rosales with enforcement of the union-security clause unless they paid to Respondent dues arrearages, or the equivalent, and reinstatement fees. The second amended consolidated complaint alleges Respondent's failures to inform and threats to be conduct violative of Section 8(b)(1)(A) of the Act. In support, counsel for the General Counsel and the Charging Parties cite four Board decisions, in chronological order—*Steelworkers Local 4186 (McGraw Edison)*, 181 NLRB 992 (1970); *Communications Workers Local 9509 (Pacific Telephone)*, 193 NLRB 83 (1971); *Communications Workers Local 1101 (N.Y. Telephone)*, 211 NLRB 114 (1970); *Telephone Traffic Union (N.Y. Telephone)*, 241 NLRB 826 (1979). Analysis of Board rationale in these cases, at least where employees engaged in conduct privileged by Section 7 of the Act, discloses that, rather than the respondent labor organization's impairment of membership rights for such conduct, which may not be unlawful,[44] the Board considers as unlawful and "a continuing form of coercion," which restrains the exercise of Section 7 rights, the labor organization's continued insistence on payment of dues or the equivalent thereof during the period of the membership impairment. Such insistence, under penalty of discharge pursuant to a union-security clause, is not "disassociated," by the Board, from the membership impairment, is viewed as "hardly necessary to preserve the [labor organization's] existence as an institution, nor . . . as a noncoercive form of internal discipline" and is, therefore, found, by the Board, to be violative of Section 8(b)(1)(A) of the Act.[45] This result holds whether the affected employee is a present member of the labor organization and whether he pays to the labor organization membership dues and fees or merely the equivalent thereof.

Analysis of the record convinces me of the merits of these particular allegations of the second amended consolidated complaint. In this regard, that I have previously concluded that the nine MDC employees who effectively resigned from membership in Respondent prior to the imposition of intraunion sanctions is an irrelevant factor[46] inasmuch as, having refused to honor said resig-

[42] Assuming arguendo proper notice was given to the MDC employees on March 21, given the circumstances, as described in fn. 39, supra, the notice would not have been sufficient.

[43] I make no finding with regard to whether employee Gehr had proper notice, nor do I reach the issue whether what Pettitt did on February 2, as testified by Karam, constituted adequate notice of art. L, sec. 3, to those employees who heard what he said.

[44] The General Counsel concedes that declaring the nine MDC employees ineligible to hold office is a form of intraunion discipline protected by the proviso to Sec. 8(b)(1)(B) of the Act.

[45] I note that, although not mentioned as justification for its decisions on this issue, the Board made certain to specify a linkage between the privileged intraunion sanction and the threatened imposition of the contractual union-security clause to collect dues arrearages that resulted from the internal penalty. Therefore, such can be said to constitute threatened *external* union enforcement of an *intraunion* sanction—"[T]his interference with the employer-employee relationship violates Section 8(b)(1)(A)." *Teamsters Local 122 (Busch & Co.)*, 203 NLRB 1041, 1042 (1973).

[46] I reject the contention of Respondent that, having effectively resigned, each of the nine MDC employees continued to have a "financial core" obligation to Respondent pursuant to the union-security clause and that, therefore, Respondent's efforts to collect arrearages were not unlawful. I do so not because the argument is without considerable merit, but rather because such does not adequately explain or comport with Respondent's conduct herein of continually treating the nine MDC employees as *members* and because this argument strikes me as a belated justification for conduct that was motivated by other concerns.

nations, Respondent, at all material times, continued to deal with the employees as members for purposes of the office holding prohibitions and the collection of dues arrearages. Thus, I note that the intraunion sanctions concern the nine employees' membership rights; that, in threatening to invoke the contractual union-security clause against employees Fuentes and Rosales, Respondent noted that each had permitted his or her "membership to lapse"; and that, in advising employees Van de Sande and Vargas of their respective dues arrearages, Respondent threatened to cancel the membership of each. In any event, treating, as I have, this aspect of the instant proceedings within the parameters established by Respondent, I initially find that the rendering of each of the nine employees ineligible from holding union office for a 5-year period constituted a substantial impairment of his or her rights as a member (*Schonfeld v. Penza*, 477 F.2d 899 (2d Cir. 1973); *McGraw Edison*, supra at 992) and that the impairment directly related to the exercise of the nine employees of a Section 7 right. With regard to the alleged failure of Respondent to inform each of the nine MDC employees that, during the period of impaired membership, the existing contractual union-security provision would not be utilized to require him or her to continue paying membership dues or the equivalent thereof, the only mention in the above cases of such an obligation is in a footnote of the administrative law judge's decision in *Telephone Traffic Union*, supra. Therein, conceding the lawful nature of the membership impairment, a suspension from membership, the respondent union was, nevertheless, held, pursuant to its fiduciary duty of fair representation, to have an affirmative obligation to inform the employee/member "that during her suspension the union-security provision would not force her to continue paying dues or its equivalent under a threat of discharge." Id. at 829 fn. 4.[47] Respondent's defense, rather than to the rationale itself, concerns the fact that the employee in *Telephone Traffic Union* was suspended from membership in the union, while the only limitation placed on the employees herein is their respective ineligibility to hold union office for a 5-year period. Contrary to counsel, nowhere in the relevant footnote or elsewhere does the administrative law judge or the Board justify this holding on the basis of the severity of the membership impairment, nor do they give any indication that such constitutes a relevant consideration, at all. Moreover, I have already concluded that the prohibition herein is, indeed, a substantial one. Accordingly, I find Respondent's defense to be without merit and its failure to advise the nine MDC employees in the manner set forth above, either at the time of or subsequent to the imposition of the union office prohibition, to be a breach of its fiduciary duty of fair representation and violative of Section 8(b)(1)(A) of the Act. With regard to the threats to employees Fuentes and Rosales, Respondent's conduct is exactly that which the Board concluded was unlawful in *Communications Workers Local 1101*, supra, and *Telephone Traffic Union*, supra at 826, fn. 3. Thus, having lawfully disciplined each for engaging in conduct privileged by Section 7, Respondent insisted, under penalty of discharge, on their continued payment of dues—while continuing intraunion sanctions. Respondent's defense is, as described in footnote 45 supra, and is without merit. Therefore, I find the threats, by Respondent to Fuentes and Rosales, that the former would demand their discharges by MDC for failure to pay the equivalent of dues arrearages, while the membership of each in Respondent was substantially impaired, to be violative of Section 8(b)(1)(A) of the Act. Id.

The record establishes that, along with its demands, on penalty of discharge, for dues arrearages, Respondent also demanded that Rosales and Fuentes each pay a reinstatement fee of $100. Such is alleged as a further violation of Section 8(b)(1)(A) of the Act and, as a supporting theory, the General Counsel and the Charging Parties argue that neither employee had prior notice of such a requirement and that Respondent's failure to so inform Fuentes and Rosales before demanding payment of the reinstatement fee was in breach of its duty of fair representation. At the outset, Respondent did not controvert the testimony of either employee that, prior to receiving Respondent's demand for payment of the $100 fee, he or she had been entirely unaware of this requirement. As stated above, Respondent could not lawfully require the payment of dues under threat of discharge in these circumstances, and it logically follows that a demand for reinstatement fees, in the same circumstances, would likewise be unlawful. Moreover, it is standard Board law that, in order to comply with its fiduciary duty of fair representation, "a union which seeks to enforce a union security clause with respect to particular employees has the absolute duty to see that they are in fact informed of their financial membership obligations prior to demanding . . . discharge for nonpayment of regular dues and fees," including payment of a reinstatement fee as a condition of continued employment. *Machinists District 9 (Borg-Warner Corp.)*, 237 NLRB 1278, 1278–1279 (1978). Herein, the first, and only, notice to both Fuentes and Rosales that they would have to pay reinstatement fees came in letters in which Respondent also warned that failure to pay the fee and dues arrearages would result in implementation of the contractual union-security clause. This type of notice has been held by the Board "to be insufficient notice to members of their potential obligation to pay the fee," and a threatened enforcement of a union-security clause of failure to pay in such circumstances is violative of Section 8(b)(1)(A) of the Act. *Marvel-Schebzer*, supra at 1279; *Busch & Co.*, supra at 1042. Accordingly, in the absence of adequate notice of the reinstatement fee, Respondent's threats were violative of the Act.

CONCLUSIONS OF LAW

1. MDC is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

[47] Although the Board modified other aspects of the decision, it left standing fn. 4 and the reasoning therein. Presumably, therefore, the footnote was adopted by the Board, and such is a correct statement of the law.

3. By maintaining in force and effect, as its rule restricting members' rights to resign, article L, section 3, lines 24 through 40, of the IAM constitution, Respondent coerced and restrained employees of MDC in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act.

4. By bringing internal union disciplinary proceedings, imposing fines, and prosecuting lawsuits to collect the fines against former members Fuentes, Rosales, Van de Sande, Miller, Vargas, Morales, Melendez, Gehr, and Barrios, all of whom had resigned from membership in Respondent, for their postresignation crossing of a sanctioned picket line and working during a strike, which began on March 25, 1981, at the MDC Monrovia, California facility, Respondent restrained and coerced employees in the exercise of their Section 7 rights and, thereby, engaged in conduct violative of Section 8(b)(1)(A) of the Act.

5. By bringing internal union disciplinary proceedings, imposing fines, and prosecuting lawsuits to collect the fines against former members Fuentes, Rosales, Van de Sande, Miller, Vargas, Morales, Melendez, and Barrios, all of whom had resigned their membership in Respondent without legally sufficient notice of any restrictions on their respective rights to resign their membership, for their postresignation crossing of a sanctioned picket line and working during a strike, which began March 25, 1981, at the MDC Monrovia, California facility, Respondent restrained and coerced employees in the exercise of their Section 7 rights and, thereby, engaged in conduct violative of Section 8(b)(1)(A) of the Act.

6. By failing to advise employees Fuentes, Rosales, Van de Sande, Miller, Vargas, Morales, Melendez, Gehr, and Barrios of his or her obligations under the union-security clause of the existing contract between MDC and Respondent at the time each was prohibited from holding any office in it for a 5-year period for having crossed a picket line and worked for MDC at its Monrovia, California facility during the strike that began March 25, 1981, Respondent failed to afford them fair representation and, thereby, restrained and coerced them in the exercise of their Section 7 rights, and engaged in conduct violative of Section 8(b)(1)(A) of the Act.

7. By threatening employees Fuentes and Rosales with discharge unless they paid dues arrearages while simultaneously continuing the intraunion disciplinary sanctions imposed as a result of their having engaged in activities privileged under Section 7 of the Act, Respondent restrained and coerced Fuentes and Rosales in the exercise of their Section 7 rights and, thereby, engaged in conduct violative of Section 8(b)(1)(A) of the Act.

8. By threatening employees Fuentes and Rosales with discharge under the union-security clause of the contract between MDC and Respondent without affording either adequate notice of their membership obligations, Respondent engaged in conduct violative of Section 8(b)(1)(A) of the Act.

REMEDY

Having concluded that Respondent engaged in certain acts and conduct violative of Section 8(b)(1)(A) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. More specifically, I shall recommend that Respondent cease and desist from maintaining and enforcing, as its rule placing restrictions upon members' rights to resign from it, article L, section 3, lines 24 through 40, of the IAM constitution, and that it rescind the fines levied against employees Fuentes, Rosales, Van de Sande, Miller, Vargas, Morales, Melendez,[48] Gehr, and Barrios.[49] Having concluded that, pursuant to its duty of fair representation, Respondent was obligated to inform each of the above MDC employees, at the time of the imposition of intraunion sanctions, that the existing contractual union-security clause would not force him or her, under penalty of discharge, to continue paying dues or its equivalent and that Respondent violated its fiduciary duty by not doing so, I shall recommend, in view of this significant infirmity, that the latter be required to cease demanding, under penalty of discharge pursuant to the existing union-security clause of its contract with MDC, the payment of membership dues or the equivalent from these nine MDC employees until the expiration of the prohibition against each from holding office in Respondent and to reimburse Fuentes, Van de Sande, Rosales, Miller, Vargas, Morales, Melendez, Gehr, and Barrios, respectively, for all dues paid, until the cessation, by Fuentes and Rosales since April 20, 1982; by Van de Sande since May 16, 1982; and by Vargas, Miller, Melendez, Morales, Gehr, and Barrios since October 20, 1982,[50] with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[51] Further, in view of the fact that Respondent must reimburse dues payments to employees Fuentes and Rosales and the unlawful demand for such, under penalty of discharge, during the pendency of the intraunion sanction described above, was accompanied by the unlawful demand for payment by each of a reinstatement fee, I shall recommend that Respondent be ordered to refund the fees to

[48] Respondent's fine against Melendez stands—to the extent it involves preresignation work for MDC during the strike.

[49] Contrary to counsel for the Charging Parties, I shall not recommend that Respondent be ordered to reimburse Fuentes, Rosales, Barrios, Vargas, and Morales for their legal expenses in connection with the lawsuit to collect the fines. In this regard, while the effect of the lawsuit was to coerce and restrain employees in the exercise of Section 7 rights, such does not alone compel the extraordinary remedy requested by counsel. *Commercial Workers District 227 (Kroger Co.)*, 247 NLRB 195 (1980). Further, there is no evidence that the lawsuit was filed because Fuentes had previously filed a charge with the Board; the fact that the filing occurred subsequent to a signed stipulation of facts, a portion of which stated that Respondent had not attempted to collect the fines, evidences poor timing rather than malicious intent. Moreover, while the size of the awards would have been large, they would have corresponded exactly to what the employees knew to be the amount of the fines, with no unforeseen expenses involved. Finally, despite my finding that the filing of the lawsuit was unlawful, I am unable to conclude that such was in bad faith inasmuch as the restriction on resignation herein involved was then, and is now, the subject of extensive litigation, the outcome of which is not free from doubt.

[50] In accord with the suggestion of the General Counsel, noting the mandates of Sec. 10(b) of the Act, and in view of the vague nature of the remedy in *Telephone Traffic Union*, supra, I shall require dues reimbursements for the period beginning 6 months preceding the filing of the applicable unfair labor practice charges.

[51] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

each, with interest, as described above.[52] In addition, I shall recommend that Respondent be ordered to remove from its files any references to the internal union proceedings, the fines, and the lawsuits to collect the fines against these nine MDC employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[53]

ORDER

The Respondent, International Association of Machinists and Aerospace Workers, District Lodge 94, Local Lodge 575, Monrovia, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining or giving effect to, as its rule for restricting the resignation rights of its members, article L, section 3, lines 24 through 40, of the IAM constitution.

(b) Restraining or coercing employees, who have duly resigned from and are no longer members of Respondent, in the exercise of their rights guaranteed by Section 7 of the Act by bringing internal union proceedings, imposing fines, and filing lawsuits to collect the fines against them because of their postresignation conduct in crossing a picket line and working at MDC during the strike that began in March 1981.

(c) Threatening employees that they will be discharged unless they pay membership dues, or the equivalent thereof, where such is otherwise lawfully required as a condition of employment, during a period in which they have been prohibited from holding office in Respondent for exercising their right under Section 7 of the Act to refrain from continuing to support a strike against their employer.

(d) Failing to inform members who are prohibited from holding office in Respondent of their obligations under the contractual union-security clause.

(e) Continuing to demand from employees of MDC the payment of membership dues, or the equivalent thereof, where such is otherwise lawfully required as a condition of employment, during a period in which they have been prohibited from holding office in Respondent for exercising their Section 7 right of refraining from continuing to support a strike against their employer.

(f) Threatening employees of MDC that it will demand their discharge if they do not pay a membership reinstatement fee without having initially notified the employees of their union duties giving rise to their obligation to pay such fee as a condition of employment.

(g) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful fines levied on its former members, Fuentes, Rosales, Van de Sande, Miller, Vargas, Morales, Melendez, Gehr, and Barrios, for their respective postresignation conduct of having worked for MDC during the period of the strike that began March 25, 1981.

(b) Remove from its records and files any references to the internal proceeding, respective fines and lawsuit against the above-named employees for their respective postresignation conduct of having worked for MDC during the period of the strike that began on March 25, 1981, and notify the employees in writing of the actions taken in this regard.

(c) Refund to the above-named employees, in the manner set forth in the remedy section above, any membership dues and fees, including reinstatement fees, or the equivalent thereof, with interest, collected after our failure to advise them, after the imposition against each of them of a prohibition from holding office in Respondent for a 5-year period, of their respective obligations under the contractual union-security clause.

(d) Preserve and, on request, make available to agents of the Board, for examining and copying, if necessary, all records and files that are relevant to a determination of the amounts to be refunded herein.

(e) Post at its meeting hall, copies of the attached notice marked "Appendix."[54] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[52] I have ordered reimbursement of the reinstatement fees notwithstanding the recent Board decisions in *Teamsters Local 595 (Certified Grocers)*, 257 NLRB 492 (1981), and *Teamsters Local 572 (Ralphs Grocery)*, 247 NLRB 934 (1980), both involving a lack of proper notice, enforcement of a union-security clause, and an alleged violation of Sec. 8(b)(1)(A) and (2) of the Act, inasmuch as Respondent was not entitled to even demand the payment of a reinstatement fee herein had proper notice been given. This must be so, for it would be incongruous, indeed, to hold that Respondent was not entitled to demand the dues arrearages under penalty of discharge, but was entitled to demand a reinstatement fee in the same circumstances and for having had the employees' memberships canceled for nonpayment of dues.

[53] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[54] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Sussex Properties, Inc. *and* Hotel Employees and Restaurant Employees Local Union 886, AFL–CIO. Case 10–CA–21425

6 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 27 May 1986 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ruth Morton, the president of the Union.[2] We also agree that the Respondent violated Section 8(a)(1) when it solicited employee Addie Dorsey to check with the employees to see if they were going to walk out, and report back to the Respondent.[3]

The General Counsel excepts to the judge's failure to find in addition that about 28 or 29 December 1985 the Respondent again unlawfully solicited Dorsey to conduct surveillance on the union activities of other employees, and report those activities to the Respondent. The Respondent contends that the General Counsel's allegation that there was a second incident of unlawful solicitation of surveillance goes far beyond the narrow allegations of the charge in this case. We find merit in the General Counsel's exception, and we agree with the judge that the surveillance allegation does not exceed the scope of the charge.

In finding that the Respondent unlawfully coerced employee Dorsey into interfering with the employees' protected union activities, the judge credited Dorsey's testimony that, on 27 December 1985, Acting General Manager Clayton asked Dorsey to check with the maids to see if they were going to walk out so he could get somebody else in there to work, and that Dorsey did report back that the maids were not going to walk out. However, Dorsey also testified that a day or two later Clayton again asked her if she would talk to the ladies and find out what was going on with the Union. According to Dorsey, a couple of days after that, she reported to Clayton that the maids were not talking to her and that if they were talking when she approached, they would stop talking.

We find, based on this testimony of Dorsey, who was generally credited by the judge, that by this second incident the Respondent again solicited its employee to report on the union activities of her fellow employees, and thus again interfered with their Section 7 rights in violation of Section 8(a)(1).[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sussex Properties, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act in violation of Section 8(a)(1) of the Act by soliciting its employees to report on union activities of other employees and to engage in the surveillance of the union activities of other employees."

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Member Babson agrees with the judge's finding that the Respondent knew of Morton's position. In so doing, however, he does not rely on the judge's statement that "[I]t is incredible that any employer would hear of a possible strike without fully investigating the status of the employee that uttered the threat."

[3] See, e.g., *Holding Co.*, 231 NLRB 383, 388 (1977). In adopting the judge's conclusion, we find it unnecessary to pass on his reliance on *Eagle Headers*, 273 NLRB 1486 (1985). Member Babson additionally notes that no exception was filed to the judge's finding that Dorsey is not a supervisor.

[4] See, e.g., *Holding Co.*, supra.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT solicit our employees to report on activities of other employees or to engage in surveillance of the activities of other employees on behalf of Hotel Employees and Restaurant Employees Local Union 886, AFL–CIO, or any other labor organization.

WE WILL NOT discharge our employees because they engage in union activities or other concerted activities protected under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Ruth Morton immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

SUSSEX PROPERTIES, INC.

Virginia Jordan, Esq., for the General Counsel.
Barry V. Frederick and *Charles A. Powell III, Esqs.*, of Birmingham, Alabama, for the Respondent.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Birmingham, Alabama, on 21 March 1986. The charge was filed on 30 December 1985, and amended on 13 February 1986. The complaint, which issued on 7 March 1986, alleges that Respondent[1] violated Section 8(a)(1) and (3) by discharging employee Ruth Morton, and Section 8(a)(1) by soliciting its employees to engage in surveillance of its employees' union activities.

On consideration of the entire record and briefs filed by the General Counsel and Respondent, I make the following[2]

FINDINGS OF FACT

This case involves an admitted successor employer and the discharge of the Local Union's president because she made a statement to a nonunit employee about a strike.

Respondent operates a hotel in Birmingham, Alabama, which has changed owners on several occasions during the past few years. From 1980 until 27 December 1985, the hotel was owned by the Birmingham Hilton. In 1976, the hotel was called the Kahler Plaza, and from 1978 until 1980 it was called the Plaza Hotel South. Respondent purchased the hotel effective 12:01 a.m., 27 December 1985.

The unit employees involved in the instant matter have been represented by Hotel Employees and Restaurant Employees Local Union 886, AFL–CIO continuously since 1977.

Alleged discriminatee Ruth Morton served as vice president beginning in 1979. She also served as shop steward in the housekeeping department.

From 1982 on, Ruth Morton was Local 886's president.

On 27 December 1985 Respondent interviewed numerous applicants for employment, including employees of the predecessor employer. One of those applicants was Ruth Morton. Morton had worked continuously at the hotel under its various owners since August 1976. According to Morton's testimony, which I credit,[3] she was interviewed by Acting General Manager Stan Clayton. Before beginning the interview, Morton noticed Clayton talking with Assistant Housekeeper Addie Dorsey.[4] Clayton left Dorsey, walked to Morton, and said, "Oh, you're Ruth." Morton said she was wearing an identification button and a union button during the interview. However, according to Clayton, he did not notice Morton's name tag.

On the night of 27 December, around 8:30 p.m., Morton was called by Addie Dorsey and told to report to work at the hotel the next morning.

Morton reported to work on 28 December. She worked approximately 6 hours when she was paged by Addie Dorsey. Dorsey directed Morton to report to the front office where she was discharged by Stan Clayton.

[1] The charge and the complaint show Respondent as Columbia Sussex Corporation, Inc. However, the parties stipulated during the hearing that the correct name of Respondent is Sussex Properties, Inc.

[2] Neither jurisdiction nor the status of the Charging Party is at issue. Respondent admitted that it is an Alabama corporation with a Birmingham, Alabama location, where it is engaged in the business of providing hotel and restaurant services to the public and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Respondent also admitted that the Charging Party is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Respondent's acting general manager Stan Clayton demonstrated by his testimony that he did not recall Morton's interview in detail.

[4] Dorsey had been employed at the hotel since it was the Kahler Plaza. When Respondent took over the hotel on 27 December, Dorsey was a member of the staff and was included in the meeting of the department heads on that day.

Present at the discharge interview were Clayton, Morton, Addie Dorsey, and Karen Mineo. Mineo testified that she works "for the home office . . . more or less in quality control."

Stan Clayton asked Karen Mineo to sit in the interview, but not to say anything.

According to Morton, Stan Clayton asked her about her problems and told her "I've got an employee that would tell me you said you all was going to strike." Morton admitted that she denied telling any employee that she was going to strike. Clayton subsequently called in employees Norma Gaddy and Rhonda Hatcher who said that Morton had told them that "they was going to strike on Saturday."

Morton was discharged. Her payroll charge notice states:

> Ruth Morton was heard by Norma and Rhonda that she was going on strike Saturday.

Addie Dorsey testified that she was present at a staff meeting on 27 December. During the meeting, Rhonda Hatcher told Stan Clayton that "he should know they had plans to strike that Saturday." Hatcher said to Clayton that "it was told to her in confidential [sic] by Ruth Morton."[5]

Clayton told Dorsey "to check with the ladies to see if they were going to walk out so he could get somebody else in there to work." On the day of Morton's discharge, Dorsey reported to Clayton that the ladies "weren't going to walk out because they needed to work."[6]

Conclusion

The evidence does not dispute that on 27 December employees, including Ruth Morton, received their final paychecks from the predecessor employer. Ruth Morton went to the office to inquire why insurance premiums were deducted from both her wage and vacation checks. At the office Morton spoke with Executive Secretary Rhonda Hatcher. According to Morton, Hatcher had been Morton's "inside source" and they maintained a close relationship.

After discussing Morton's insurance deduction problems, Hatcher asked Morton "what is [International Union Agent] Marshall Race gonna do about this mess, Ruth?" Morton responded, "We gonna strike."

Morton then noticed that an employee later identified as Norma Gaddy was standing behind her. Hatcher assured Morton that Gaddy would not say anything.[7]

The record illustrates that a strike did not occur as forecast by Morton. Nevertheless, the question of whether Morton's comment was correct is not of significant importance in the instant analysis. The issue at this point is whether Morton's action was protected by the National Labor Relations Act.

At the time of Morton's comment, no collective-bargaining agreement was in effect.[8]

Respondent does not quarrel with the above facts. However, Respondent argues that it was unaware on 27 and 28 December that Ruth Morton was the Local Union's president, and for that reason it did not realize if Morton was engaged in union activities. Additionally, Respondent argues that it understood Morton was threatening that she alone would strike, and her action was not concerted or protected.

Respondent's argument must be rooted in jurisprudence that has established that a so-called pretextual or mixed motive allegation must fail in those situations where the General Counsel is unable to prove that the employer knew of the alleged dischargee's union or protected activities. See, e.g., *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Here, Respondent contends that I should credit evidence that it had no knowledge that Morton was engaged in protected activities when she talked with Rhonda Hatcher.

In that regard, the record evidence shows that Addie Dorsey was present when Rhonda Hatcher told Acting General Manager Stan Clayton of Morton's comment. As indicated above, I credit Dorsey's testimony. Dorsey testified:

> A. Rhonda Hatcher. She told Mr. Clayton she thought he should know they had plans to strike that Saturday.
>
> Q. Did she say anything else?
>
> A. She said it was told to her in confidential, you know, by Ruth.
>
> Q. Did she say Ruth who?
>
> A. Ruth Morton.
>
> Q. Was anything else said at that time?
>
> A. Well, he asked me to check with the ladies to see if they were going to walk out so he could get somebody else in there to work.
>
> Q. What ladies are those?
>
> A. The maids.
>
> Q. And did you do that?
>
> A. Yes, I did.

---

[5] Clayton's testimony about what he was told by Hatcher is similar to the above testimony of Dorsey. However, Clayton testified that Hatcher talked with him after the staff meeting outside the hearing of Dorsey. I credit Dorsey who showed good demeanor. Dorsey's testimony reveals personal knowledge she could not have possessed if Clayton's version of the incident is correct. Neither Rhonda Hatcher nor Norma Gaddy testified.

[6] Clayton denied that he asked anyone to "spy on the Union." When asked if he asked anyone to let him know if they heard anything about a strike, Clayton testified:

> Not really. I was concerned that we were going to be busy with the All-American Bowl and I was concerned if anyone wasn't going to show up because of the change in ownership.

Again I credit Dorsey over Clayton. Clayton's answer demonstrated that he was concerned about a strike after hearing that a strike was predicted. His testimony that he did not inquire about a strike appears improbable and somewhat self-contradictory. Moreover, I was more impressed with Dorsey's demeanor.

[7] Neither Hatcher nor Gaddy testified. Apparently, neither is now employed by Respondent. I credit Morton's testimony of the incident with Hatcher and Gaddy. Her testimony is unrebutted and it is supported by record evidence about matters that flowed from that incident.

[8] The Union asked Respondent to assume the contract of the predecessor, but Respondent refused.

Q. Did you have a further conversation with Mr. Clayton after you had checked with the ladies?

A. Yes, I did.

Q. When was that?

A. It was the same day I told him they weren't going to walk out because they needed to work.

It is obvious from the above that Clayton was told that Ruth Morton had said that the employees planned to strike. Additionally, Clayton's subsequent action in asking Dorsey to check out the employees' plans supports my conclusion that he was originally told the employees planned to strike.

Moreover, Respondent retained department heads, including Addie Dorsey, from the predecessor employer. All of those people knew that Ruth Morton was, and had been since 1982, president of the Local.

I am convinced that Respondent knew of Ruth Morton's position as Local 886's president before her discharge. In the first place, as shown above, Respondent retained several department head supervisors from the predecessor employer. Therefore, Respondent, through its supervisors and agents, knew of Morton's union position. Moreover, the actual source of Respondent's information that Morton was threatening to strike, Rhonda Hatcher, was fully aware of Ruth Morton's position as president of the Local. Finally, it is incredible that any employer would hear of a possible strike without fully investigating the status of the employee that uttered the threat. See *Marathon LeTourneau Co. v. NLRB*, 699 F.2d 248 (5th Cir. 1983); *United Supermarkets*, 261 NLRB 1291, 1301 (1982).

Respondent also argues that Morton's comment was inconsistent with the Union's request that Respondent should assume its collective-bargaining agreement with the predecessor employer in that the predecessor employer agreement contained a no-strike provision. I find no merit in that argument. The record is not in dispute that Respondent rejected the Union's efforts to extend to Respondent the terms of its predecessor agreement. Cf. *Energy Coal Partnership*, 269 NLRB 770 (1984), in which the union made a specific recommendation to the alleged discriminatees that they not engage in a strike.

The issue here is much more fundamental than Respondent's arguments would imply.

Here, the facts and issues are simple. An employee, Rhonda Hatcher, asked the Local Union's president what the Union planned regarding changed working conditions. There can be no real dispute regarding the import of Hatcher's question. That Hatcher's question referenced union action was established by Hatcher mentioning International Union Representative Marshall Race.

The instant matter is similar in many ways to the landmark case of *NLRB v. Burnup & Sims*, 379 U.S. 21, (1964). See also *Rubin Bros. Footwear*, 99 NLRB 610 (1952); *K & K Transportation Corp.*, 262 NLRB 1481 (1982). In *Burnup & Sims*, the employer was advised by an employee that while soliciting him for membership in the union, two employees had said that "the union will use dynamite to get in if the union did not acquire the authorization." 379 U.S. at 21. There, as here, the employer argued that its knowledge should be determinative. In *Burnup & Sims*, the employer argued that its good-faith belief that the two employees engaged in misconduct should show that it did not engage in illegal activity. Here, Respondent argues that it was unaware that Morton was engaged in protected activity. The Supreme Court in *Burnup & Sims* held that where employees are engaged in union activities, an employer's good-faith belief is immaterial unless the record shows that the employees actually engaged in misconduct.

Here, the record shows that Rhonda Hatcher questioned Ruth Morton about what the Union, through its International representative, planned. Ruth Morton responded in kind (i.e., she told Hatcher the Union planned to strike). Hatcher and Gaddy understood that Morton was talking about union action. In fact, unrebutted testimony shows that Gaddy tried to persuade Morton to avoid calling a strike. Morton's discussion of union activities constitutes protected activities[9] as much as the employees' solicitation efforts constituted protected activities in *Burnup & Sims*. Therefore, Respondent's action against Morton is illegal unless it is shown that Morton engaged in misconduct.

The record shows that Morton did nothing more than predict a strike. She made no threat to Respondent. In fact, the evidence shows that Morton did not intend to convey her comments to Respondent. There was no instant collective-bargaining agreement and, of course, there was no contractual prohibition to striking. Therefore, neither a strike nor a prediction of a strike constitutes misconduct in this instance. Cf. *Champion Parts*, 260 NLRB 731 (1982); *John Morrell & Co.*, 270 NLRB 1 (1984); *General Electric Co.*, 253 NLRB 1189 (1981).

I find that Morton was engaged in union activities when she discussed the Union's plans with employee Rhonda Hatcher on 27 December 1985. Those activities are protected by the National Labor Relations Act. Respondent did not have a good-faith belief that Morton's activities were unprotected. Nor did Respondent have a good-faith belief that Morton engaged in misconduct. In fact, Ruth Morton did not engage in misconduct. I find that Respondent's discharge of Morton violates the terms of the Act.

The General Counsel also alleges that Respondent violated Section 8(a)(1) by asking Addie Dorsey to report on its employees' planned union activities.

The only record evidence dealing with Dorsey's employee status illustrates that she was not a supervisor.

The credited evidence proves that Stan Clayton asked Dorsey "to check with the ladies to see if they were going to walk out so he could get somebody else in there to work."

The Act protects employees from being required to report on union activities.

I agree with Respondent's argument that it had a legitimate business interest in inquiring whether the housekeeping employees would strike. However, Respondent

[9] Since the credited evidence shows that Respondent was told that Morton had said that the employees were going to strike, I find that she was forecasting concerted activity that is protected regardless of Respondent's knowledge about her position as president of the Local.

had other sources to determine whether a strike was planned. For example, Respondent could have checked with International Representative Marshall Race. By requiring an employee to investigate and report, Respondent coerced that employee into interfering with the employees' protected union activities. The Board has consistently found similar activities to be violative of Section 8(a)(1). *Eagle Headers*, 273 NLRB 1486, 1490 (1985).[10]

ADDITIONAL CONCLUSIONS OF LAW

1. By soliciting its employee to report on the union activities of other employees, Respondent violated Section 8(a)(1) of the Act.

2. By discharging employee Ruth Morton on 28 December 1985, Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has illegally discharged its employee Ruth Morton in violation of Section 8(a)(1) and (3) of the Act, I shall order Respondent to offer Morton immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges, and to make Morton whole for any loss of earnings she may have suffered as a result of the discrimination against her. Backpay and interest shall be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[11]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Sussex Properties, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act in violation of Section 8(a)(1) of the Act by soliciting its employees to report on union activities of other employees.

(b) Discharging and refusing to reinstate employees because of their protected union activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Ruth Morton to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make Morton whole for any losses she may have suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(b) Remove from Ruth Morton's personnel files any reference to its discharge of her and notify Morton in writing that this has been done and that evidence of its unlawful discharge will not be used as a basis for future personnel action against Morton.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Birmingham, Alabama facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[10] Respondent argues that the General Counsel's 8(a)(1) allegation should be dismissed as outside the scope of the charge and additionally that it was misled by the General Counsel regarding the nature of the evidence in support of that allegation. That contention by Respondent must be rejected. If Respondent was prevented from properly preparing a defense because of a misunderstanding as to the nature of the allegation, its proper recourse would have been to ask for sufficient time to prepare after the conclusion of the General Counsel's evidence. Respondent failed to make that request.

I find the General Counsel's allegation does not exceed the scope of the charge. *Clark Equipment Co.*, 278 NLRB 498, 499 (1986).

[11] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Hahn Motors, Inc., and Hahn Truck Sales & Service Corp. *and* United Steelworkers of America, AFL-CIO-CLC. Case 4-CA-13275

6 May 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 30 September 1983 Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief in support.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

In adopting the judge's findings of violations and his finding that the Respondents, Hahn Motors, Inc. (HMI or Hahn Motors) and Hahn Truck Sales & Service Corp. (HTS or Hahn Sales), are a single employer, we find it unnecessary to reach the question whether an alter ego relationship exists. In making the single employer finding we rely, as did the judge, on Robert Stavin's role as chief executive officer in each company; his exercise of virtually unrestricted operational, financial, administrative, and labor relations control over both companies; the substantially similar ownership of both companies, i.e., Robert Stavin and his wife Marion owning Hahn Sales outright as well as 35 percent of Hahn Motors, with practically the entire remainder inuring to the beneficial interest of Marion Stavin, her mother, and her sister;[1] and the interrelation of the two companies' operations, as evidenced by the functional integration of their businesses, the extensive financial and operational support provided Hahn Sales by Hahn Motors, the centralized telephone and accounting systems, and the deliberate extension of Hahn Motors' goodwill to Hahn Sales by virtue of Stavin's letters of introduction to customers, the similarity of their corporate names, and the use of the same company stationery and corporate logos. We find that these factors establish that Hahn Motors and Hahn Sales do not maintain an arm's-length relationship such as is found among unintegrated companies. See *NLRB v. Al Bryant, Inc.*, 711 F.2d 543 (3d Cir. 1983), enfg. 260 NLRB 128 (1982). Accordingly, as noted, we find that HMI and HTS constitute a single employer.

Further, we find that the relocation of the service department employees to a new facility did not destroy the community of interests that had existed within the plantwide Hahn Motors unit to justify depriving these employees of continued representation. Indeed, the only significant difference in working conditions that the relocated employees experienced was the move to a different facility 7 miles away. At the time Hahn Sales commenced operations, all its employees were former Hahn Motors service department unit employees. Those employees shared single unit status with the other Hahn Motors employees and were represented by the Union until Stavin formed Hahn Sales. As Hahn Sales employees, they continued to work the same hours under the same clock numbers they had used at Hahn Motors and to perform substantially the same work they had performed as service department employees, using much of the same equipment and skills, and working under the same immediate supervisor, Harry Close.[2] The work performed at the two facilities continues to be highly integrated, with Hahn Motors manufacturing the parts used by Hahn Sales and Hahn Sales performing predelivery and warranty work on Hahn Motors-produced trucks. Employees at both locations are covered by a single life and medical insurance policy and the employees of Hahn Sales enjoy the same benefits as the Hahn Motors employees.

We find that these factors demonstrate that the Hahn Sales employees continue to share a community of interests with the existing Hahn Motors unit and that the Respondent's efforts to fragment that unit by unilaterally imposing a geographic separation of 7 miles is inadequate to defeat the service employees' right to continued union representation. Accordingly, we find that the Respondents unlawfully failed to continue to recognize the Union as the bargaining representative of the unit employees

[1] Of the 1000 shares of HMI stock, Robert and Marion Stavin own 384 outright with Marion Stavin possessing beneficial interest in one-half of a trust whose corpus includes 510 shares. The next largest, singly owned block is held outright by Robert Stavin's mother-in-law, Mrs. R. J. Steinhauer. Only four shares are owned by individuals not related to the Stavins.

[2] Thus, day-to-day supervision has remained unchanged. At Hahn Motors these employees had been under the direct supervision of Close, who was the "service department" manager there. At Hahn Sales they continued under his direct supervision as its "general manager." Furthermore, the former service department employees of Hahn Motors who accepted jobs with Hahn Sales were not required to file new employment applications.

Despite the fact that the service employees are now performing their duties at Hahn Sales rather than Hahn Motors, the *differences* between their duties and those performed by the production and maintenance employees have remained unchanged. It is also important to bear in mind that the question here is not whether the service employees might *also* constitute a separate appropriate *unit*. It is whether the overall unit remained *an* appropriate unit when the Respondent moved the employees 7 miles down the road.

working at the Hahn Sales location and to apply the contract terms to them.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Hahn Motors, Inc., Hamburg, Pennsylvania, and Hahn Truck Sales & Service Corp., Shartlesville, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

[3] Because we have adopted the judge's finding that the Respondent's relocation of a part of the established unit does not relieve it of its obligation to recognize and apply the contract to the new site, we place no reliance on the judge's separate analysis under the now-overruled *Milwaukee Spring Division*, 265 NLRB 206 (1982). See *Milwaukee Spring Division*, 268 NLRB 601 (1984), affd. sub nom. *Auto Workers v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

Daniel E. Halevy, Esq., for the General Counsel.
Robert T. Miller, Esq., of Reading, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This proceeding was heard by me in Reading, Pennsylvania, on April 14, 1983, on an initial unfair labor practice charge filed on October 15, 1982, and a complaint issued on November 29, 1982, alleging that Hahn Motors, Inc. and Hahn Truck Sales & Service Corp. (the Respondent) constitute an alter ego and single employer within the meaning of the Act, and that the Respondent violated Section 8(a)(5) and (1) of the Act by dealing directly with certain employees in the appropriate collective-bargaining unit, and further violated Section 8(a)(1), (3), and (5) of the Act by relocating these employees and refusing to apply the applicable collective-bargaining agreement at the new worksite. In its timely filed answer the Respondent denied that any unfair labor practices were committed. After close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.

On the entire record in this proceeding,[1] including my opportunity directly to observe the witnesses while testifying and their demeanor,[2] and on consideration of the posthearing briefs, it is found as follows

[1] Certain errors in the transcript are noted and corrected.

[2] The fact that my credibility rulings are accompanied by objective rationale does not discount, but merely serves to reinforce, impressions gained from my first-hand observation of the witnesses. Furthermore, although it should go without saying, testimony, whether or not contradicted, is rejected by implication to the extent that it includes matters that might not be reconciled with expressly credited evidence. Cf. *Herbert F. Darling, Inc.*, 267 NLRB 476 (1983).

FINDINGS OF FACT

I. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

II. JURISDICTION AND THE SINGLE EMPLOYER ISSUE

A. *Preliminary Statement*

Hahn Motors, Inc. (HMI) is, and has been at all times material, a Pennsylvania corporation engaged in the manufacture, sale, and distribution of firefighting apparatus from its facility located in Hamburg, Pennsylvania. Prior to May 1, 1982,[3] the operations of HMI included a service department. During that same period, United Steelworkers of America, AFL–CIO–CLC represented a production and maintenance unit, numbering some 100 employees, including 7 who were assigned to the service department. These employees at that time were covered by a collective-bargaining agreement not scheduled to expire until April 30, 1984.

On May 1, 1982, a new corporation, Hahn Truck Sales & Service Corp. (HTS) commenced operations in Shartlesville, Pennsylvania, only 6–8 miles distant from Hamburg. This new firm, as of the date of the hearing and since the inception of its operations, has been engaged almost exclusively in "servicing" firefighting equipment.

Contemporaneous with the opening of HTS' Shartlesville facility, HMI terminated its service operations. Prior thereto, however, all seven of the latter's service employees were offered employment with HTS; six accepted. HTS refused to recognize the Union or honor HMI's subsisting collective-bargaining agreement as binding with respect to these Shartlesville employees.

The resulting partial curtailment of the established bargaining relationship is challenged by the instant complaint on the premise that HMI and HTS constitute an alter ego or single employer and, hence, all that was involved was a single entity's relocation of unit work to a nearby, newly established facility. See, e.g., *Westwood Import Co.*, 251 NLRB 1213 (1980), enfd. 681 F.2d 664 (9th Cir. 1982). It also is argued that the removal of the service operation was designed to evade bargaining and that the Respondent thereby violated Section 8(a)(1), (3), and (5) of the Act. See, e.g., *Los Angeles Marine Hardware Co.*, 235 NLRB 720 (1978); *Milwaukee Spring Division*, 265 NLRB 206 (1982); *Oak Cliff-Golman Bakery Co.*, 207 NLRB 1063 (1973). By way of remedy, it is urged that the Respondent be directed to recognize the Union at the Shartlesville site, and to apply the existing collective-bargaining agreement to the employees at that location, while making them whole for lost benefits. Also sought is compensation for the Union with respect to dues not remitted on behalf of employees who had executed valid checkoff authorizations.

[3] Unless otherwise indicated all dates refer to 1982.

On behalf of the defense it is asserted that the two firms possessed qualities of independence sufficient to negate alter ego or single employer status, and, hence, HMI simply terminated the service end of its business, action that is not subject to any obligation to bargain under either the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), or the management-prerogative clause of the subsisting agreement.

The "single employer-alter ego" issue is plainly determinative here. Thus, neither the pleadings, controlling precedent, the manner in which this proceeding was litigated, nor the posthearing briefs suggest that this complaint might be salvaged if HMI and HTS are deemed legally independent persons in the statutory sense. Indeed, the jurisdictional allegations appear to concede the point. For the commerce facts are alleged, and admitted, under conditions presupposing that HTS and HMI are a single entity, and there is no basis for ascertaining whether either firm independently met the Board's jurisdictional standards. Clearly, dismissal of the complaint on that ground alone would be impelled should the General Counsel fail to establish that HTS and HMI constitute a single entity.[4]

At the same time, the Respondent raises a number of defenses that would lack vitality and require no consideration if single employer status is substantiated. Within this category is the Respondent's reliance on *First National Maintenance Corp. v. NLRB*, supra, and other cases reconciling management's right to *terminate* a segment of its business. For, if HMI and HTS are deemed to be a single entity, this case would involve a transfer within a single enterprise, rather than a discontinuance, of the service operation. Hence, *First National Maintenance* would be plainly inapposite. Falling within that same category would be the Respondent's further contention that, by virtue of article 6 of the contract with HMI, the Union waived its interest in collective bargaining with respect to the events in issue here. In this regard, section I thereof, in material part, merely recites as follows:

> The management of the plant and the direction of the working force including . . . the right to relieve employees from duty because of lack of work or for other legitimate reasons . . . the right to determine the extent to which the plant shall be operated, the products to be manufactured, the method of manufacturing . . . and to extend, limit or curtail its operation, is vested exclusively in the Company.

Here again, if HTS and HMI are to be regarded as a single entity, the matter under scrutiny would be limited to a "relocation" or "transfer" of unit work, action which transcends the broad, general language of the above-cited management-prerogative clause. Under longstanding Board policy, a waiver on the part of a labor organization under such a generalized provision is not to be "lightly inferred." Rather, it must be manifested by "clear and unmistakable" evidence. See, e.g., *Park-Ohio Industries*, 257 NLRB 413–414 (1981).

Thus, for the above reasons, the waiver defense as well as that arising under the Supreme Court decision in *First National Maintenance*, supra, will prove either superfluous or nonmeritorious depending on final resolution of the single employer issue, and, hence, there will be no further discussion of either.

B. *Conclusions on the Single Employer Issue*

The principles pertaining to analysis of single employer issues were summarized recently by the Third Circuit Court of Appeals as follows:[5]

> Four criteria have been used by the Board in determining whether separate entities constitute a single employer: interrelation of operations, common management, centralized control of labor relations, and common ownership. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 . . . . The Board finds no one factor controlling, although it has stressed the first three factors, particularly centralized control of labor relations, which tend to show "operational integration.". . . Ultimately, single employer status depends on all the circumstances of the case and is characterized by absence of an "arm's length relationship found among unintegrated companies."

On this record, as shall be seen, little question arises in the area of centralized control or operational interdependence. As for ownership and control, as of May 1, 1982, the members of the board of directors of HMI were: Robert Stavin; Marion Stavin (Robert Stavin's wife); Thomas F. Confer, Esq. (president of Hamburg Savings & Trust); Lulu Ann Sheetz (Marion Stavin's sister); and Mrs. R. J. Steinhauer (Marion Stavin's mother).

Of the 1100 shares of outstanding HMI stock, Robert Stavin and his wife, Marion, own 384 outright, with the latter also possessing beneficial interest in one-half of a trust, whose corpus included 510 shares. Of the remaining outstanding shares, only 4 are owned by individuals who are not related to the Stavins, and the next largest singly owned block is the 146 held outright by Robert Stavin's mother-in-law, R. J. Steinhauer.

The board of directors of HTS consisted solely of Robert and Marion Stavin, who jointly owned 100 percent of that firms outstanding stock. Robert Stavin and Larry Hummer were president and secretary-treasurer, respectively, of both firms, with Stavin serving as president and Larry Hummer secretary-treasurer.[6]

---

[4] The admission of jurisdiction in the Respondent's answer, considering the manner in which the pleadings are framed, only admits that both firms collectively are engaged in commerce. It is an admission conditioned on the ability of the General Counsel to substantiate the single employer allegation.

[5] *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983).

[6] Robert Stavin testified that with respect to HMI he and Hummer were the only corporate officers. This testimony was afforded while Stavin had access to the articles of incorporation and bylaws of HMI. Nonetheless, the parties entered a stipulation to the effect that Frank Clements was HMI's vice-president of manufacturing, a fact confirmed by Clements' own testimony. Beyond this, the only other difference between

Continued

As would seem to be characteristic of corporations having strong familial ties, emergence of HTS did not create differences in ultimate control, nor was the business objective of the overall venture altered materially. Thus, prior to the establishment of HTS, HMI was engaged in the manufacture of fire trucks on a fully integrated basis, including production, service, sales, and distribution. With the establishment of HTS, the service activity was splintered off from HMI and transferred to HTS. However, day-to-day supervision of those engaged in service operations remained unchanged. Harry Close was transferred from his former job as "service department" manager to become "general manager" of HTS. Six service department employees of HMI, formerly supervised by Close, were offered, accepted, and granted employment, without need for the filing of new employment applications. They continued under the direct, immediate supervision of Close.

As suggested, the move did not involve any real, substantive change in authority at the highest level. As president of both firms, Stavin's control continued. His domination of the affairs of HMI and HTS is evident from the fact that it was his decision to acquire the real property, to establish a separate corporation, to spin off the service function previously provided through HMI to the new corporation, and to retain Harry Close as general manager of this latter operation.

Stavin also had the final say in the area of labor relations.[7] He signed the collective-bargaining agreement covering the production and maintenance unit. Admittedly, it was his decision to offer the HMI service department employees jobs with HTS, and it was he who conceived the terms and conditions under which they would work, including the fact that neither the collective-bargaining agreement nor the Union's status as exclusive employee representative would be honored at HTS.

Common control is also manifested by the degree to which HMI and HTS are integrated in both administrative and operational areas. Thus, the service department of HMI historically was engaged in three basic functions. The first entailed inspection and predelivery repair work on newly manufactured fire trucks. The second involved servicing Hahn vehicles still under warranty. The third consisted of service and repair operations with respect to out-of-warranty fire trucks manufactured by HMI. Only on occasion would the HMI service department work on alien vehicles, i.e., fire trucks manufactured by a competitor.[8] Stavin testified that through HTS it was his intent to establish a complete truck service business, incorporating the operations formerly provided through HMI, but at a level expanded to include alien fire trucks and commercial tractor-trailer rigs. The latter would be solicited from an interstate highway and other routes proximate to the Shartlesville site.[9] However, Stavin admitted that, as of the date of the hearing, HTS had been engaged exclusively in the servicing of "fire equipment and apparatus."

Thus, HTS as established will carry on many services identical to those historically performed by HMI. Indeed, insofar as HMI clientele or potential customers are involved, HTS will continue to represent a vital link between HMI and the reputation in the market place for serviceability of HMI products. For example, final inspection of vehicles manufactured by HMI now is performed by HTS. In the course of those functions, service personnel of HTS, as was true at HMI, correct minor discrepancies themselves. As always, in the event that HTS discovers a major problem with the vehicle, it is returned to the HMI manufacturing department for correction. Thus, HTS continues to perform work which is a vital link in the overall manufacturing, inspection, and delivery activity of HMI. This, together with the postdelivery service provided by HTS on HMI warranties, would naturally tend to influence the "good will" of HMI and, indeed, involves work, the quality of which will likely impact on future HMI sales. At present, of the 340 customers serviced by HTS, 305 were customers of HMI and might well continue to be, at least in connection with the purchase of new fire trucks.

The relationship between HTS' performance and the success of HMI's marketing program is evidenced by several factors suggesting an intent to pass off HMI and HTS, in the eyes of the public, as related firms. This was reflected in the name given Hahn Truck Sales & Service (HTS), which, though incorporating the name "Hahn" and the term "Sales," was utilized to label a company not structured to perform truck sales. The need for common identification was carried further by the fact that HTS and HMI utilized the same basic trademark and letterhead. Finally, the business interest served by maintenance of an "association" between service and sales functions was acknowledged in the testimony of Stavin set forth below:

> [W]e're trying to . . . have a good reputation for a product, because sales and service—that's why we

---

the corporate officers of HMI and HTS is signified in the Respondent's brief, in which it is suggested that an individual named Phil Rossi is HMI's vice president in charge of engineering. Nowhere is this representation confirmed on the record.

[7] Stavin, in an unpersuasive attempt to mitigate his influence over dealings with the Union, testified that Clements and Hummer over the years had "a free hand in this area." He acknowledged that, as president, the "buck" stopped with him, but then attempted to turn this aside, indicating that he always went along with Hummer and Clements, never overriding them. Notwithstanding the Respondent's testimony to the contrary, from observation of Stavin, I was impressed with the relative strength of his presence and I stand convinced that he was the abiding, dominant influence within both HMI and HTS with respect to the economic destiny of employees of both firms.

[8] The limited amount of work on alien fire equipment impressed me as being a byproduct of space limitations rather than a shortfall in skills, equipment, or managerial ability at HMI.

[9] Any intent to broaden HTS operations to the competitive field of commercial tractor-trailer rigs, as of the date of the hearing, had not been implemented forcefully. There had been no formal advertising. HTS does not even appear in the yellow pages. Indeed, the signs erected on the facility are not subject to observation by vehicles on the adjacent interstate highway until they have passed the Shartlesville access ramp. In addition, HTS has neither tow truck nor a "tire buster," both of which would appear to be required equipment for full scale servicing of over-the-road carriers. Finally, provision had not been made for 24-hour service by a mechanic. As for the future, the Respondent did adduce testimony that steel poles had been purchased for the purpose of erecting signs that would be visible to trucks using the interstate highway.

> call it Hahn Trucks Sales and Service. I realize that they go hand in hand. And that's why we tried to disguise that as totally foreign from Hahn Motors.
>
> . . . .
>
> We try to give an association between the two companies so they felt they were dealing, even though it was a different company, we tried to make some association.

Other evidence reveals HTS' considerable *operational* dependence on HMI. For, in addition to parts obtained from vendors,[10] as was true of the HMI service department in existence prior to May 1, HTS routinely ordered from HMI parts manufactured in the latter's production department.[11]

Finally, it is my observation that HTS was an operating shell with little in the way of administrative autonomy. It had no accounting department, and was completely dependent on HMI for those services. Indeed, at one time, HMI employed a clerical who was primarily engaged in performing accounting functions on behalf of HTS. As for the processing of orders, when HTS invoices were received from vendors, they were checked by Close, and then forwarded to HMI for payment. Although HTS maintained its own savings and checking accounts in a bank different from that used by HMI, Close was not authorized to sign the checks.[12] In all cases, they were signed by either Stavin himself or Hummer.[13] Accounts receivable of HTS are maintained on the HMI computer. HMI provides Close with a weekly printout of the receivables balance. However, Close is responsible for collection of receivables and testimony indicated that he prepared billings, which he forwarded to HMI for entry on the computer.

Beyond the clerical work in connection with ordering, purchasing, invoice verification, and collection of accounts receivable, it does not appear that HTS performs or is capable of performing other administrative duties. Thus, it was not shown to have any independent sales representative, but, according to Close, utilizes Joe Zeller, a sales representative of HMI. Although HTS and HMI have separate phone numbers and are billed separately by the phone company, they have an interconnected system whereby a customer calling HMI for service would be switched automatically to HTS without the customer having to hang up and make a second call. It also appears that the personnel records of employees of HTS are maintained by HMI. Finally, employees of both HTS and HMI are covered by a single group policy for purposes of health and welfare.

Consistent with the foregoing, a number of factors belie the notion that HMI and HTS were operated in a fashion representative of separate firms pursuing distinct economic interests. Unlike the typical arm's-length business relationship, HMI made valuable concessions in substantial areas whereby it absorbed expenses for services rendered to HTS. For example, the means by which HTS compensated HMI for accounting services merely required that a HMI clerical employee tabulate the time spent when working on behalf of HTS. The hourly cost of those services was the sole charge levied against HTS. Thus, overhead costs, including those derived from office equipment, office materials, fair rental value of the premises, and the HMI computer were not defrayed by any charges levied against HTS. In the same category is the proportionate share of services rendered by Hummer in connection with HTS' operation. Hummer is paid no salary from HTS, but oversees the HMI accounting operation and apparently himself administers health and welfare programs on behalf of HTS personnel. HTS does not compensate HMI for Hummer's contribution to the discharge of its administrative responsibilities.

Beyond these privileges, additional monetary concessions on the part of HMI were associated with the establishment of HTS. Thus, in May, after an inventory, HTS removed HMI service parts to HTS. To compensate HMI in this respect, an unsecured, interest free note in the amount of $50,000 was given by HTS. These liberal terms, although clearly advantageous to HTS, appear less prejudicial to HMI than the circumstances surrounding the removal by HTS of HMI's equipment.[14] For it

---

[10] Since its inception, HTS has used many vendors formerly utilized by HMI. Thus, of the 136 vendors from whom HTS purchased goods and service, 106 had done business previously with HMI and continue to do so.

[11] Stavin testified that among the reasons prompting elimination of HMI's service operation and establishment of HTS was a rivalry between the service and production departments and a conflict between Service Manager Close and Production Manager Clements. This rift was apparently caused by the fact that parts requested by the service department would frequently be disruptive of production, while at the same time delays in providing the part requested would produce delays in the service department. Notwithstanding the corroborative testimony of Clements and Close as to this source of friction, because HTS continued to order parts from the HMI production department, while performing some assembly work, it is difficult to fathom just how the establishment of HTS eliminated or mitigated this problem.

[12] It is noted that the Respondent's witnesses, at various points in their testimony, seemed to imply that Harry Close possessed almost total autonomy in running the affairs of HTS. Any such view would be an exaggeration. Close was not on the board of directors, nor did he serve as an officer of HTS. It is found that he had been a "hired" manager at HMI, and that he had no higher status when employed at HTS.

[13] Hummer testified that HTS in the beginning had no credit reputation and no financial statement, and therefore certain vendors refused to sell direct to HTS. He hardly appeared resolute in responding to questions whether there were occasions when HMI was impelled to tell a vendor to bill HMI in order for HTS to obtain delivery of special parts. Hummer did concede, however, that on certain sales to HTS, HMI was billed. When this occurred, HMI processed the invoice but paid it, as far as Hummer could remember, on a HTS check.

[14] Close was evasive in testifying concerning the transfer of equipment. The attempt to downplay the matter first emerged when Close was asked by his own counsel to describe "the type and nature of equipment acquired from HMI." Close demeaned the quality of the equipment, and, in contrast to the more specific definition given about equipment that HTS acquired from other sources, Close barely identified that taken from HMI, testifying merely as follows:

> Most of the equipment was extremely old. In terms of service shops we were quite equipped. The newest thing we brought with us was the floor jack.
>
> . . . .
>
> And some other small air tools and equipment of that nature.

However, on cross-examination by counsel for the General Counsel, Close admitted that HTS also removed from HMI "two very old drill presses," an "old wood saw," "a very old hydraulic press," "very old homemade work benches," "several floor jacks," "one dipstick welder," and "one stick welding machine [of] questionable quality." Aside from the foregoing, it took three inquiries from me before Close was willing to admit that nothing was left behind that could be used. Although I have

Continued

does not appear that HTS compensated HMI, even to the extent of paying salvage value for this equipment.[15] Moreover, because of the "good offices" of HMI, it has been unnecessary for HTS to acquire vehicles in its own behalf. Instead, HMI has provided a 1973 station wagon and a "Bronco," both of which possess dealer plates registered to and owned by HMI. In exchange, HTS is subject to a charge of $50 monthly, a fee which also licenses HTS to unmonitored and unlimited access to HMI's photocopying equipment.

The absence of cash exchanges between the two firms is also in keeping with the General Counsel's position. For, although valuable services and parts routinely are subject to exchange between HMI and HTS, cash is never involved in those transactions. Instead, an open-ended system of credit is utilized. Pursuant thereto, compensation for the warranty service provided by HTS and parts built by HMI for the account of HTS is accomplished through reciprocal bookkeeping entries, whereby the account founded on the $50,000 unsecured note payable from HTS to HMI is increased or reduced depending on which firm is providing the service.

By way of conclusion, it is considered that the foregoing fails to furnish a basis for regarding HTS as a distinct entity insulated from obligations which the Act imposes on the labor relations of HMI. Through HTS it appears that Stavin effectuated little more than the relocation of a department under the guise of a separate corporate veil. Thus, HTS, by having acquired additional equipment and additional employees, might well have broadened the scope of the market served. Nonetheless, it has continued to remain captive to the established business objectives of HMI. It is true that through HTS Stavin sought to expand the service market to include alien fire trucks and more comprehensive rehabilitation and maintenance work, but it does not appear that HTS had any independent marketing facility, and indeed, from all indications on this record, it appears that to a substantial extent it remained dependent on the market previously forged and developed by HMI.[16] In short, I am convinced that HTS, though a separate corporation, was created without sacrifice in control of labor relations and overall management or to the basic business objectives of HMI. The two firms continued as an interdependent and integrated family venture dominated by Robert Stavin. In such circumstances, the establishment of HTS and the concomitant withholding of representation rights of the service personnel was the equivalent of "an economic benefit at the expense of statutory employee rights, upsetting and undermining the balance of power between labor and management created to reflect national labor policy." Cf. *Alkire v. NLRB*, 716 F.2d 1014, 1021 (4th Cir. 1983). Accordingly, the criteria set forth by the Supreme Court in *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965), have been substantiated and based thereon it is concluded that Respondents HMI and HTS constitute a single employer within the meaning of the Act.

With respect to the issue of jurisdiction, the Respondent in the course and conduct of the business operations heretofore described, during the 12-month period preceding issuance of the complaint, a representative period, sold and shipped products, goods, and materials valued in excess of $50.000 to points located directly outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and it is found that the Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

1. Quite independent of the single employer issue, the complaint alleges that the Respondent, through HMI's president, Robert Stavin, violated Section 8(a)(5) and (1) by engaging in direct dealing with employees. This assertion is substantiated by undisputed evidence. For, shortly before May 1, Stavin met with HMI service department employees. The Union received no formal notification and was not invited or given the opportunity to participate in this meeting. At the meeting, Stavin informed the HMI service employees that as of May 1, 1982, HMI would no longer be engaged in service work, and that as of that date HTS would embark on a service operation in Shartlesville. All were offered positions at HTS by Stavin, who indicated that HTS would operate on a nonunion basis, but that employees were free to organize if they wished. The seven employees involved were told that they would lose their seniority and pension benefits if they accepted employment at HTS. Finally, it was indicated that those electing to remain with HMI would have a job, though the exact nature thereof was unspecified. That meeting left open the question of whether any service employee refusing to accept employment at HTS might have imperiled his job security in the event of possible future cutbacks at HMI. In any event, the offers articulated by Stavin represented an effort unilaterally to alter conditions of work of employees at the Hamburg facility in derogation of the Union's status as exclusive representative of the employees. The Respondent thereby violated Section 8(a)(5) and (1) of the Act. See, e.g., *Otis Elevator Co.*, 255 NLRB 235, 242, 247–248 (1981).

2. The complaint further alleges that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by transferring employees to the Shartlesville facility and failing to abide by the governing collective-bargaining agree-

---

no doubt that the HMI service equipment was not in the best of shape, from all appearances it was still in use at the time of the hearing. In the circumstances, the effort by Close to mitigate the value and extent of the transfer was as understandable as it was unpersuasive. I believe that Close's sensitivity in this area was attributable to concern over the degree of HTS' dependence on equipment taken from HMI, which I infer to have been substantial.

[15] According to Hummer, after the removal of this equipment, it was not carried on the books of either HMI or HTS.

[16] Close made an attempt to differentiate between the services provided through HTS and the former service department at HMI. Basically, however, subject to one exception, the mechanical work involved did not appear to entail a difference in skills and was plainly related to other work performed historically by HMI. The exception relates to painting, sand blasting, and body work, none of which was available through HMI. However, in the period preceding the hearing, painting had been limited to two vehicles and the record fails to disclose the percentage of HTS' revenue what would be attributable to body work. In any event, the addition of these services would seem a normal adjunct of mechanical, maintenance, and repair work and, thus, was not unrelated to services traditionally available through the HMI service department.

ment covering these employees. Having found that the Respondent, for purposes of the Act, shall be treated as a single entity, its bargaining obligation is subject to scrutiny under two independent theories.

First is the line of cases exemplified by *Milwaukee Spring Division*, 265 NLRB 206 (1982).[17] By virtue thereof, an employer's transfer of unit work, during the term of a collective-bargaining agreement and without union assent, to another of its facilities where employees are not represented by a union has been deemed conduct inherently destructive of employee rights and violative of Section 8(a)(1), (3), and (5) of the Act. See, e.g., *Los Angeles Marine Hardware Co.*, 235 NLRB 720 (1978), enfd. 602 F.2d 1302 (9th Cir. 1979); *Brown Co.*, 243 NLRB 769 (1979); *Milwaukee Spring Division*, supra. The rationale underlying this line of precedent views the removal of unit work as a mid-term modification of a collective-bargaining agreement and, hence, absent concurrence of the employee representative, such action violates Section 8(d) and constitutes a refusal to bargain violative of Section 8(a)(5). Those cases stand for the further proposition that prejudice to employment terms sustained by unit employees in consequence of such a loss of work is "inherently destructive of employee interests" and violative of Section 8(a)(3) and (1) of the Act. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). This is so even in the absence of *specific* proof of union animus or, indeed, in the face of credited evidence that the employer pleaded an inability to afford terms of the contract and unsuccessfully sought relief therefrom through renegotiation.

With these considerations in mind, it is noted that here the relocation of the service function was unaccompanied by any claim of economic distress derived from the Hamburg contract. Instead, the removal of unit work does not appear to have been based on anything other than acquisition of a new facility and the Respondent's having seized on that acquisition as an opportunity to perform the service function at a nearby location on a nonunion basis.[18] It follows on the cited authority that by discontinuing the service function at Hamburg and by relocating that operation at Shartlesville, while refusing to recognize the exclusive employee representative and failing to extend the terms of the unexpired contract to that location, the Respondent, on authority of *Milwaukee Spring*, supra, violated Section 8(a)(1), (3), and (5) of the Act.

Second, and in the alternative, the same basic remedy on the instant facts would be warranted quite independent of the reasoning set forth in *Milwaukee Spring*, supra, and related decisions. For, under long-established Board policy, mere relocation of a segment of an established collective-bargaining unit will not necessarily alter the scope of the unit so as to relieve an employer of the obligation to recognize and apply the contract to the new site. See, e.g., *Rittling Corp.*, 203 NLRB 355 (1973); *Robertshaw Controls Co.*, 240 NLRB 1260 (1979); *Westwood Import Co.*, 251 NLRB 1213 (1980), enfd. 681 F.2d 664 (9th Cir. 1982); *Marine Optical*, 255 NLRB 1241, 1244 (1981), affd. 671 F.2d 11 (1st Cir. 1982); *NLRB v. Royal Oak Tool & Machine Co.*, 320 F.2d 77, 83 (6th Cir. 1963). Expanding on the policy reflected in these decisions, the Board in *Westwood Import Co.*, supra at 1214, stated as follows:

> [A]n existing and effective collective-bargaining agreement remains in effect following a relocation, provided operations and equipment remain substantially the same at the new location, and a substantial percentage of the employees at the old plant transfer to the new location.

Here, the Shartlesville facility was located a mere 6–8 miles distant from the historic site of the appropriate unit.[19] Operations commenced at Shartlesville with equipment formerly utilized by the service department at Hamburg to an extent which on this record cannot be considered insubstantial.[20] Furthermore, six of the seven unit employees engaged in service work at Hamburg accepted transfers to Shartlesville and constituted a majority of the work force at that location until December 1982. Later, as of the date of the hearing, when the payroll of HTS had grown to 13 employees, the original transfers constituted no less than 46 percent of the overall work force.[21] Moreover, the Shartlesville service operation was initiated and continued without change in the identity of immediate management. In the circumstances, including the continued integration of the work performed by employees at both locations, the changes attendant in the relocation failed to create new and distinct business operations unrelated and distinct from those historically performed at Hamburg through HMI. Cf. *Westinghouse Electric Corp.*, 174 NLRB 636 (1969). Instead, the relocation to Shartlesville entailed a mere expansion, amounting to a normal evolution within the framework of an established venture, which failed to produce a material change in the class of jobs, functions, or community of interests within the historic collective-bargaining unit. In the circumstances, as the relocation

[17] On August 4, 1983, the Seventh Circuit Court of Appeals, on request of the Board, remanded *Milwaukee Spring* for reconsideration. On September 20, 1983, oral argument was conducted before the Board in that case.

[18] The Respondent insists that Stavin acted on a legitimate business consideration in creating HTS, acquiring the Shartlesville site, leasing it to HTS, and in effect transferring HMI's service function to HTS. The assigned business justification related to past conflicts between manufacturing and service that had arisen because both functions were performed at the same facility. Although this defense might well support the removal and transfer of the service function, those actions were not incompatible with continued recognition. Hence, the economic defense fell short of excusing Stavin's further determination that recognition be withheld and the collective-bargaining agreement dishonored at Shartlesville.

[19] The Respondent makes no serious claim that the contract contains any language limiting the geographic scope of the established bargaining unit. Thus, the collective-bargaining unit in art. 3, sec. 2, of the contract is defined without qualifying language, in the following terms:

> The term "Employee," as hereinafter used in this agreement, refers to production and maintenance employees and watchmen who constitute the appropriate bargaining unit.

Thus, the contract on its face fails to limit the scope of the appropriate collective-bargaining unit to the Hamburg worksite. See *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302, 1306 (9th Cir. 1979).

[20] See fn. 14, supra.

[21] See *Westwood Import Co.*, supra at 1214 fn. 8, and cases cited therein to the effect that the 46-percent figure satisfies the requirement that "a sufficiently large number of employees [be] transferred."

occurred at a time when the existing collective-bargaining agreement constituted a bar to an election, the Respondent was obligated to continue recognition of the Union at Shartlesville as a part of the established collective-bargaining unit,[22] and to honor the terms of the subsisting contract with the Union at the Shartlesville location as part of the appropriate collective-bargaining unit covered thereby.[23] Accordingly, this alternative ground independently supports the conclusion that in each of these several respects the Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Hahn Motors, Inc. and Hahn Truck Sales & Service Corp. collectively constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steel Workers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit appropriate for purposes of collective bargaining is:

> All production and maintenance employees and watchmen, excluding professional employees, guards, and supervisors as defined in the Act.

4. At all times material, United Steelworkers of America, AFL–CIO–CLC has been the exclusive collective-bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

5. By dealing directly with employees concerning terms and conditions of employment, and thereby bypassing their exclusive statutory representative, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By relocating its service operation to Shartlesville, Pennsylvania, by refusing to recognize United Steelworkers of America, AFL–CIO–CLC, as the exclusive representative of employees at that location, and by failing and refusing to apply the terms and conditions of the current collective-bargaining agreement to those employees, the Respondent unlawfully refused to bargain in good faith in violation of Section 8(a)(1), (3), and (5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

Affirmatively, consistent with the General Counsel's request, the Respondent shall be ordered to recognize the Union as the representative of its employees engaged in the performance of unit work at its Shartlesville facility as part of the established appropriate collective-bargaining unit and to apply the current collective-bargaining agreement to those employees. It shall be further recommended that the Respondent make whole employees for any loss of benefits sustained by reason of the Respondent's repudiation of the subsisting collective-bargaining agreement at that location, and that the Respondent be ordered to make the Union whole for dues owing in the case of those Shartlesville employees who had executed checkoff authorizations prior to the commencement of operations at that location.[24] All monetary sums due shall include interest as prescribed by *Florida Steel Corp.*, 231 NLRB 651 (1977).[25]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Hahn Motors, Inc. and Hahn Truck Sales & Service Corp., Hamburg, and Shartlesville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in a labor organization by abrogating contract benefits, withholding negotiated terms, or in any other manner discriminating with respect to wages, hours, or other terms and conditions of employment.

(b) Refusing to bargain collectively with United Steelworkers of America, AFL–CIO–CLC, as the exclusive bargaining representative of employees in the appropriate collective-bargaining unit, by bypassing the Union and dealing directly with employees concerning terms and conditions of employment, by refusing to recognize the Union for a relocated segment of the appropriate unit, and by repudiating and refusing to apply the unexpired contract to employees in the appropriate unit at the new location. The appropriate collective-bargaining unit is as follows:

---

[22] See *Hexton Furniture Co.*, 111 NLRB 342 (1955). The Respondent did not raise a doubt of majority status. On the facts, it was not free to do so, as, at times material, the collective-bargaining agreement would constitute a bar to the raising of a question concerning representation. See *Sanson Hosiery Mills*, 92 NLRB 1102, 1103 (1950), enfd. 195 F.2d 350 (5th Cir. 1952). See, e.g., *Pioneer Inn*, 228 NLRB 1263, 1265–1266 (1977), enfd. 578 F.2d 835 (9th Cir. 1978).

[23] *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974). *Westwood Import Co.*, supra at 1216.

[24] It is noted in this connection that, even if precedent in line with *Milwaukee Spring Division*, supra, were to be rejected, the remedy here for the most part would not be affected. Thus, with the exception of the notice and additional language in the cease-and-desist portion of the remedy, the 8(a)(3) and (1) finding sanctioned by that case is dispensable. In short, such a finding is unnecessary to the terms of the affirmative remedy recommended here. Beyond that, as the relocation did not alter the scope of the appropriate unit, the Board's conventional remedy, applied most recently in similar circumstances in *Westwood Import Co.*, supra at 1214 fn. 7, would warrant relief that would not be substantively different from that which would derive from *Milwaukee Spring*, supra.

[25] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All production and maintenance employees and watchmen, excluding professional employees, guards, and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with United Steelworkers of America, AFL–CIO–CLC as the exclusive bargaining representative of all employees employed in the above-defined appropriate collective-bargaining unit, including those employed at the Shartlesville, Pennsylvania facility.

(b) Apply the terms and conditions of the current collective-bargaining agreement to all employees employed in the aforesaid collective-bargaining unit, including those who are employed at the Shartlesville facility.

(c) Make whole employees for any loss of pay or benefits that would have accrued to them under the collective-bargaining agreement but for the failure to apply the terms and conditions of that agreement to all employees employed in the aforesaid collective-bargaining unit, including those located at the Shartlesville, Pennsylvania facility.

(d) Make whole United Steelworkers of America, AFL–CIO–CLC for dues not remitted on behalf of Shartlesville employees who had executed valid, unrevoked checkoff authorizations.

(e) Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay or value of other benefits, including interest, due under the terms set forth in the remedy section of this decision.

(f) Post at its Hamburg and Shartlesville, Pennsylvania facilities copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.
Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with United Steelworkers of America, AFL–CIO–CLC as the exclusive bargaining representative of all employees in the following appropriate unit:

All production and maintenance employees and watchmen, excluding professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT deal directly with any of the employees in the aforedescribed appropriate collective-bargaining unit under conditions bypassing United Steel Workers of America, AFL–CIO–CLC as their exclusive representative.

WE WILL NOT refuse to recognize United Steelworkers of America, AFL–CIO–CLC as the exclusive representative of the employees in the aforedescribed unit, including those located at our Shartlesville, Pennsylvania facility.

WE WILL NOT fail and refuse to apply the terms and conditions of our collective-bargaining agreement with United Steelworkers of America, AFL–CIO–CLC to all the employees in the above-described bargaining unit, including those located at our Shartlesville, Pennsylvania facility, without the written consent of that Union.

WE WILL NOT deny benefits to you under the governing collective-bargaining agreement or in any manner discriminate against you for engaging in activities on behalf of United Steelworkers of America, AFL–CIO–CLC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain collectively with United Steelworkers of America, AFL–CIO–CLC as the exclusive collective-bargaining representative of all the employees in the above-described bargaining unit, including those located at our Shartlesville, Pennsylvania facility.

WE WILL apply the terms and conditions of our current collective- bargaining agreement with United Steelworkers of America, AFL–CIO–CLC to all employees

in the above-described bargaining unit, including those employees at our Shartlesville, Pennsylvania facility.

WE WILL make whole all employees for any losses sustained by our failure to apply the terms and conditions of our collective-bargaining agreement with United Steelworkers of America, AFL-CIO-CLC to all employees in the appropriate collective-bargaining agreement set forth above, including those employees at our facility located in Shartlesville, Pennsylvania.

HAHN MOTORS, INC. AND HAHN TRUCK SALES & SERVICE CORP.

Decor Noel, Inc. *and* Division 19, District 65, United Auto Workers, AFL–CIO. Case 26–CA–11307

6 May 1987

DECISION AND ORDER

BY MEMBERS BABSON, STEPHENS, AND CRACRAFT

On 18 November 1986 Administrative Law Judge Lawrence W. Cullen issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Decor Noel, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Charging Party's motion to correct error in the date in sec. IV, par. 6 of the judge's decision is granted; the date is corrected to read 6 August 1985.

[2] The General Counsel seeks a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The General Counsel excepted to the judge's failure to state affirmatively that the bargaining unit includes "all full-time and regular part-time maintenance and production employees." We agree with the judge's finding that neither the unit description nor the practice of the parties as described at the hearing shows a limitation which would exclude employees working less than 30 hours per week from the bargaining unit. We find it inappropriate to redefine the bargaining unit, however, because the General Counsel first requested this in posthearing exceptions and the matter was not fully litigated at the hearing.

William D. Levy, Esq., for the General Counsel.
Henry Shelton III, Esq., of Memphis Tennessee, for the Respondent.
Howard Paul, Esq., of Memphis Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Memphis, Tennessee, on 24 February 1986. The original charge was filed by Division 19, District 65, United Auto Workers, AFL–CIO (the Union) on 20 September 1985 against Decor Noel, Inc. and the original complaint was issued by the Regional Director for Region 26 of the National Labor Relations Board (the Board) in this case on 13 November 1985 and alleged that Respondent Decor Noel, Inc. had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by since about 6 August 1985 failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees. On 18 December 1985 Respondent filed its answer to the complaint denying the commission of any violations of the Act and alleging that the Union did not represent a majority of the employees of Respondent. On 9 January 1986 the Regional Director amended the complaint by alleging that Creative Technology, Inc. and Decor Noel Corporation constituted a single employer within the meaning of the Act. Respondent filed its answer to this amendment on 22 January 1986 denying that Creative Technology, Inc., and Decor Noel Corporation were a single employer under the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the evidence shows, and I find that Respondent Decor Noel, Inc. is a Tennessee corporation with an office and place of business in Memphis, Tennessee, where it has been engaged in the manufacture of Christmas decorations, and that since 29 March 1985 it sold and shipped from its place of business products, goods, and materials valued in excess of $50,000 directly to points outside the State of Tennessee and that Respondent Decor Noel, Inc. is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that Division 19, District 65, United Auto Workers, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE BARGAINING UNIT

The complaint alleges, and I find on the basis of the evidence presented at the hearing, including a stipulation

[1] The findings of fact include a composite of the testimony of the witnesses, admitted exhibits and stipulated facts, and admissions made by Respondent.

entered into by the parties, that the following employees of Decor Noel Corporation and its successor Decor Noel, Inc. constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.[2]

> All maintenance and production employees employed at the Employer's Memphis, Tennessee location, excluding all office clerical employees, supervisors and guards as defined in the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The underlying facts in this case are largely undisputed. Decor Noel Corporation (DNC) had been engaged in the manufacture of Christmas tinsel products since at least 1974. Creative Technology Inc. (Creative) was wholly owned by and engaged in the manufacture of Christmas ornaments as an operating division of DNC. DNC and Creative shared common premises, provided services for each other, interchanged employees, maintained a common labor relations policy, and shared common management. I, accordingly, conclude that DNC and Creative constituted a single-integrated enterprise and a single employer within the meaning of the Act.

On 18 October 1974 Local 19, Distributive Workers of America (DWA) (Local 19) was certified as the bargaining representative of employees of DNC in the following described unit in Case 26–RC–4825:

> All maintenance and production employees employed at the Employer's Memphis, Tennessee, location, excluding all office clerical employees, supervisors and guards as defined in the Act.

Local 19 and DNC were parties to a series of collective-bargaining agreements covering the employees in the above-described unit, including an agreement that, by its terms, was effective from 18 January 1978 to 31 December 1980. In 1979 Local 19 became affiliated with the United Auto Workers (UAW), and the name of Local 19 was changed to Division 19, District 65, United Automobile Workers of America, UAW (the Union). DNC entered into a series of agreements with the Union covering the employees certified in Case 26–RC–4825, the first of which was, by its terms, effective from 5 March 1981 to 31 December 1983 and the second and most recent of which was entered into on 29 February 1984 to be effective until 31 December 1986 and thereafter to be continued from year to year unless terminated by the parties under the terms of agreement.

On 6 February 1985 DNC and Creative filed petitions for reorganization under Chapter 11 of the Bankruptcy Code and on 8 March 1985 orders were issued by the bankruptcy court authorization Citicorp Industrial Credit, Inc. (Citicorp), the primary secured creditor of DNC and Creative, to repossess and foreclose on the assets of DNC and Creative, and to seek bids for the sale of the assets. On 22 March 1985 Citicorp and Irvin Kaplan, DNC's chairman of its board of directors, entered into a purchase agreement in which Kaplan agreed to acquire substantially all the assets of DNC and Creative. The sale was approved by the bankruptcy court on 28 March 1985. On the same day (28 March 1985) DNI, Inc. was incorporated. On 29 March 1985 Kaplan sold all the assets acquired by him under the terms of the purchase agreement to Decor Noel, Inc. (Respondent) and on 29 April 1985 the name of DNI, Inc. was changed to Decor Noel, Inc. On 22 April 1985 the board of directors of DNC had adopted a resolution waiving its rights to the use of the name of Decor Noel to DNI, Inc. and supporting the action of DNI, Inc., in changing its corporate name to Decor Noel, Inc.

The record also established that the ousiness of DNC and Creative had been seasonal and that DNC and Creative had an established practice of laying off its employes in December and recalling them in February or a later month of the following year and such a layoff had occurred in December 1984. In February 1985, employees in the glass ornament department of Creative were recalled to complete an order of glass ornaments for Hallmark, a customer of DNC and Creative. DNC and Creative also recalled employees in January and February to manufacture samples for display in their New York merchandise showroom, and in January 1985 DNC had recalled warehouse employees to transfer goods from one warehouse to another. Glass ornament employee Dorothy Lee worked in the glass ornament department during January, February, and March 1985. On 7 March 1985 the debtor-in-possession of bankruptcy trustee of DNC issued checks for wages to 12 employees for completion of glass ornaments for Campbell Soup, a customer of DNC.

Respondent continued to operate at the same facility as DNC and Creative, hired Mitchell Rice from Hallmark as its president, and hired Danny Stone who had been the vice president of DNC in January 1985 as its vice president of manufacturing. It also hired Nancy Todd, a former vice president of Creative, as its vice president of manufacturing, and Billy Williams, the former traffic manager of DNC, as its vice president and retained Gene Davis, DNC's vice president of sales, in that same capacity. Bill Daniel, the former president of DNC, was asked to serve as a consultant for Respondent and, according to the testimony of Daniel, was informally designated as chairman of the board but did not act in that capacity nor was he utilized in the capacity of consultant by Respondent's new management. Stone has been terminated by Respondent at the time of the hearing. Additionally, four former supervisors of DNC were hired as supervisors of Respondent and two mechanics formerly employed by DNC were hired as supervisors of Respondent. It is undisputed that Respondent continued in the same business of DNC in the manufacture of tinsel and Creative in the manufacture of ornaments although it served fewer customers in the tinsel area and its business operated on a diminished scale. Respondent engaged in operations on a preliminary basis as early as the week ending 9 May 1985 when it started to gear up for production according to the unrebutted testimony of Stone,

[2] I find no merit to Respondent's contention that the bargaining unit should be limited to "regular full-time maintenance and production employees." See discussion of this issue infra.

which I credit. It also continued to employ production employees from May through August 1985 at the same premises and manufacturing the same products, utilizing the same equipment as had DNC and Creative. Respondent's records show that it had sales in the calendar year 1985 of which over 75 percent were made to the former customers of DNC and Creative.

It was stipulated that on 6 August 1986 Respondent received a written demand for recognition and bargaining from the Union and that Respondent did not respond to the demand. The payroll records of the week ending 11 August 1985 as designated at the hearing show that as of that week Respondent employed 94 production and maintenance employees, 57 of whom were former production and maintenance employees of DNC and Creative. Additionally, the payroll registers of Respondent and DNC and Creative showed that during the entire period from the week ending 2 June 1985 until the week ending 3 August 1985 a majority of the production and maintenance employees of Respondent were former production and maintenance employees of DNC and Creative.

Respondent made no response to the union demand for recognition. Michael Rice, Respondent's president, testified he based his decision to decline to recognize the Union because of his opinion that the "full-time permanent employees did not wish to be represented by the Union, based on conversations I had with them, and with certain administrative people who used to be members of the bargaining unit." He cited one conversation in August 1985 with employees Terry Scott (who had been promoted to supervisor from the bargaining unit in the summer of 1985) and Gary Powell in which they told him the Union had called an organizational meeting and that most of the employees had not attended. He also testified that Scott and Powell told him that the full-time employees prefered the working conditions and environment of Respondent to those of DNC. In the first week of December 1985 employee Ora Broome handed him a letter from the International Union, informing her of her nonpayment of dues and told him she was not going to pay her dues. He could cite no other specific instances of any employees allegedly expressing a lack of support for the Union. He made his decision in August 1985 not to recognize the Union based on his conversations with employees Scott and Powell and on recommendations from his line supervisors. Subsequently, after consultation with his attorney he conducted a poll of certain of the employees in February 1986 shortly before the hearing in this matter. The poll was limited to employees who were considered by him to be permanent full-time employees as opposed to temporary part-time employees although there had never been such a distinction drawn in the recognition clause of the bargaining unit of DNC and Creative. There were also no safeguards provided to assure that the person returning the ballot that was mailed to the employees was the employee to whom it was mailed. He contended at the hearing that many of the temporary part-time employees had been discharged in late 1985 prior to the time of the poll, although this was contradicted by Patricia Handy, Respondent's accounting manager and payroll clerk, who testified that the term "temporary employee" had never been used by Respondent and that no records existed in Respondent's files designating employees as "temporary employees," and that the employees had been laid off for lack of work in late 1985 and were never told that they were being discharged or that they would not be recalled. She made the determination to send the ballots only to those employees who worked 30 hours a week or more on an average as of the first month of their employment by Respondent. I credit Handy's testimony in this regard.[3]

Contentions of the Parties

The General Counsel and the Charging Party contend that Respondent is a successor of DNC and Creative and that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and, on request, bargain with the Union on behalf of the employees in the alleged appropriate unit. The Charging Party contends that a remedy of the assumption of the contract between the Union and the predecessor employers by the successor employer is appropriate. Respondent contends that the issues are whether it is a successor to DNC, whether Respondent's management entertained a good-faith doubt concerning the Union's majority status as of the date of demand, and whether the Union enjoys the support of a majority of Respondent's employees.

The General Counsel and the Charging Party contend that Respondent is a successor to previous employers DNC and Creative as demonstrated by the evidence showing that virtually no hiatus existed between the date that DNC and Creative ceased manufacturing products (January—March 1985) and the date on which Respondent began preparing materials for production (May 1985) and the initiation of full production in June 1985, noting that the employees of DNC and Creative were not informed directly by DNC or Creative of the filing of bankruptcy petitions or of any plans to cease operation of the business but rather were laid off in December 1984 for lack of work and that Respondent called experienced operators of DNC and Creative to return to work, thus demonstrating sufficient continuity in operation to establish a successor relationship, citing *C. G. Conn Ltd.*, 197 NLRB 442 (1972).

The General Counsel also contends that successorship status should be accorded to Respondent as a result of the evidence that Respondent continued to manufacture the same goods as the predecessor employer at the same location, utilized the same equipment, machinery, and manufacturing processes, maintained the same job classifications, and that employees in these job classifications performed the same work functions under essentially the same supervision and that Respondent was dependent on former customer of DNC and Creative for more than

[3] With respect to the issue of the scope of the bargaining unit raised by Respondent, I find that the express language of the unit description contains no limitation of members of the bargaining unit and the practice of the parties as described by Handy shows that no limitation was ever placed on employees that would exclude employees working less than 30 hours per week from the bargaining unit, and I conclude that all maintenance and production employees were properly includable in the bargaining unit.

three-fourths of its sales. The General Counsel also relies on records of Respondent that show that during each payroll week from the week ending 2 June 1985 to the week ending 11 August 1985 (the week in which Respondent received the Union's demand for recognition) Respondent employed as a majority of its production and maintenance employees who were former employees of DNC and Creative, citing *Eastone of Ohio*, 277 NLRB 1652 (1986).

The General Counsel further contends that Respondent's reliance on the poll taken by it in February 1986 is immaterial as the poll occurred 6 months after its initial declination of the Union's demand for recognition, citing *Pre-Engineered Building Products*, 228 NLRB 841 (1977), in which the Board held that the events occurring prior to the date of the demand for recognition are crucial in determining whether the employer has successfully rebutted the presumption of continued majority status accorded to the union and contends that Respondent's poll of its employees is immaterial to this determination as it occurred substantially after the date of the Union's demand for recognition. The General Counsel also contends that Respondent conducted its poll in an inappropriate grouping of employees and polled less than a majority in the established bargaining unit citing *Crest Floors & Plastic*, 274 NLRB 1230 (1985), and *IMS Mfg. Co.*, 278 NLRB 538 (1986), as it limited the conduct of its poll to employees who had been employed on a regular basis for more than 30 hours per week during the first month of employment and excluded those employees employed for 20 to 30 hours per week on a regular basis, and who had been laid off due to lack of work rather than discharged. The General Counsel, thus, contends that Respondent, as successor to DNC and Creative, lacked valid objective considerations for contesting majority status and that Respondent thereby failed to rebut the presumption that the Union continued to enjoy majority status, citing *Stratford Visiting Nurses Assn.*, 264 NLRB 1026 (1982).

In support of its contention that Respondent is a successor to Decor Noel Corporation and Creative, the Charging Party relies on *Great Lakes Chemical Corp.*, 280 NLRB 1131 (1986), and *Grico Corp.*, 265 NLRB 1344 (1982), which it contends concerned a situation almost identical to the instant case. The Charging Party also relies on *Golden State Habilitation Convalescent Center*, 224 NLRB 1618 (1976), in support of its contention that the various defenses raised by Respondent concerning the alleged loss of majority of the Union and good-faith doubt of Respondent of the Union's majority such as nonpayment of union dues, small participation in checkoff, and turnover among employees, did not establish a reasonable basis for Respondent to assert a good-faith doubt of the Union's majority. The Charging Party contends that Respondent should be required to remedy the unfair labor practices by assuming the collective-bargaining agreement. The Charging Party relies on article XIX, section 2, of the contract between DNC and Respondent, which provides, "This agreement shall be binding on the successors and assigns of the employer" and contends that Respondent is charged with knowledge of this provision as the employer representatives who signed the agreement are officers and management officials of Respondent.

Respondent contends the following: It is not a successor to DNC as it purchased the assets of DNC from a third party following a foreclosure on the assets of DNC by its creditor Citicorp in a bankruptcy proceeding and the subsequent sale of those assets to a third party individual pursuant to an order of the bankruptcy court for the sum of $2 million and that the third party subsequently assigned his interest in these assets to Respondent after it had received its charter from the State of Tennessee, all of which ensured that these transactions were of an arm's-length nature. It is owned by different parties, managed by different persons, and sells a greatly reduced volume of its products to a significantly smaller share of the market than did DNC. All the evidence available to management in August 1985 at the time of demand for recognition by the Union indicated a lack of union support among its employees. None of its hourly employees desire representation by the Union as shown by its poll of these employees conducted in February 1986.

Respondent, accordingly, contends in argument that the instant case is distinguishable from the case of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and its progeny including *Grico Corp.*, supra, both of which found the new employer to be a successor, as in the instant case there was a hiatus in production for resale (as opposed to isolated sample manufacturing or management of stock) of approximately 6 months; at the peak of production, on the demand date, there was barely a majority of employees and the volume of goods manufactured and sold by Respondent amounted to less than 40 percent of that manufactured and sold by Decor Noel Corporation in its last year of operation. In addition, Respondent contends that unlike *Grico Corp.*, Respondent's management was new and substantially different from that of Decor Noel Corporation. Respondent further contends that because DNC formerly served all the wholesale customers in the continental United States, it must necessarily sell to a former customer of DNC's and accordingly this criteria should not be utilized in determining successorship. Respondent relies on *Spencer Foods*, 268 NLRB 1483 (1984), revd. 768 F.2d 1463 (D.C. Cir. 1986), for its position that it should not be found a successor as the assets of Respondent constitute only a part of the assets of DNC and were purchased from a third party who had purchased the assets from a third party. It also contends that entirely new high-level management and substantially new plant supervisory personnel were hired by Respondent, that the work force of Respondent is substantially smaller than that of DNC and organized along substantially different lines, and the volume of goods sold is substantially less than that sold by DNC.

Respondent also contends that it had operated its plant for 2 months without any indication of union support, and management had been advised of the employees' lack of interest in the Union and of the Union's futile efforts to organize the new shop. It contends that in similar circumstances the Board and courts have found suffi-

cient objective circumstances to justify a good-faith doubt of majority support of the Union, citing *Houston Shopping News Co.*, 233 NLRB 105 (1977); *White Castle System*, 224 NLRB 1089 (1976); and *Landmark Trucks*, 272 NLRB 675 (1984).

Discussion

I find that Respondent is a successor of DNC and Creative as I find that it is substantially the same enterprise as DNC and Creative, and that the continuity of the business operation has been demonstrated in *C. G. Conn Ltd.*, supra, citing *Alamo White Truck Service*, 273 F.2d 238, 240 (5th Cir. 1959); and citing *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970).

As set out above the material facts of this case are largely undisputed. The crux of the differences between the parties rest on the weight to be accorded the fact as applied to the cases cited by the parties. I find the General Counsel's argument in this case compelling as supported by its cited cases, supra. I also find applicable the cases cited, supra, by the Charging Party. I find the *Spencer* case, supra, cited by Respondent does not equate with the instant case in certain of the facts, notably the length of the hiatus and other factors including the shutdown of facilities and elimination of a product line all of which make this case factually distinguishable from the instant case that involves a much shorter hiatus in operations and the continuation of both of its former product lines. Initially, I find that the evidence demonstrates that there was virtually no hiatus existing between the cessation of production between January and March 1985 and the preparation by Respondent for new production in May 1985. During this period of time several of Respondent's management officials remained on duty and sample runs of Christmas ornaments were run by calling in previously laid-off employees to operate certain of these machines. Respondent operated the same equipment and manufacturing processes in the same plant. It maintained the same job classifications, recalled its skilled employees, and although it advertised in a general circulation newspaper for unskilled employees, it hired its former unskilled employees who applied. Respondent employed as a majority of its production and maintenance employees the former employees of DNC and Creative. It is undisputed that Respondent remained in the same business and sold to the same customers as its predecessor. Although this may have been inevitable as contended by Respondent because the predecessor had previously sold to all wholesale customers in the continental United States according to the unrebutted testimony of the predecessor's former president, Daniel, these facts should not be ignored in determining whether the employing enterprise is substantially the same as its predecessors. Respondent employed the former employees of DNC and Creative as a majority of its production and maintenance employees at the time of the Union's demand for recognition. It is well settled that the date of the demand for recognition is the critical date to consider in determining whether the request for recognition could properly have been refused or ignored by Respondent. Thus, the poll conducted 6 months after the demand for recognition and the refusal by Respondent to recognize and bargain with the Union has no relevancy to the majority status of the Union at the time of the demand *Pre-Engineered Building Products*, supra.[4] Nor were the conversations of Respondent's president, Rice, with two employees or the other unspecified conversations with Respondent's employees and supervisors sufficient to raise a reasonable doubt of the Union's continued majority status. I also find that the cases cited by Respondent in support of its position that it has sufficient objective circumstances to justify good-faith doubt as to majority support of the Union are not controlling in this case as they involved substantially different fact situations from these presented in the instant case. *Houston Shopping*, supra, involved a situation in which a substantial number of the employees in the unit (12 out of a unit of 31) expressed their own sentiments against the Union and a long-term employee expressed the sentiment "that nobody back there wants the Union." In *White Castle System*, supra, 224 NLRB at 1092, the administrative law judge relied on factors other than those present in the instant case. He specifically cited the following as "valid objective considerations: only one grievance in 10 years; no union stewards; no employees on the bargaining committee; statements of union representatives in bargaining supportive of an inference that the Union lacked majority support . . . and expressions of employee dissatisfaction with the Union, communicated to Respondent by a majority of the employees." In *Landmark Truck*, the Board found that "the withdrawal of recognition was unlawful because it was predicated upon information obtained in an unlawful manner.' The information in question consisted of the receipt by the employer of resignation and revocation letters from the Union from 13 of the 18 department employees.

It should also be noted that the advent of a bankruptcy of a predecessor and the purchase of assets under court order by a third party does not bar a finding of successorship. Rather, the Board looks at all the circumstances to determine whether the employing entity is the same. *Lloyd Flanders*, 280 NLRB 1216 (1986), citing *Premium Foods v. NLRB*, 709 F.2d 623 (9th Cir. 1984). It is thus clear that under all the circumstances Respondent is a new employer conducting substantially the same business as DNC and Creative, employing the former employees of DNC and Creative as a majority of its employees, operating at the same plant and utilizing the same equipment, job classifications, and selling to substantially the same customers as DNC and Creative. Respondent is clearly a successor employer to DNC and Creative. The Union thus enjoyed the presumption of continued majority status and Respondent has failed to establish that it had a sufficient basis for a reasonable doubt of the majority status. Its refusal to recognize and bargain with the Union on its demand constitutes a violation of Section 8(a)(5) and (1) of the Act.

With respect to the Charging Party's contention that Respondent should be required to assume the collective-

[4] In view of this finding, I find it unnecessary to determine whether the poll was a valid one. However, assuming arguendo, I would find the relevancy of the poll invalid for the reasons cited by the General Counsel as outlined above.

bargaining agreement of the predecesser employer, I find that such a remedy is precluded by the *Burns* case in which the Supreme Court expressly held that a successor is not obligated to assume nor is it bound by the substantive terms of the labor agreement of its predecessor. Accordingly, I decline to recommend such a remedy.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of Respondent, as found herein in section IV, above, in connection with the business of Respondent as found in section I above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes obstructing the free flow of commerce.

On the above findings of fact, and on the entire record, I make the following

CONCLUSIONS OF LAW

1. Respondent Decor Noel, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is a successor of Decor Noel Corporation and Creative Technology, Inc.

2. Division 19, District 65, United Auto Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive collective-bargaining representative of the unit employees in the following described bargaining unit:

> All maintenance and production employees employed at the Employer's Memphis, Tennessee location, excluding all office clerical employees, supervisors and guards as defined in the Act.

3. By its refusal to recognize and bargain with the Union on demand, Respondent violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain violations of Section 8(a)(5) and (1) of the Act, it will be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purpose and policies of the Act, and to post the appropriate notice. I recommend that Respondent bargain, on request, with the Union as the collective-bargaining representative of its employees in the appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Decor Noel, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with Division 19, District 65, United Auto Workers, AFL–CIO as exclusive collective-bargaining representative of the employees in the following bargaining unit:

> All maintenance and production employees employed at the Employer's Memphis, Tennessee location, excluding all office clerical employees, supervisors and guards as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Recognize and, on request, bargain in good faith with Division 19, District 65, United Auto Workers, AFL–CIO, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) Post at its Memphis, Tennessee facility, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and, on request, bargain in good faith with Division 19, District 65, United Auto Workers, AFL–CIO as the exclusive representative of the employees in the following appropriate unit:

All maintenance and production employees employed at the Employer's Memphis, Tennessee location, excluding all office clerical employees, supervisors and guards as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with Division 19, District 65, United Auto Workers, AFL–CIO as the exclusive representative of employees in the appropriate bargaining unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed contract.

DECOR NOEL, INC.

Local Union No. 133, Laborers International Union of North America *and* A. P. Whitaker & Sons, Inc. Case 1–CP–348

7 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

Upon unfair labor practice charges filed by A. P. Whitaker & Sons, Inc. (Whitaker) on 8 March 1985, the General Counsel of the National Labor Relations Board issued a complaint on 5 April 1985, against Local Union No. 133, Laborers International Union of North America, the Respondent, alleging that the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(7)(C) of the National Labor Relations Act. Thereafter the Respondent filed a timely answer denying the commission of any unfair labor practices.

On 23 May 1986 the parties jointly moved the Board to transfer the proceeding to the Board without benefit of hearing before an administrative law judge, and submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On 7 August 1986 the Deputy Executive Secretary of the Board, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the briefs of the parties. For the reasons set forth below, the Board finds that the Respondent has violated Section 8(b)(7)(C) of the Act as alleged by the complaint.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Whitaker is a corporation engaged in the construction industry as a general contractor, with an office and place of business in Bridgewater, Massachusetts (Bridgewater facility). Whitaker annually purchases and receives at its Bridgewater facility products and materials valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. We find that Whitaker is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that the Respondent, Local Union No. 133, Laborers International Union of North America, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

On 21 January 1985[1] Whitaker began work on a construction project for the New England Telephone Company in Weymouth, Massachusetts. On 23 January the Respondent Union demanded that Whitaker recognize and bargain with it as the exclusive representative of Whitaker's employees employed as laborers at its Weymouth project. The Respondent is not currently certified as the representative of any of Whitaker's employees, and until 11 February only one employee was employed by Whitaker as a laborer at the Weymouth project. On 28 January the Respondent began picketing in furtherance of its recognitional demand. That picketing continued until 15 March, for a total of 47 days.

The Respondent filed a petition seeking to represent Whitaker's laborers at the Weymouth project on 22 February, when Whitaker employed more than one laborer at that jobsite, but the petition was not supported by a showing of interest indicating that a substantial number of employees at the Weymouth project wished to be represented by the Respondent.[2] Because no charge alleging a violation of Section 8(b)(7)(C) of the Act that would have dispensed with the necessity of a showing of interest on the part of the labor organization had been filed, and the Respondent failed to submit the showing of interest required by the Board in support of its representation petition, the Acting Regional Director dismissed the petition on 4 March. Upon the Respondent's request for review, the Board thereafter, on 30 April, affirmed the dismissal.

On 8 March, subsequent to the Acting Regional Director's dismissal of the representation petition, Whitaker filed a charge alleging that the Respondent's picketing violated Section 8(b)(7)(C) of the

[1] Unless otherwise indicated, all dates are 1985.

[2] The Board investigates any petition filed by a labor organization that alleges that a "substantial number" of employees wish to be represented by the petitioner and the petitioner desires to be certified as their representative. The Board has adopted the administrative rule, documented in its Statements of Procedure at Sec. 101.18(a), that 30 percent constitutes a "substantial number." The purpose of this requirement is to enable the Board to determine whether the filing of a petition warrants the holding of an election without the needless expenditure of Government time, efforts, and funds. *S. H. Kress & Co.*, 137 NLRB 1244, 1248 (1962). It has been the Board's administrative experience that the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.

Act. The Respondent ceased its picketing after 15 March.

B. *Contentions of the Parties*

In the complaint, the General Counsel alleges that the Respondent picketed for more than 30 days to force or require Whitaker to recognize or bargain with the Respondent as the representative of its laborer employees, notwithstanding that the Respondent is not currently certified as the representative of such employees and a question concerning the representation of such employees has not appropriately been raised under Section 9(c) of the Act. The General Counsel asserts that, although filed within 30 days of the commencement of recognitional picketing, a petition that does not raise a valid question concerning representation does not preclude the finding of a violation of Section 8(b)(7)(C) of the Act based on a charge filed following the petition's dismissal.

The Respondent argues that the clear statutory language of Section 8(b)(7)(C) directs the Board to expedite election procedures when a petition is filed within a reasonable time after the commencement of recognitional picketing, without regard to the provisions of Section 9(c)(1) or the absence of a showing of substantial interest on the part of the labor organization. Accordingly, the Respondent submits, by filing its petition within 30 days of the commencement of picketing, it satisfied the requirements of Section 8(b)(7)(C) and its recognitional picketing was protected under the Act. Alternatively, the Respondent contends that its picketing did not violate Section 8(b)(7)(C) because the time during which its election petition was pending, and the time during which only one laborer was employed at the Weymouth project, should not be counted in calculating a reasonable period not to exceed 30 days during which its recognitional picketing would be lawful.

C. *Discussion*

We agree with the General Counsel that the Respondent violated Section 8(b)(7)(C) of the Act by picketing for more than 30 days without the filing of a valid petition, under Section 9(c) of the Act, for a Board election where an object of the Respondent's picketing was to force or require Whitaker to recognize the Respondent as the representative of its employees employed as laborers at its Weymouth project jobsite. As the Board long ago noted in the seminal case of *Hod Carriers Local 840 (C. A. Blinne)*, 135 NLRB 1153 (1962), the expedited election procedure contemplated by Section 8(b)(7)(C) is applicable only in an 8(b)(7)(C) proceeding where an 8(b)(7)(C) unfair labor practice charge has been filed. "In the absence of an 8(b)(7)(C) unfair labor practice charge," the Board stated, "a union will not be enabled to obtain an expedited election by the mere device of engaging in recognition or organization picketing and filing a representation petition." *Blinne*, supra at 1157.[3] In this situation, the normal representation procedures are applicable; the showing of a substantial interest will be required, and the preelection hearing directed in Section 9(c)(1) will be held.

This approach has been incorporated in the Board's Rules and Regulations. Thus, Section 102.76 provides that when an employer has been picketed for an object proscribed by Section 8(b)(7) of the Act, a petition for the determination of a question concerning representation of the employees of that employer may be filed in accordance with the procedures under Section 9(c) of the Act, but if an 8(b)(7) charge has been filed against the labor organization that is picketing, the petition shall not be required to contain a statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a). Section 102.77(b) conditions an expedited election on the prior filing of a charge of an unfair labor practice under Section 8(b)(7)(C). (See also Board Statements of Procedure, Sec. 101.23.)

As the necessary proof that a substantial number of the employees desire to be represented by the petitioner was lacking to sustain the petition, dismissal of the petition was warranted. If an 8(b)(7) charge is filed before the petition is dismissed, then the expedited procedure is invoked, but in the present case no such charge was filed before the petition's dismissal. As the Board explained in *Blinne*, Congress did not intend to allow unions to circumvent 9(c) requirements by the mere device of engaging in picketing and filing a petition. Absent a charge that its picketing violated the law, there is no justification for allowing the Union to avail itself of the expedited election procedure and dispensing with normal showing-of-interest requirements. The proposition that the first proviso to Section 8(b)(7)(C) must be interpreted literally, rather than construed within the total context of the Act, has previously been urged and found deficient. See *Reed v. Roumell*, 185 F.Supp. 4 (D.C.E.D. Mich. 1960), discussed in *Blinne* at 1157–1158.

[3] Congress plainly did not intend such a result, the Board opined, citing Congressman Barden's statement in the Conference Report on the Labor-Management Reporting and Disclosure Act of 1959 to the effect that the expedited election proviso to Sec. 8(b)(7)(C) was not intended to be used as a device or subterfuge by a picketing union to bring about a prehearing or quickie election. (105 Daily Cong. Rec. A8062, September 4, 1959; 2 Leg. Hist. 1813). Id.

We also reject the Respondent's argument that the 11 days during which its unsupported petition was pending prior to the Regional Director's dismissal should not be counted in computing the number of days in which it engaged in recognitional picketing. The Union's petition here did not raise a question concerning representation because of the Union's failure to obtain or submit any showing of interest. The Board has held that a petition that does not raise a valid question concerning representation does not preclude the finding of a violation under Section 8(b)(7)(C). *Teamsters Local 639 (Dunbar Armored Express)*, 211 NLRB 687, 690 (1974).[4] Similarly, here, in the absence of an 8(b)(7) charge that would have triggered the expedited election procedure, a petition that may not otherwise lead to an election in no way protects a union's picketing for recognitional purposes beyond the period allowed by Section 8(b)(7)(C). Nor does it insulate the offending union from liability for its picketing in excess of that allowed by Section 8(b)(7)(C) for recognitional purposes.

Finally, we find it unnecessary to address the Respondent's additional contention based on *Vila-Barr*, supra, that the 14 days during which only one laborer was employed at the Weymouth project should not be counted against the limitation period on recognitional picketing. Since the Respondent picketed for 33 days without including that time period, that determination cannot affect the result in this case.

CONCLUSIONS OF LAW

1. A. P. Whitaker & Sons, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, Local Union No. 133, Laborers International Union of North America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing or causing to be picketed A. P. Whitaker & Sons, Inc. for more than 30 days without the filing of a valid petition, under Section 9(c) of the Act, for a Board election, and with an object of forcing or requiring the Company to recognize or bargain with the Respondent as the representative of its employees employed as laborers at its Weymouth, Massachusetts jobsite, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(b)(7)(C) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Local Union No. 133, Laborers International Union of North America, Weymouth, Massachusetts, its officers, agents, and representatives, shall

1. Cease and desist from picketing, or causing to be picketed, A. P. Whitaker & Sons, Inc., where an object thereof is forcing or requiring the Company to recognize or bargain with the Respondent as the representative of its employees employed as laborers at its Weymouth, Massachusetts jobsite, in violation of Section 8(b)(7)(C) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business office copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish the Regional Director for Region 1 signed copies of the notice for posting by A. P. Whitaker & Sons, Inc., if willing, in places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] The Board distinguished the situation in *Dunbar*, where the union was unable to obtain a Board certification because of its decision to admit both guards and nonguards to membership from the situation in *Teamsters Local 115 (Vila-Barr Co.)*, 157 NLRB 588 (1966), where the union was unable to obtain an election because the Board will not entertain an election petition for a one-man unit. In *Vila-Barr*, the Board stated, the union was disabled through no fault of its own from invoking the Board's processes, whereas in *Dunbar* the union was unable to obtain a certification because of its own voluntary choice to admit nonguard employees to membership.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT picket or cause to be picketed A. P. Whitaker & Sons, Inc., where an object thereof is forcing or requiring the Company to recognize or bargain with us as the representative of its employees employed as laborers at its Weymouth, Massachusetts jobsite, in violation of Section 8(b)(7)(C) of the Act.

LOCAL UNION NO. 133, LABORERS INTERNATIONAL UNION OF NORTH AMERICA

Local 851, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Local 295, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Northern Air Freight, Inc. Cases 29–CB–6277 and 29–CB–6278

7 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 14 January 1987 Administrative Law Judge David L. Evans issued the attached decision. The Respondents filed exceptions and a supporting brief, the Charging Party filed a brief in opposition, and the General Counsel filed a cross-exception and supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Local 851, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Local 295, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, their officers, agents, and representatives, shall take the action set forth in the Order.

[1] We deny as unnecessary the General Counsel's request for a visitatorial provision.

[2] We do not rely on the judge's finding that because the Respondents permitted the Charging Party to review the contracts, they had admitted the relevancy of the documents.

We need not decide whether the information requested is *presumptively* relevant, because the evidence here establishes the information is relevant.

Elliot J. Mandel, Esq., for the General Counsel.
Stephen H. Kahn, Esq., of New York, New York, for the Respondents.
Bonnie Glatzer and *Eric Rosenfeld, Esqs.*, of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter was tried before me on 15 September 1986 in Brooklyn, New York. On 4 April 1986 Northern Air Freight, Inc. (Northern, the Employer, or Charging Party), filed the charge in Case 29–CB–6277 against Local 851, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 851). Also on 4 April Northern filed the charge in Case 29–CB–6278 against Local 295, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 295) (collectively the Respondents). On 21 May, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing (the complaint). The complaint alleges that Respondents have refused to furnish the Employer with information necessary for the defense against grievances in violation of Section 8(b)(3) of the National Labor Relations Act (the Act). Respondents filed an answer that, as amended, admits jurisdiction but denies the commission of any unfair labor practices. On the entire record and careful consideration of the briefs filed by Respondents, the General Counsel, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Employer has been, and is, a corporation whose principal office and place of business is in Seattle, Washington. It has also maintained offices and facilities throughout New Jersey, New York, and Connecticut, including a facility at Inwood, New York, where it has been engaged in the business of providing air freight services at John F. Kennedy Airport. During the year preceding issuance of the complaint, the Employer, in the course and conduct of its New York metropolitan area operations, performed services valued in excess of $50,000, which services were the transportation of goods across state lines and, as such, is an instrumentality or link of interstate commerce. Therefore, the Employer is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Locals 851 and 295 are now, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The ultimate legal issue in this case is whether Respondents must provide photocopies (or allow photocopying) of certain documents that were requested by the Employer. The facts are not in dispute.

Northern and Local 295 were parties to a collective-bargaining agreement that was, by its terms, effective from 2 April 1984 through 31 August 1985; that agreement covered "all truckdrivers, heipers, switcher," etc., employed by Northern in the New York City area. Northern and Local 851 were parties to another collective-bargaining agreement that was, by its terms, effec-

tive from 1 November 1984 through 31 August 1985; that agreement covered Northern's office clerical employees in the New York area. Both of these agreements were drafted by completing form agreements entitled "1982–1985 Master Agreement," and were referred to by the parties as the "1982–1985 Agreements," even though they were not actually effective until 1984. Both of those agreements had "guaranteed work force" provisions that required the Employer, throughout each contract's effective period, "maintain the existing number of employees" employed at the beginning of each contract's effective term.

In July 1985 both Respondents sent Northern notices of contract termination together with a complete set of contract proposals for new agreements. The letter incorporated separate proposals, which provided:

> 2. The undersigned employer, in lieu of engaging in protracted negotiations with the Union, does hereby agree that it will accept uniform terms and conditions of employment which may hereafter be negotiated with other firms in the Air Freight Industry.
>
> . . . .
>
> 4. The Employer agrees immediately to sign to the attached copy of the [Local 295 or Local 851] Joint Grievance Settlement Board Agreement and agrees to be bound by its terms.
>
> 5. The agreement between the parties effective from September 1, 1982 to August 31, 1985 shall remain in force and effect until the execution of the succeeding agreement which shall commence on September 1, 1985.

These proposals were referred to at the hearing as "me too" proposals or agreements. The Joint Grievance Settlement Board agreements provided for a panel, which was composed of an equal number of employer and union representatives, to hear and decide disputes and further provided, in the event of a tie vote by those representatives, for binding arbitration by a named permanent umpire.

Charles Nelson, vice president of operations at Northern, testified that at a negotiation session on 29 August 1985 representatives of Respondents presented the "me too" proposals as quoted above. The representatives told Nelson that, among the organized air freight services at JFK airport, only Emery Air Freight was then negotiating for a new agreement and that Northern could sign the "me too" proposals as presented or be struck. After receiving this threat, Nelson signed the "me too" agreements with Locals 851 and 295 on behalf of Northern.[1]

By letters dated 24 December 1985 Nelson notified representatives of both Respondents: "This is to advise you that Northern Air Freight, Inc., will close our New York (JKF) office effective January 15, 1986. Let us know if you wish to discuss this."

By letters dated 16 January 1986, by their attorney, Stephen H. Kahn, both Respondents notified Nelson that

> A dispute has arisen under the terms of the 1985–1988 [sic] collective-bargaining agreement between your company and the Union. That dispute concerns your company's termination of its operations at Kennedy Airport. The Union contends that such termination violates, *inter alia*, [section numbers] of the collective-bargaining agreement, including the guaranteed work force provisions.

The letter further stated that the disputes were being simultaneously submitted to the Joint Grievance Settlement Board for resolution and that body was being asked to convene promptly to resolve the dispute. By the date of Kahn's letter, and continuing to the date of the hearing, there has been no document purporting to be the "1985–1988 collective-bargaining agreement" between Northern and either of the Unions. As will be discussed, infra, Kahn later informed Northern that the reference to the "1985–1988 collective-bargaining agreement" was an error and that Respondents were actually referring to the agreements, which expire 31 August 1985 but were extended by the "me too" agreements.

On 28 February an article appeared in the *Journal of Commerce* that recited that Local 295 and Emery Air Freight had reached a contract, which settled a long strike. By letters dated 7 March, Northern, by its Attorney Eric Rosenfeld, notified the Unions that dates previously requested by Kahn for a meeting before the Joint Grievance Settlement Board were unacceptable and proposed other dates. Rosenfeld's letters concluded: "By copy of this letter to Mr. Kahn I am requesting him to furnish me with a copy of the 1986 Emery Agreement, in advance of the hearing to be scheduled in this case."

On 8 March Kahn and Rosenfeld had a telephone conversation in which, according to Rosenfeld:

> We discussed two subjects. One, the rescheduling or the scheduling of the Joint Grievance Settlement Board proceeding and, two, at my insistence of course, the company's need to have a copy of the [Emery] agreement since I told Mr. Kahn in this conversation, and have said it more than once, [that] Northern understood that it was "me too" in regard to Emery and that's why it needed and was demanding that the Emery agreement. It needed it in advance of the arbitration of the Joint Grievance Settlement Board proceeding whenever they were going to be held in order to prepare for those hearings.

Further, according to Rosenfeld, Kahn refused to supply the agreements, citing as the reason the insistence of his clients. Kahn did not testify.

On 11 April Kahn sent Rosenfeld a draft agreement, which he proposed as a settlement of the 16 January grievances.

By letter dated 15 April Rosenfeld replied with counterproposals stating that the counterproposals assumed

> no change in guaranteed work force or other pertinent provisions of 1986 Emery Agreement. You must give us that Agreement so we can assess the

[1] There is no testimony that either 8(b)(1)B) or 8(b)(3) charges were filed over this incident.

> situation before we can either sign the settlement agreement, or, of course, proceed before the Joint Boards.

At the bottom of the letter Rosenfeld subscripted:

> I am using the term "1986 Emery Agreement" to refer to whatever agreement(s) is (are) comprehended by the term "the 1985–1988 collective bargaining agreement" in the two 1/16/86 notices of disputes, and by the term "uniform terms and conditions of employment which may hereafter may be negotiated with other firms" in the 8/29/85 "me too" agreements (par. 2) and by the term "succeeding agreement" in para. 4 [sic] of said agreements.

(As quoted above, the term "succeeding agreement" appears in par. 5, not 4, of the "me too" agreement; no issue was made of this error.)

On 29 April Rosenfeld sent another letter to Kahn, copies to members of the Joint Grievance Settlement Board, asking for a postponement of the grievance hearings pending disposition of the NLRB charges filed herein, pending suit in Federal court for injunctive relief against the Joint Board Grievance proceedings, and further

> pending Northern's timely receipt and review of all agreements negotiated by Locals 295 and 851 with Emery and other employers in the air freight industry since August 29, 1985 (the date of the "me-too" agreements between Northern and Local 295 and 851) and of all agreements comprising the "1985–1988 collective bargaining agreement" referenced in the January 16, 1986 notices of dispute.

Rosenfeld testified that several times he repeated his request for these contractual agreements to Kahn in telephone conversations. In addition, on 8 May, Rosenfeld wrote Kahn:

> In [sic] behalf of Northern Air Freight, we request, again, copies of the Emery and all other agreements negotiated by Locals 295 and/or 851 after August 29, 1985 (the date of the "me-too" agreements with Northern) "with other firms in the Air Freight industry," *and* of all agreements and/or other documents constituting "the 1985–1988 collective bargaining agreement between your company and the Union" referenced in the Local 851 and Local 295 notices of dispute dated January 16, 1986.

On 12 May Kahn replied to Rosenfeld by letter stating:

> As I advised you the last time that we met, the Unions are willing to permit your client to inspect the Airbone agreements. The Unions will not voluntarily permit inspection of other collective bargaining agreement[s]. It is the Union's position that these agreements are irrelevant both because Northern's "me-too" agreements relate to Airborne and because Northern closed its business prior to the negotiations of any master collective bargaining agreement for the 1985–1988 term.

By letter dated 19 May, Kahn further advised Rosenfeld:

> I have previously advised you that the January 16, 1986 demands for arbitration from both Locals were in error insofar as they referred to the "1985–1988 Collective Bargaining Agreement . . . ." Of course, there never was such an agreement. The Unions' claims arise under the "me-too" agreements and the 1982–1985 Collective Bargaining Agreements insofar as they were extended by the "me-too" agreements. Please correct both arbitration notices accordingly.

By letter dated 2 June, Kahn notified Rosenfeld that Respondents "will consent to the inspection of all documents which you have requested." Kahn further indicated the places where such inspections could be conducted and asked Rosenfeld to contact Kahn to set up a time for the inspections.

By letter dated 11 June Kahn reaffirmed that he was willing to arrange for inspection of the requested documents and added:

> My clients will also provide you with blank copies of the 1985–88 Master Collective Bargaining Agreement[s] for both unions. The vast majority of air freight employers under contract with Locals 295 and 851 have signed the Master without modification. Any addendum or modifications tend to reflect particular company-specific issues. Such changes from the Master Agreements are uncommon, not voluminous and not relevant to the dispute between our clients. You inspect such modifications, but the unions will not provide photocopies.

By letter dated 16 June, Attorney Bonnie Glatzer, an associate of Rosenfeld's replied to Kahn's 11 June letter accepting the offer to inspect whatever contracts Respondents would produce, but stated that she was doing so without waiving the right to make copies of the documents. On 18 June Attorney Glatzer went to the office of Local 851 where she was presented with the contracts that Union had negotiated with 10 air freight employers in the area and was further presented with a blank "1985–1988 Master Agreement" for the employers in the area. On 19 June Glatzer was presented with 130 collective-bargaining agreements and another blank "1985–1988 Master Agreement" by Local 295.

By letter dated 23 June, Glatzer notified Kahn:

> Following my review last week at the Union's offices of certain contracts with employers in the air freight industry entered into since August 20, 1985 by Local 295 and 851, I.B.T., we must again request copies of the non-printed provisions of these contracts, i.e., all side letters and/or addenda, which modify the printed 1985–1988 master agreements, as well as complete copies of all Emery contracts, side letters and addenda entered into since January 1,

1979, which together constitute the Emery agreement.

The reason for this request is that, in light of the size and complexity of these various agreements, my two-day review was inadequate for the thorough analysis of these documents needed to prepare our position for the arbitration and to evaluate the Company's and Unions' respective rights and obligations during the 1985–1988 period. Moreover, there was insufficient time to hand copy many relevant provisions, let alone discuss those provisions in confidence with my associates and our client.

As discussed in my letter to you on June 16, 1986, we stand ready and willing to provide the confidentiality assurances outlined therein.

Each "Master Agreement" consists of 12 pages of small type and 4 pages of addenda that were composed on a standard typewriter. Both contain "guaranteed work force" provision identical to those in the 1982–1985 agreements. No other 1985–1988 contracts were received by the Employer, and the precise volume of documents reviewed by Glatzer on 18 and 19 June is not in evidence.

Respondents presented no evidence. How Respondents determined that for the 1985–1988 period that Northern was "me too" to Airborne, and not Emery (or "me too" to Airborne and not any other employer in the New York area) is not suggested by the record.

B. *Analysis and Conclusions*

The complaint, paragraphs 9, 10, and 11, alleges as violations of Section 8(b)(3) of the Act:

> 9. On or about March 7, 1986, March 8, 1986, April 15, 1986 and May 8, 1986 and at all times material herein since said dates, Northern, by its attorneys, agents and representatives has requested Respondent Local 851 and Respondent Local 295, respectively, to furnish Northern with the following information:
>
> Copies of the Emery Air Freight agreement, and all other agreements with other firms in the air freight industry, negotiated by Local 295 and/or 851 after August 29, 1985, and all agreements and/or other documents constituting the 1985–88 collective bargaining agreement between the Employer and Locals 295 and 851.
>
> 10. The information requested by Northern, as described above in paragraph 9 is necessary for and relevant to Northern's ability to administer the collective bargaining agreements with Respondent Local 295 and Respondent Local 851, respectively, and to determine which collective bargaining agreements, if any, it is bound by, and to prepare its defenses to the grievances filed by Respondent Local 295 and Respondent Local 851, respectively, on January 16, 1986.
>
> 11. Since on or about March 8, 1986, Respondents have failed and refused to furnish to Northern the information requested by it, as described above in paragraphs 9 and 10.

Respondents admit the refusals to furnish copies of the specified[2] information or to allow Northern to copy it. Respondents defend their refusals to furnish copies, or permit making of copies, of the contracts on the following bases:

> The Consolidated Complaint should be dismissed because: (1) the documents are not relevant; (2) Northern has already inspected all of the documents: and (3) there has been no showing that the documents were so voluminous as to give Northern the legal right to copies of the documents. (Br. p. 2.)

Under Section 8(b)(3) of the Act the duty of labor organizations to bargain collectively, in good faith, is equal in scope to that of employers under Section 8(a)(5) of the Act. *Carpenters of Will County (Mid-America Bargaining Assn.)*, 225 NLRB 530 (1981). Specifically, a labor organization's duty to furnish relevant information is parallel to that of an employer's. *Plasterers Local 346 (Brawner Plastering)*, 273 NLRB 1143 (1984). Therefore, the first defense to be addressed is Respondents' assertion that the requested 1985–1988 collective-bargaining agreements are not relevant.

The law on the issue is plainly stated in *Westinghouse Electric Corp.*, 239 NLRB 106, 107 (1978):

> The test of the [requesting party's] need for such information is simply a showing of "probability that the desired information was relevant, and that it would be of use to the [requesting party] in carrying out its statutory duties and responsibilities.[8] The [requesting party] need not demonstrate that the information sought is certainly relevant or clearly dispositive of the basic negotiation or arbitration issues between the parties. The fact that the information is of probable or potential relevance is sufficient to give rise to an obligation on the part of [in this case, the Unions] to provide it.[9] The appropriate standard in determining the potential relevance of information sought in aid of the bargaining agent's responsibility is a liberal discovery-type standard.[10]

[8] *N.L.R.B* v. *Acme Industrial Co.*, 285 U.S. 432, 437 (1967).
[9] *The Brooklyn Union Gas Company*, 220 NLRB 189 (1975).
[10] *Acme Industrial Co.*, *supra*.

Respondents argue that because as amended by Kahn's letter of 19 May, the grievances were filed under the 1982–1985 Northern contracts, the 1985–1988 contracts with other employers are not relevant to the processing of those grievances, even under the liberal discovery provisions of the Federal Rules of Civil Procedure. The

[2] Not specified in the complaint were the Emery agreement "entered into since January 1, 1979" as additionally requested in Glatzer's letter of 23 June. Neither the relevance of the materials encompassed in the expanded request, nor the legality of Respondents' refusals to provide those materials, was litigated.

answer to this argument is that the "me too" agreements provide for retroactive application (to 1 September 1985) of the terms of the 1985–1988 agreements that were negotiated by other area employers; Respondents may argue before an arbitrator, and an arbitrator may conclude, that Northern is bound by the terms of the 1985–1988 agreements, just if it had executed agreements for that period, as it had promised to do in the "me too" agreements. The effect would be, of course, that Northern would be liable, under the guaranteed work force provisions, to make whole the employees who were employed between 1 September 1985 and, at least, the date when Northern closed its JFK terminal operations; and the "make whole" remedy would be under the terms and conditions of employment contained in the 1985–1988 agreements with the other area employers.

Respondents, in effect, have conceded the validity of this reasoning by their actions by permitting visual inspection and handcopying of the 1985–1988 agreements negotiated with other employers, the Unions necessarily were admitting that they intend to contend that Northern is to be held liable under those agreements in the grievance/arbitration process that Respondents had invoked. There could have been no other reason for presenting them for Northern's inspection on 18 and 19 June. Because this is Respondents' claim (or potential claim) in the grievance/arbitration process, they cannot simultaneously argue that Northern has no right to examine and photocopy the contracts.

Also, Respondents' production of the documents on 18 and 19 June is the answer to Respondents' second argument, that the documents need not be produced for reproduction because they have already been seen. As stated by the Third Circuit in *Communications Workers Local 1051 v. NLRB*, 644 F.2d 923 (1981), a case in which the employer had produced documents for review and handcopying, but would not allow photocopies: "[T]he Company, having provided for handcopying all of the information requested by the Union, may not now argue that it had no duty at all to disclose the requested material."

That is, rather than weigh against ordering production for copying, Respondents' production for visual inspection and note-taking by hand is further compelling evidence that production for duplication should be ordered.

I further find unpersuasive Respondents' third argument, that there has been no showing that the documents are voluminous enough to require Respondents to produce them for photocopying. In making this argument, Respondents rely on cases involving only the production of one page, *Roadway Express*, 275 NLRB 1107 (1985), or just a few pages and notes, *Abercrombie & Fitch Co.*, 206 NLRB 464 (1973). In both cases the Board noted that there was no claim of difficulty in handcopying or understanding and held that there was no necessity for production of photocopies. Here, there is such a claim of difficulty in handcopying, and, although Respondents did not produce the contracts to demonstrate just how voluminous they were, it is safe to say that the documents that were produced are quite voluminous. For example, the expiring 1982–1985 agreements each were 12 pages long; the 1985–1988 Master Agreements given to the Company on 18 and 19 June (and placed in evidence) were each 16 pages long; and it is safe to assume that the other 140 contracts furnished on 18 and 19 June are of similar length. Therefore, even without a counting of the pages of the documents, which I have not seen, I find no difficulty in concluding that there are enough of them, and that they are assuredly long enough to justify requiring Respondents to produce them for the purposes of photocopying.

Finally, although not mentioned in their brief, in their answer Respondents claim that this matter should be deferred to arbitration. Such contention was rejected in *General Dynamics Corp.*, 268 NLRB 1432 (1984), in which the Board held that it will not require the party seeking relevant information to invoke separate arbitrations, one for the purposes of production of relevant information and another for the disposition of the substance of a grievance.

Accordingly, I find and conclude that by refusing to provide photocopies, or by refusing to permit photocopying, of information relevant and necessary to the processing of grievances filed by Respondents, Respondents have violated Section 8(b)(3) of the Act.

CONCLUSIONS OF LAW

1. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

2. Northern Air Freight, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. (a) The following employees of Northern Air Freight, Inc. have at all times material constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All office clerical employees, including lead agents, dispatchers, agents, entry clerks and clerks of Northern employed in the New York metropolitan area, exclusive of all other employees, and guards, and supervisors as defined in Section 2(11) of the Act.

(b) The following employees of Northern Air Freight, Inc. have at all times material constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All truckdrivers, helpers, switchers, platform men, motor lift truck operators, mechanics, garage employees and fuelers of Northern employed in the New York metropolitan area, exclusive of all office clerical employees, and guards, and supervisors as defined in Section 2(11) of the Act.

4. At all times material to this proceeding Respondent Local 851 and Respondent Local 295 have been the exclusive representatives of the employees in the appropriate units described, in paragraphs 3(a) and (b), above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondents have violated Section 8(b)(3) of the Act by failing and refusing to supply, pursuant to de-

mands by Northern Air Freight, Inc. photocopies of information relevant, or presumptively relevant, and necessary to the processing of grievances filed on behalf of employees.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The actions of Respondents set forth in section III, above, occurring in connection with their relationship with Northern Air Freight, Inc., have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce or the free flow of commerce.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondents, Local 851, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Local 295, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Northern Air Freight, Inc. by refusing to furnish that Employer with photocopies of information relevant, or presumptively relevant, and necessary to the processing of grievances filed on behalf of its employees.

(b) Engaging in any like or related conduct in derogation of Respondent's statutory duties to bargain.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish, on request by Northern Air Freight, Inc., photocopies of Respondents' 1985–1988 contracts with other New York City area employers in the air freight industry, which information is relevant, or presumptively relevant, and necessary to the processing of grievances filed on behalf of employees. Respondents shall provide, or allow Northern Air Freight, Inc. to make, the photocopies, and shall bargain over the reasonable additional costs for furnishing the requested information, which costs shall be assumed by Northern Air Freight, Inc.

(b) Post at their business offices and meeting places copies of the attached notice marked "Appendix A" in the case of Respondent Local 851, or "Appendix B" in the case of Respondent Local 295.[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representatives, shall be posted by them for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director for Region 29 sufficient copies of the attached notice marked "Appendix A" in the case of the Respondent Local 851, or sufficient copies of the attached notice marked "Appendix B" in the case of Respondent Local 295, for posting by Northern Air Freight, Inc. if willing, in conspicuous places at the New York City area facilities, including all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively by refusing requests by Northern Air Freights, Inc. for photocopies of our 1985–1988 contracts with other New York area employers in the air freight industry, which information is relevant, or presumptively relevant, and necessary to the processing of grievances filed on behalf of employees.

WE WILL NOT engage in any like or related conduct in derogation of our statutory duty to bargain.

WE WILL furnish, on request by Northern Air Freight, Inc., photocopies of our 1985–1988 contracts with other New York area employers in the air freight industry, which information is relevant, or presumptively relevant, and necessary in the processing of grievances filed on behalf of employees; we shall provide, or allow Northern Air Freight, Inc. to make, the photocopies, and shall bargain over the reasonable additional costs for furnishing the requested information, which costs shall be assumed by Northern Air Freight, Inc.

LOCAL 851, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively by refusing requests by Northern Air Freight, Inc. for photocop-

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ies of our 1985–1988 contracts with other New York City area employers in the air freight industry, which information is relevant, or presumptively relevant, and necessary in the processing of grievances filed on behalf of employees.

WE WILL NOT engage in any like or related conduct in derogation of our statutory duty to bargain.

WE WILL furnish, on request by Northern Air Freights, Inc., photocopies of our 1985–1988 contracts with other New York City area employers in the air freight industry, which information is relevant, or presumptively relevant, and necessary in the processing of grievances filed on behalf of employees; we shall provide, or allow Northern Air Freight, Inc. to make, the photocopies, and shall bargain over the reasonable additional costs for furnishing the requested information, which costs shall be assumed by Northern Air Freight, Inc.

LOCAL 295, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Lear Siegler, Inc., d/b/a Safelite Glass *and* Glaziers, Architectural Metal & Glassworkers Union, Local Nos. 169, 718, and 1621, International Brotherhood of Painters & Allied Trades, AFL–CIO. Cases 32–CA–6566 and 32–CA–6864

11 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 12 July 1985 Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a supporting brief.

The National Labor Relations Board had delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

The judge found that the Respondent unilaterally decreased employees' hourly wages and abrogated the health and welfare, pension, and holiday and vacation provisions of the existing collective-bargaining agreements and thereafter refused to furnish the Union (sometimes referred to herein as the Locals) with employees' names, addresses, dates of hire, and wage rates, in violation of Section 8(a)(5) and (1). We agree.[3] We also agree with the judge's findings that the Respondent coercively interrogated James Poda about a grievance that the Union had filed on his behalf and threatened him with discharge in violation of Section 8(a)(1), but that it did not unlawfully interrogate employees when it attempted to obtain affidavits from them in preparation of its defense against charges in Case 32–CA–6566.[4] Further, we agree with the judge's finding that the Respondent's advising employees that they would be permanently replaced if they participated in a strike constituted a threat violative of Section 8(a)(1). For the reasons that follow, however, we reverse his finding that this threat also violated Section 8(a)(5). Similarly, we reverse the judge's finding that the Respondent's communicating its bargaining position to employees and explaining in detail its proposals constitutes unlawful direct dealing with them.

The facts of this case are fully set forth in the judge's decision. The Respondent is a glass installation company that employs 17 auto glass installers in 9 shops in northern California. These employees are represented by Locals 169, 718, and 1621. Locals 169 and 1621 are joint parties to a collective-bargaining agreement with the Respondent effective from 1 July 1982 through 30 June 1985. The collective-bargaining agreement between the Respondent and Local 718 was effective for the same term.

Pursuant to wage reopener provisions in the contracts, the Locals and the Respondent met jointly in June and July 1984[5] to negotiate wages for the final year of the contracts. During these negotiations, we have found, the Respondent insisted on modifying certain terms of the contracts, not all of which were covered by the reopener provisions, and ultimately unlawfully implemented these modifications as well as others on 18 July. Immediately

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt the judge's findings that the Respondent did not unlawfully transfer employee James Poda, solicit employees to resign from the Union, or threaten to close its facilities.

[3] In affirming the judge's conclusion that the Respondent violated Secs. 8(a)(5) and (1) and 8(d) by insisting on terms that were beyond the scope of the reopener clauses of the existing collective-bargaining agreements and thereafter instituting midterm modifications of the agreements based on its proposals, we disavow any implication that holiday and vacation deductions were nonbargainable subjects. As the evidence relating to the parties' past practice in midterm bargaining negotiations is inconclusive on this point and inasmuch as vacations and holiday deductions are included in the wage schedules appended to the contracts, contributions to those funds (i.e., deductions from employees' net wages therefor) arguably are negotiable under the wage reopener provisions. Nevertheless we agree with the judge that even if the Respondent genuinely believed that it could modify the agreement after reaching a bona fide impasse, no such impasse was possible because the Respondent additionally insisted on changing noneconomic terms of the holiday and vacation provisions. Although it did not expressly condition acceptance of its 13 June offer on a change in actual holidays, the imposition of eligibility requirements for holidays and alteration of eligibility for vacations and their length, as well as the proposal itself and the restatement of the proposal in the Respondent's 18 July telegram to the Union announcing the unilateral changes, make it clear that the noneconomic items were so integral to the remaining economic proposals as to make one contingent on the acceptance of the other.

[4] Contrary to his colleagues, Member Babson does not adopt the judge's dismissal of the allegation that the Respondent, through its attorney, violated Sec. 8(a)(1) based on the interrogation of employees for the purpose of preparing its defense to Local 1621's unfair labor practice charge. Local 1621's charge alleged that the Respondent engaged in direct dealing in certain meetings with employees in violation of Sec. 8(a)(5) and (1). The judge concluded that *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), applies only to situations where an employer interrogates employees about matters involving their Sec. 7 rights and that the questions here, concerning what statements were made by the Respondent's representatives and its attorney at the previous meetings, did not pertain to the employees' involvement in conduct protected by Sec. 7. In Member Babson's view, such a reading of *Johnnie's Poultry* may be unduly restrictive, particularly in light of the circumstances of this case. Before passing on this issue, however, Member Babson would remand this portion of the case to the judge to resolve the conflicts in testimony whether the Respondent's attorney, in fact, provided adequate safeguards to the employees.

[5] Unless otherwise stated all dates are in 1984.

following the 13 and 23 June negotiation sessions, the Respondent's chief negotiator and attorney, William Haynes, Vice President of Industrial Relations Robert Courtney, and Division Manager Kenneth Anderson conducted group meetings at the shops. At these meetings Courtney told employees about the status of negotiations, outlined the features of the Respondent's 13 June proposal in detail, and told employees it had three options: (1) continuing operations and losing money; (2) closing; or (3) operating profitably under its proposals. In setting forth these options, Courtney told employees that while the Union had not stated its intent to strike, it could do so under the terms of the collective-bargaining agreements. He explained that in the event of a strike, the Respondent would permanently replace strikers and that the Union could fine employees who refused to strike. In response to questions, Courtney promised to provide employees with sample language they could use in letters resigning from the Union and subsequently did so.[6]

The judge found that by outlining proposals to the employees that were beyond the scope of the reopener provisions, with a view toward unilaterally implementing them, the Respondent engaged in direct dealing with the employees in contravention of Section 8(a)(5). In this connection, the judge reasoned that because of the Respondent's unlawful conduct both at the bargaining table and away from it, any strike called as a result of the parties' failure to reach an agreement would be an unfair labor practice strike rather than an economic one, and he found that the Respondent independently violated Section 8(a)(1) of the Act by threatening employees that they would be permanently replaced. He found that this threat also violated Section 8(a)(5) inasmuch as it was "part and parcel" of the Respondent's direct dealing with the employees. We find merit in the Respondent's exception that it was privileged to communicate its bargaining position to the employees, and we reverse the judge's finding that it thereby violated Section 8(a)(5). Additionally, although we affirm the judge's finding that the Respondent's striker replacement statement runs afoul of Section 8(a)(1) as it constitutes a threat permanently to replace unfair labor practice strikers, we reverse his finding that the statement violates Section 8(a)(5).

[6] The judge found that option 2 was a viable prediction in view of the Respondent's financial condition and not an unlawful threat. The judge also found that because the sample resignation letters it distributed to employees made it clear that resigning from membership was their choice, the Respondent did not unlawfully solicit employees to resign. As noted at fn. 2, above, we have adopted these findings in the absence of exceptions.

In analyzing the Respondent's conduct, the judge distinguished *United Technologies Corp.*, 274 NLRB 609 (1985), and 274 NLRB 1069 (1985). In the latter decision the Board stated (274 NLRB at 1074):

> In our view, an employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations. . . . [W]e believe that free and open discussion by all parties to the collective-bargaining process affords the best chance for successful conclusion of negotiations and creates the most favorable climate for successful bargaining. Indeed, employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties' positions as to those issues. We believe employees are fully capable of evaluating the relative merits of those positions for themselves. As in *United Technologies* (274 NLRB 609) there is nothing in the Respondent's communications here which indicates an effort by the Respondent to bargain directly with the employees or an invitation to them to abandon their representative to achieve better terms directly from the Respondent. Indeed, all the Respondent's substantive proposals were submitted to the Union prior to their disclosure to the employees.

The same is true in the instant case. The Respondent had a right to communicate its position to the employees. That the proposals were beyond the scope of the reopener provisions does not, without more, compel a different finding. Though not within the purview of the reopeners, the Respondent did submit its proposals to the Locals before disclosing them to the employees. The Respondent's disclosure of its bargaining position to the employees occurred before it unlawfully insisted on and implemented its proposals. The evidence does not establish that communication with the employees was tactically part of an unlawful bargaining strategy.[7] Further, it has been found that the Re-

[7] In this regard, the Respondent's conduct is distinguishable from that found unlawful in *General Electric Co.*, 150 NLRB 192 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), in which the employer's absolute intransigence at the bargaining table, i.e., its fixed "take it or leave it" position throughout negotiations, permeated its communications to employees, and *Fitzgerald Mills Corp.*, 133 NLRB 877 (1961), enfd. 313 F.2d 260 (2d Cir. 1963), in which the employer's entering negotiations with no intent to reach an agreement was found to have infused its communications to employees with unlawfulness. See also *Generac Corp.*, 149 NLRB 980, 988 (1964), in which the employer engaged in numerous instances of 8(a)(5) conduct including direct dealing, all of which were found to constitute an unlawful refusal to bargain.

spondent did not attempt to undermine the Locals by soliciting employees to resign from the Union. Hence, there is no evidence that the Respondent bypassed the Union and dealt directly with the employees. Inasmuch as the Respondent's telling employees they would be replaced in the event of a strike was not a function of any unlawful direct dealing with them, we find that the admonition did not independently violate Section 8(a)(5).

Having found that the Respondent did not bypass the Union and deal directly with the employees or threaten them with replacement in violation of Section 8(a)(5), we shall modify the judge's recommended Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lear Siegler, Inc., d/b/a Safelite Glass, San Mateo, San Francisco, Richmond, Oakland, San Jose, Pleasant Hill, San Leandro, Hayward, and Fremont, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(e).

"(e) Threatening to permanently replace employees if they support a strike caused by the Respondent's insistence that the Unions accept nonbargainable items as a part of the Respondent's contract proposal."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Glaziers, Architectural Metal & Glassworkers Union, Local Nos. 169, 718, and 1621, International Brotherhood of Painters & Allied Trades, AFL-CIO, by refusing to furnish the Unions with names, addresses, dates of hire, and wage rates of our employees in the appropriate bargaining units as follows:

(i) All our employees, excluding supervisors as defined in the Act, employed in the job classifications covered by our contract with Local Unions 169 and 1621 effective from 1 July 1982 to 30 June 1985, and who are employed at our facilities located in California in the cities of Richmond, Oakland, San Jose, Pleasant Hill, San Leandro, Hayward and Fremont.

(ii) All our employees, excluding supervisors as defined in the Act, employed in the job classifications covered by our contract with Local Union 718 effective from 1 July 1982 to 30 June 1985, and who are employed at our San Mateo, California and San Francisco, California facilities.

WE WILL NOT refuse to bargain with the above-named Unions by unilaterally ceasing to make contributions on behalf of our unit employees to the health and welfare, pension, and holiday and vacation funds as provided for in our collective-bargaining contracts with the Unions, which were effective 1 July 1982 to 30 June 1985, during the term of those contracts.

WE WILL NOT refuse to bargain with the above-named Unions by unilaterally instituting during the term of our contracts with the Unions our own health and welfare and pension plans for the plans provided for in our contracts with the Unions with respect to our unit employees.

WE WILL NOT refuse to bargain collectively with the above-named Unions by unilaterally during the term of our contracts with the Unions decreasing the vacation and holiday benefits and wage rates established by our contracts with the Unions with respect to unit employees.

WE WILL NOT threaten to permanently replace employees if they support a strike caused by our insistence that the Unions accept nonbargainable items as part of our contract proposal.

WE WILL NOT interrogate our employees about grievances they file against us with the above-named Unions and WE WILL NOT threaten our employees with discharge for filing such grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on written request of the above-named Unions, furnish the Unions with the names, addresses, dates of hire, and wage rates of our unit employees.

WE WILL, on written request of the above-named Unions, restore making payments on behalf of the unit employees to the health and welfare, pension, and vacation and holiday funds established by our contracts with the Unions effective 1 July 1982 to 30 June 1985.

WE WILL, on written request of the above-named Unions, restore the holiday and vacation

benefits and wage rates of the unit employees so as to conform to the provisions contained in our contracts with the Unions effective 1 July 1982 to 30 June 1985.

WE WILL, on written request of the above-named Unions, rescind the health and welfare and pension plans that we instituted in July 1984 and reestablish the health and welfare and pension plans that were in existence under our contracts with the Unions effective 1 July 1982 to 30 June 1985.

WE WILL make whole the employees in the above-described units by making the contributions to the health and welfare, pension, and vacation and holdiay funds, as provided in the above-described applicable collective-bargaining agreements, which were not paid and which would have been paid absent our unilateral discontinuance of such contributions during the term of the agreements, and by reimbursing the unit employees for any expenses ensuing from our failure to make such contributions, with interest.

WE WILL make whole the employees in the above-described units for any losses or expenses they may have suffered as a result of our unilateral conduct during the term of our contracts with the above-named Unions in decreasing the employees' holiday and vacation benefits, decreasing their wages, and substituting our own health and welfare and pension plans for the plans established by the Unions' contracts, with interest.

LEAR SIEGLER, INC., D/B/A SAFELITE GLASS

William O'Connor and *Rony Clements, Esqs.*, for the General Counsel.
William Haynes, Esq. (Edison, Lewis, Porter & Haynes), for the Respondent.
Robert Jesinger and *Kathryn Sure, Esqs. (Wylie, Blunt, McBridge & Jesinger)*, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This consolidated proceeding in which a hearing was held 12 through 14 March 1985 is based on unfair labor practice charges filed against Lear Siegler, Inc., d/b/a Safelite Glass (the Respondent), by the Unions named in the case caption (collectively called the Unions and separately called Locals 169, 718, and 1621),[1] and a consolidated amended complaint issued 26 February 1985 against Respondent, by the Regional Director for Region 32 of the National Labor Relations Board, on behalf of the Board's General Counsel, alleging that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

More specifically the amended consolidated complaint alleges in substance that Respondent violated the Act, as follows: Section 8(a)(1) by interrogating employee Poda about a grievance filed against Respondent on his behalf by Local 718 and threatening him with discharge and other unspecified reprisals because of the filing of the grievance, and by coercively interrogating employees in connection with preparing its defense to the unfair labor practice charges in this proceeding; Section 8(a)(1) and (3) by transferring employee Poda from one facility to another because of his union or other protected concerted activities; Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of employees represented by the Unions during the term of existing collective-bargaining agreements, by dealing directly with employees represented by the Unions, by engaging in conduct calculated to undermine the employees' support of the Unions, and by refusing to furnish to the Unions certain requested information needed by the Unions to perform their duties as the employees' collective-bargaining representative. Respondent filed an answer denying the commission of the alleged unfair labor practices.[2]

On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Changes in Employees' Terms and Conditions of Employment*

1. The evidence

Respondent is a corporation whose headquarters are in Wichita, Kansas. Its sells and installs automobile glass throughout the United States. The facilities involved in this case are its nine northern California shops: Richmond, Oakland, San Jose, San Mateo, San Francisco, Pleasant Hill, San Leandro, Hayward, and Fremont. During the time material these shops employed approximately 17 auto glass installers. Before 1 July 1982 these auto glass installers were covered by a collective-bargaining agreement between the Unions and an employer association, the Glass Management Association, effective from 1 July 1979 to 30 June 1982. This agreement encompassed a multiemployer bargaining unit comprised of

[1] The charge in Case 32-CA-6566 was filed 21 June 1984 by Local 1621 and amended charges in that case were filed by Locals 1621 and 718 on 12 July 1984 and by the Unions on 18 July 1984. On 25 October 1984 the Unions filed the charge in Case 32-CA-6864.

[2] In its answer Respondent admits that it meets one of the Board's applicable discretionary jurisdictional standards and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Also in its answer Respondent admits that the Unions are labor organizations within the meaning of Sec. 2(5) of the Act.

Respondent and the other employers who were members of the Glass Management Association. Respondent withdrew timely from this unit prior to the expiration of the 1979–1982 Association agreement. Subsequently, it negotiated successor contracts on a single employer basis with Local 718, and with Locals 169 and 1621. The contract with Local 718 covered Respondent's San Mateo and San Francisco shops, and the contract with Locals 169 and 1621 covered its remaining seven shops in northern California.[3] Each of these contracts were for 3 years' duration, effective from 1 July 1982 to 30 June 1985. Each contained a grievance procedure ending in binding impartial arbitration.

The pertinent provisions of the the 1982–1985 contract between Respondent and Locals 169 and 1621 covering Respondent's auto glass installers are as follows. The contract contains health and welfare, pension, vacation, and holiday benefits for the covered employees, including specified health and welfare and pension plans. Pursuant to the contract's terms, Respondent agreed to pay $1.60 an hour for each employee to the contractual trust funds to finance the employees' health and welfare benefits, and $2.53 an hour to finance the employees' pension benefits. Also Respondent agreed to pay 4 cents an hour to finance an industry promotional fund. Regarding vacation and holiday benefits, Respondent agreed to deduct $1.97 an hour from employees' net hourly pay and transmit these moneys to a vacation and holiday fund. The contract provides that employees are entitled to seven holidays a year and if they work 40 weeks a year they are entitled to 3 weeks' vacation. Respondent did not pay the employees for the aforesaid holiday and vacation benefits. Rather, the money Respondent was required to deduct from their wages for the vacation and holiday fund was paid to the employees by the fund twice yearly. Regarding the employees' union dues, the contract provides for Respondent to deduct 30 cents an hour from an employee's net pay and transmit this money either to the Unions or to an agent designated by the Unions.

Regarding employees' wages, the section of Respondent's 1982–1985 contract with Locals 169 and 1621 entitled, "Wages for Auto Glass Mechanics"[4] reads as follows:

> (i) Hourly Wage Rates
>
> The minimum straight time hourly rate of wages for Auto Glass Mechanics shall be as follows:
>
> Effective 1 July 1982—$15.17
>
> Total Package 1 July 1982—$19.34[5]
>
> (ii) Effective 1 October 1982 there will be a fifty cent (.50 cent) an hour increase to the total package to be distributed as the Union determines.
>
> (iii) Effective 1 May 1983 it is agreed that the Union and [Respondent] shall meet to determine the wage increase for the remaining two (2) years of this Agreement.
>
> (iv) It will not be a violation of Article 35, Work Stoppage, if the union strikes or the Employer locks out because there has been no agreement of the amount of wage increase for the following two years.

Continuing, the section of the contract dealing with wages contains a subsection entitled, "Transfer of Money from Wages to Benefit Funds" that reads as follows:

> During the term of this Agreement the Union may request in writing an increase in the contributions required by the Employers to the Group Health and Welfare Plan, Pension Plan . . . and a corresponding reduction in the minimum hourly wage rates set forth in Section A. Such request shall be made in writing 30 days prior to the proposed effective date requested by the Union. As of such date the hourly minimum wage rates set forth in section A of this Article shall be reduced in an amount equal to the increase required of individual Employers to the particular benefit fund or funds.
>
> Any increase in the required contribution by the Employers to the particular benefit fund or funds and the corresponding reduction in the minimum hourly wage rate shall be set forth in a Memorandum of Understanding by the Employer and Union.

The Locals 169 and 1621 contract also contains a "Supplementary Understanding" agreed to by the parties that provides:

> 1. The Employer and the Union have today executed a Collective Bargaining Agreement effective 1 July 1982 and extending through 30 June 1985. The parties agreed that because of the extended period covered by this Agreement conditions may change within the industry, and that it maybe desirable to both parties to institute changes in the Agreement that will reflect a recognition of the differing conditions. Rather than delay action until the expiration of the contract, the parties have agreed that discussion and negotiation may be carried out through the medium of the Joint Conference Committee set up under the Collective Bargaining Agreement between Glass Management Association and the Union.
>
> 2. Any additions or amendments to the Collective Bargaining Agreement agreed to by the Joint Conference Committee pursuant to said discussions and negotiations shall become a part of the Collective Bargaining Agreement, provided, however, that any such additions or amendments must be ratified by both the members of the Employers and the Union, in accordance with the rules of the Employer and the Union.
>
> 3. In the event the members of the Joint Conference Committee cannot reach agreement on proposed additions or amendments pursuant to the dis-

[3] The record reveals that Respondent's San Mateo and San Francisco shops are within the territorial jurisdiction of Local 718 and the remaining seven shops are within the territorial jurisdictions of either Locals 169 or 1621.

[4] The contract refers to the auto glass installers as auto glass mechanics.

[5] The reference to "Total Package" refers to the $15.17 net wage, the $1.60-an-hour contribution for the health and welfare benefits, the $2.53 contribution for the pension benefits, and the 4-cent contribution to the industry trust fund.

cussions and negotiations provided herein or in the event of lack of ratification by either side, such disagreement shall not be subject to arbitration under Article 37.

The pertinent provisions of Respondent's contract with Local 718 covering Respondent's auto glass installers are the same as the above-described provisions in the Locals 169 and 1621 contract, except as follows. In that portion of the Local 718 contract dealing with "Wages For Auto Glass Mechanics" the parties agreed that effective 16 October 1982 the employees' net wages would be increased from $15.17 to $15.45 per hour and Respondent's pension contributions would be increased from $2.53 to $2.75 an hour and that Respondent would deduct for the vacation and holiday fund $2 an hour from an employee's net pay rather than $1.97, and deduct for union dues 31 cents an hour rather than 30 cents. In other words, the Local 178 agreement, like the Locals 169 and 1621 agreement, called for an increase of 50 cents an hour in the total package effective October 1982, but the parties agreed to distribute the 50-cent increase (28 cents to wages and 22 cents to pension benefits) at the time the contract was negotiated. Under the Locals 169 and 1621 contract, the Unions distributed the 50-cent-an-hour increase by raising net wages from $15.17 to $15.61 an hour and raising pension contributions from $2.53 to $2.59 an hour. The other pertinent difference between the Locals 169 and 1621 contract and the Local 178 contract is that whereas the Locals 169 and 1621 contract provided that effective 1 May 1983 the parties would meet to determine "the wage increase for the remaining 2 years of this Agreement," the Local 178 contract provided that: "1 July 1983 . . . Wages to be Negotiated" and "1 July 1984 . . . Wages to be Negotiated."

The 1979–1982 Glass Management Association contract, to which Respondent and the Unions were previously bound, did not include a wage reopener provision. This contract provided for wage increases at 6-month intervals during the term of the contract, based on an increase in the cost of living. The formula for these pay raises was contained in the contract. The Unions, pursuant to this formula, determined the amount of the increase that was due to the covered employees. It is undisputed that the Unions, without bargaining with the employers, covered by the Association contract, allotted part of these cost-of-living increases to the employers' contractual health and welfare and pension benefit contributions.

The Local 718 contract effective 1 July 1982 to 30 June 1985 was negotiated by the parties separate and apart from the negotiations between Respondent and Locals 169 and 1621, which resulted in the Locals 169 and 1621 contract of the same duration. However, the negotiation meetings on 3 and 29 June 1983, described in detail infra, held pursuant to the wage reopener provisions of those contracts, was conducted jointly. The representatives of all three Local Unions met together jointly with Respondent's representatives. The business manager of Local 1621, William Brown, acted as the Unions' spokesperson.

On 3 June 1983 representatives from all three Unions met with Robert Courtney, the Respondent's vice president of industrial relations, and Ken Anderson, Respondent's division manager. After informing Courtney and Anderson that the Unions were negotiating together and that Brown was the chairman and Carl Dahl of Local 718 was the secretary of the Unions' negotiating committee, Brown stated that they were there to negotiate for a total package only and that the Unions would decide how this package was divided. Brown also stated that, as set forth in the Local 718 agreement, they were there to negotiate for 1 year only and would meet again in 1984 to negotiate for that year. Respondent's negotiators agreed to this. Brown proposed that effective 1 July 1983 the total package for Respondent's auto glass installers be increased by 99 cents an hour to $20.83 and that 24 cents of this amount be used for health and welfare. Courtney replied that this was not acceptable because, among other things, since January 1983 Respondent had lost over $200,000 doing business in the area mainly because of high labor costs. The parties agreed to meet 29 June 1983, at which time Courtney stated Respondent would have its proposal for the Unions. Before leaving there was a brief discussion initiated by Courtney or Anderson concerning a staggered workweek. During this discussion, Brown pointed out to the Company's negotiators that "at this time we [are] only talking wages for the three local unions."[6]

On 29 June 1983, when the negotiations resumed, Respondent offered to increase the contractual total package by 24 cents an hour, an amount sufficient to cover the increase that Brown had previously stated the Unions needed for Respondent's contractual health and welfare contributions. The Unions' negotiators rejected this offer and countered with an offer of 70 cents a hour, 29 cents lower than their previous offer. Respondent's negotiators then raised their offer from 24 to 44 cents an hour, and before the meeting ended the parties agreed on a 50-cent-an-hour increase in the total package.

On approximately 1 July 1983 Local 718, in writing, notified Respondent that effective 1 July 1983 the contractual wage schedule for the employees covered by the Local 718 contract would be as follows: net wages—$15.71; H & W—$1.84; pension—$2.65; IBPAT pension—10 cents; industry fund—4 cents; total—$20.34. When this wage schedule is compared with the one in effect since October 1982, it reveals that Local 718 used the 50-cent-an-hour increase in the total package that it received from Respondent at the 29 June 1983 negotiation meeting to raise the net wage of an employee by 26 cents an hour, and to raise the Respondent's health and welfare contributions by 24 cents an hour.

[6] The description of what occurred during the 3 June negotiation meeting is based on the Unions' minutes of this meeting, introduced into evidence by Respondent without objection, and Brown's and Courtney's testimony. The only conflict between Brown's and Courtney's testimony is Courtney's testimony that when Brown proposed increasing the total package by 99 cents, Brown stated 24 cents of this increase would be for health and welfare, whereas Brown testified that without stating any specific amount he told Respondent's negotiators that a portion of the 99 cents would be allotted by the Unions to health and welfare. I have credited Courtney's testimony in this respect.

Likewise, on approximately 1 July 1983 Locals 169 and 1621, in writing, notified Respondent that effective 1 July 1983 the contractual wage schedule for the auto glass installers covered by Locals 169 and 1621 contract would be as follows: net wage—$15.84; H & W—$1.84; pension—$2.37; IBPAT pension—$25 cents; industry fund—4 cents; total—$20.34. When this wage schedule is compared to the one in effect since October 1982 it reveals that Locals 169 and 1621 used the 50-cent-an-hour increase in the total package that they received from Respondent at the 29 June 1983 negotiating meeting, to raise employees' net wages by 23 cents an hour, the Respondent's health and welfare contributions by 24 cents an hour, and the Respondent's pension contributions by 3 cents an hour.

On 16 April 1984 William Brown, Local 1621's business manager, wrote Robert Courtney, Respondent's vice president of industrial relations, as follows:

> This is to advise you that pursuant to Article 16 Section A (iv) of the current Bargaining Agreement in effect between you and the undersigned Union, this letter shall serve as a written notice to you, from the undersigned Union of its request to negotiate an amendment to said Collective Bargaining Agreement in order to determine the wage increase for the remaining year of the Agreement.
>
> This letter will further serve as notice that in the event agreement is not reached to modify the Agreement by midnight 30 June 1984, the Union may exercise its rights under Article 16 Section A (v) of the Agreement unless both parties mutually agree to extend the negotiations because of progress in good faith negotiations.
>
> It is the desire of the Local to enter into negotiations per Article 16, before the date of 3 June 1984 and hopefully reach an amicable settlement.

In response to Brown's 16 April 1984 letter, Courtney on 14 May 1984 wrote identical letters to Brown and to A. F. Sanzo, the business manager of Local 169, which read as follows:

> This is to acknowledge receipt of your letter dated 16 April 1984, advising that prusuant to Article 16, Section A (IV) of the current bargaining agreement in effect between your local union and Safelite, you are giving notice to negotiate an amendment to said collective bargaining agreement.
>
> It is understood that the notice to reopen the agreement includes wages as well as fringe benefits which are also a part of the wage package.
>
> We will be available to meet with you at a mutually agreeable place, date and time. Please contact me at your earliest convenience so that arrangements may be made for our first meeting.

In late May 1984 or early June 1984 Courtney telephoned Brown and asked that they schedule a negotiation meeting. Courtney also suggested that the three Local Unions negotiate with Respondent jointly in the same manner as during the June 1983 reopener negotiations and asked if Brown intended to act as the spokesperson for the three Local Unions during the 1984 reopener negotiations. Brown stated that he would be acting as the spokesperson for each of the three Local Unions and agreed with Courtney to commence these negotiations on 13 June 1984. As a matter of fact the negotiation meetings held during June and July 1984, described in detail infra, were conducted jointly. The representatives of all three Local Unions met jointly with Respondent's representatives. Brown acted as the spokesperson for the Unions during the negotiations.

On 13 June 1984 the first negotiation session took place. It lasted approximately 1-1/2 hours. There were two representatives present for each of the three Local Unions. Brown acted as spokesperson for the negotiation committee and Russell Young of Local 718 acted as secretary for the negotiation committee and took notes of the meeting. Present for Respondent were Division Manager Anderson, Vice President of Industrial Relations Courtney, and Respondent's lawyer, William Haynes. Haynes was the spokesperson for Respondent's negotiating committee.

The meeting began with Brown, in response to Haynes' request that the Local Unions present a proposal, stating that "economic issues are open" and proposing a 5.5-percent increase in wages that was equivalent to a $1.12-an-hour increase for the auto glass installers. Brown stated that included in this increase was approximately 20 to 30 cents an hour in increased employer contributions to the contractual health and welfare fund that was needed to maintain the current benefits provided by the current medical plan. Haynes rejected this proposal. He stated that due to the Company's financial condition they were there to ask the Unions to "hold the line" on wages. He also objected to the construction industry-type of fringe benefits that the employees were receiving, and stated that Respondent wanted to pay vacation and holiday pay directly to the employees, rather than to a vacation and holiday fund as required by the contract. Brown responded by stating, "We're open for wages only" and told Haynes the payment of vacation and holiday pay was separate from wages and the Unions were there to negotiate a "dollar amount" and not any contractual language. Haynes stated Respondent wanted to discuss vacations and holidays. He explained Respondent was not in the construction industry and, unlike an employer in the construction industry, its employees were employed on a permanent basis, rather than on a transient basis, thus the contracts' vacation and holiday provisions were not appropriate for Respondent's operation.

After the Unions' negotiating committee caucused, Brown informed Haynes, "We're open for economic issues only," but pointed out that under the section of the contracts entitled, "Supplementary Understanding," the Unions were willing to discuss anything and would be happy to schedule such meetings with Haynes. Haynes stated that Respondent was losing money and needed some kind of relief and, in particular, needed a new agreement that related to the service industry rather than the construction industry. In this regard, Haynes stated that Respondent wanted to pay the vacation and holiday pay directly to the employees rather than into a

fund. Brown stated that the Unions' negotiating committee was not prepared to discuss this subject and pointed out that as far back as 1978 Local 1621 had offered Respondent a service agreement that Respondent rejected. Brown stated that the Unions' negotiating committee was "not here to throw out Appendix C of the Agreement," i.e., referring to the appendix contained in the Unions' current contracts with Respondent that covers the auto glass installers. After a brief discussion of why the Unions' contracts contained the present holiday and vacation pay provisions and why Respondent was opposed to those provisions, Brown asked Haynes for Respondent's contract proposal. Haynes presented Respondent's contract proposal, which was as follows: seven paid holidays, one of which was the employees' employment anniversary instead of Washington's Birthday as in the current contracts, with eligibility determined by working the workday before and after the holiday; 2 weeks of paid vacation after 1 year of employment and 3 weeks after 10 years, with eligibility determined by working at least 1800 hours during the 12 months prior to the employee's anniversary date; the elimination of the present holiday and vacation fund with Respondent paying the employees' holiday and vacation benefits directly to the employees; the elimination of the Unions' pension and medical plans that would be replaced by the Respondent's pension and medical plans; the elimination of the Respondent's contributions to the industry fund; and auto glass installers to be paid an hourly rate of $15.[7]

On receipt of Respondent's proposal, the Unions' negotiating committee caucused and, after the caucus, Brown told Haynes that the Company's proposal had taken the Unions by surprise and stated, "We feel that we are willing to discuss anything you want excepting the change of the fringe package. If you feel that this was the problem, why did you wait until [this date] to discuss your difficulties?" Haynes stated that Respondent was having financial difficulties and that there was no way that it could afford the 5.5-percent increase the Unions were proposing and that it needed a reduction in the total package. The meeting then ended with the parties agreeing to meet again on 21 and 26 June 1984.[8]

The next negotiation session, which was held 26 June 1984, lasted approximately 1-1/2 hours.[9] Haynes began the meeting by asking whether Brown had received a copy of the Company's pension and medical plans that Respondent had mailed to him. Brown acknowledged receipt of these plans, but stated that he had not read them because the Unions were present "to open the agreement for wages only." He also stated that if Respondent wanted to discuss other things, they would meet with Respondent at another time to discuss those other items. Haynes replied that the Unions' proposal included an increase not just in wages, but in other economic items. Brown stated that the Unions' contracts with Respondent by their terms stated that they were only open for wages. Haynes repeated that the Unions were proposing something other than simply a raise in pay. Brown responded by stating, "no we're not . . . when we negotiate, it's for the entire wage package." After more argument about the purpose of the negotiations, Haynes pointed out to Brown that the Unions had not as yet responded to Respondent's 13 June proposal. Brown replied, "We're here to talk money only," whereupon, Respondent's negotiating committee caucused.

After the caucus, Haynes presented what he called an "Alternative Proposal," which provided for the elimination of the industry trust fund, the continuation of the current health and welfare, and pension and holiday and vacation benefits and for seven paid holidays and 2 weeks' vacation after 1 year employment and 3 weeks after 10 years and further provided for a total package of $16.95 an hour to be apportioned as follows: $15 an hour for wages; 58 cents an hour for Respondent's contribution to the holiday and vacation fund for vacations; and 40 cents an hour to the holiday and vacation fund for holidays; 53 cents an hour for the Respondent's contribution to the health and welfare fund; and 44 cents an hour for the Respondent's contribution to the pension fund.

On receipt of the "Alternative Proposal" the Unions' negotiating committee caucused. When the negotiations resumed, Brown stated to Haynes, "First of all, we want to make it very clear that we are not discussing language" and made a counteroffer of a 5-percent increase in the total wage package, which was equivalent to $1.02 an hour for the auto glass installers. Brown also told Haynes that the manner in which the Unions distributed this $1.02-an-hour increase was not bargainable as it was a matter for the Unions to unilaterally determine. Haynes stated that Respondent wanted to determine how the $1.02 was apportioned. Brown stated that the Unions' position was consistent with what had been done in the past. Haynes at this point stated, "We seem to agree to disagree" and that there did not seem to be anything left to discuss. Brown suggested that the parties leave their telephone lines open so they could communicate in case there was any change in the parties' bargaining position.

The negotiating committees then caucused and, when the negotiations resumed, Haynes stated to Brown that in an effort to show Respondent's good faith that even

[7] I note that the current net wage in the Local 718 contract was $15.71 an hour and in the Locals 169 and 1621 contract was $15.84 an hour. I also note that $2.04 an hour was being deducted for vacation and holiday benefits under the Local 718 contract and $2.05 an hour under the Locals 169 and 162' contract, whereas under the Respondent's proposal these moneys would no longer be deducted from the employees' pay and Respondent would pay the holiday and vacation benefits directly to the employees.

[8] The above description of the 13 June negotiation meeting is based on the minutes of the meeting taken by the secretary of the Unions' negotiating committee. These minutes, which were introduced into evidence by Respondent without objection by the other parties, were submitted to Respondent's negotiation committee by the Unions' negotiation committee at the outset of the next negotiation meeting held 26 June 1984 and accepted by Respondent's negotiators without change. The minutes, taken contemporaneously with the negotiation meeting, are more reliable evidence of what took place at this meeting than either Brown's or Courtney's testimony presented 9 months after the meeting. Accordingly, in describing what took place at this meeting, I have supplemented the account set forth in the Unions' minutes with Courtney's and Brown's testimony, only in those instances when I felt that their testimony was consistent with what was contained in the minutes.

[9] The negotiation session scheduled for 21 June 1984 was canceled by the Unions.

though Respondent had an economic problem, if the Unions accepted Respondent's total package of $16.95 an hour, Respondent would agree to discuss with the Unions the distribution of that package. Brown rejected this proposal. He explained that the total package contained in both the current Local 718 contract and the current Locals 169 and 1621 contract was $20.34 an hour, substantially more than Respondent's proposed total package, and stated that the Unions would not accept this decrease, but would take the Respondent's $15-an-hour wage proposal to the membership and determine what the membership's position was on that proposal. Brown stated that the contracts expired 1 July 1985 and proposed that whatever agreement was reached be made retroactive to 1 July 1984 and suggested that they extend the contract on a day-by-day basis until they reached agreement. Haynes stated that this was unacceptable because the contracts gave the Unions the right to strike if no agreement was reached by 1 July 1984, and that Respondent wanted a more substantial extension of the contract inasmuch as it wanted more notice if the Unions engaged in a strike. Brown stated that because it was only 26 June there was plenty of time to reach agreement before the 1 July 1984 deadline and that in order to do this the Unions were willing to meet anytime and place within reason. The meeting ended with Haynes stating that Respondent would use whatever means it could to reach agreement with the Unions prior to 1 July 1984 and would consider any new proposal from the Unions, but unless there was an agreement the contract would expire 1 July 1984.[10]

On 28 June 1984 Haynes sent a telegram to Brown in which, after indicating that the parties were deadlocked in their negotiations, he stated, "The company does not intend to continue the current health and welfare; pension; vacation; holiday; and industry fund contributions beyond June 30, 1984" and that "[i]f the Union does not accept the Company's final offer and if no agreement is reached by June 30 the Company will implement its offer, as the cost of the current wage and benefit program exceeds that which the Company can justify economically." Brown responded to this telegram by sending a telegram to Respondent's vice president of industrial relations, Courtney, dated 28 June 1984, which acknowledged receipt of Haynes' telegram and stated that the Unions "disagree with your position of impasse. We have another proposal and will meet with you . . . July 2, 1984. We will present it to you then. We will hold you fully responsible for unilaterally putting your last proposal into effect prior to Local 169, 718 and 1621 and [Respondent] reaching an impasse."

On 29 June 1984 Haynes telegrammed Brown that "[i]f your last proposal was not your final proposal please furnish final proposal immediately by telegram. Will arrange meeting after receipt of your proposal." On 2 July Brown telegrammed Haynes requesting that Haynes advise the Unions when he would be available to meet so that the Unions could present him with their proposal. On 3 July Haynes telegrammed Brown that Respondent's district manager Anderson would be at Brown's office 5 July "to accept any written counter proposal which you intended to make available."

On 5 July 1984 Anderson met with the Unions' negotiating committee. The meeting began with the committee's spokesperson Brown asking whether Anderson was authorized to negotiate on Respondent's behalf. Anderson stated that he was present to pick up the Unions' proposal. When Brown continued to ask Anderson whether he was authorized to negotiate on Respondent's behalf, Anderson stated he had authority to make decisions and, if he needed assistance, there were other people standing by on the telephone to assist him. However, Anderson pointed out that during the past year Respondent had lost approximately $350,000 doing business in the area covered by the Unions' contracts and because of this could not agree to any increase, but that if Brown had a new proposal that Anderson would talk with him. Brown stated that the Unions did not have a new proposal to offer Respondent, but from what Anderson had stated it appeared Respondent was claiming financial hardship and because of this the Unions wanted to examine Respondent's profit-and-loss statements to verify this claim. Brown explained to Anderson that the Unions would take a hard look at Respondent's profit-and-loss statements and, if they supported Respondent's claim of an inability to pay, the Unions, after explaining this to their membership, might accept a freeze or a reduction or whatever was necessary to assist Respondent. The meeting ended with Brown reminding Anderson that the Unions were there to negotiate wages only and requested that Respondent furnish them with its profit-and-loss statements. Anderson stated that he did not see any problem with furnishing the Unions with this information, but Respondent's attorney would have to authorize the release of the information.[11]

On 5 July 1984, immediately after the 5 July meeting between Anderson and the Unions' negotiating committee, Haynes telegrammed Brown stating, among other things, that the most recent profit-and-loss statements for Respondent's shops covered by the Unions' contracts would be furnished immediately and that additional supporting records, if desired, would also be made available. As a matter of fact, some time between 5 and 8 July 1984, Respondent hand-delivered these financial statements to Brown's office. These statements showed a pretax loss of $385,837. Thereafter the parties agreed to hold a negotiation meeting 16 July 1984.

The next and final negotiation meeting took place 16 July 1984 and lasted approximately 2-1/4 hours. Haynes

[10] As was the case with the previous negotiation meeting, the above description of the 26 June 1984 meeting was based on the Unions' contemporaneous minutes, which were introduced into evidence by Respondent without objection by any of the other parties. I have supplemented the description contained in these minutes with the testimony of Courtney and Brown only in those instances when I felt that their testimony was consistent with the minutes.

[11] As was the case with the previous negotiation meetings, the description herein of the 5 July meeting is based on the Unions' contemporaneous minutes of the meeting that were offered into evidence by Respondent without objection by any of the other parties. I have supplemented the description contained in these minutes with the testimony of Brown and Anderson only in those instances when I felt that their testimony was consistent with the minutes.

began the meeting by stating that Respondent had not received a written notice from Local 718 reopening its contract with Respondent for negotiations. Brown or one of the Local 718 representatives stated they thought Local 718 had sent Respondent a reopener notice. Haynes stated that Respondent would not negotiate with Local 718 without the receipt of a written notice from that Union reopening its contract and that he would investigate to determine whether, as claimed, Local 718 sent Respondent such a notice. Brown stated that if Local 718 had not sent a written notice to Respondent reopening its contract that it would mean that the status quo existed for another year insofar as that contract was concerned and that the current negotiations would only cover Respondent's contract with Locals 169 and 1621.

Brown then brought up the subject of Respondent's profit-and-loss statement. He stated that the Unions examined this statement and had turned it over to the Unions' auditor who needed to see the supporting records for some of the items listed. While understanding that Respondent had suffered operating losses as stated in the profit-and-loss statement, Brown stated that the Unions had the right to know what these losses were. Brown then proposed a 75-cent-an-hour increase in the total wage package, which contrasted with the Unions' last proposal of $1.02 an hour. Haynes rejected this proposal and stated that as long as the Unions continued to propose an increase in the current contractual wage package, the parties were at an impasse. Brown replied that the reopener provision in Respondent's contract with Locals 169 and 1621 called for negotiations for a wage increase and that the Unions were there to negotiate an increase. Haynes told Brown that due to Respondent's financial losses it needed a decrease in the current contractual wage package, not an increase. Brown stated that the Unions' auditor was in the hospital and the Unions wanted his opinion about the "what and why" of the losses evidenced in Respondent's profit-and-loss statement. Haynes stated that due to its financial situation Respondent was not able to negotiate an increase in the wage package and, if it was Brown's position that the Unions could not negotiate a decrease, then there was no where to go in the negotiations. Brown replied that the Unions would not negotiate a decrease in the wage package and asked for another proposal from Haynes to counter the Unions' proposed 75-cent-an-hour increase in their wage package. Haynes responded by offering a wage package of $16.50 an hour. This was rejected by Brown, who pointed out that it was less than Respondent's previous $16.95 offer. Haynes stated that Respondent believed that it could provide the employees with the same fringes and give them more money to take home each week in their paychecks with Respondent's proposed package that included Respondent's benefit plans. Brown replied that the Unions would not change trust funds, and explained that the Unions were trying to negotiate a total package and felt they had the right to distribute the moneys in this package to the health and welfare and pension funds as they saw fit. Haynes repeated that Respondent's economic condition, as shown by the $350,000 loss in the profit-and-loss statement, made it impossible for Respondent to meet the Unions' demands and that Respondent needed a decrease in the current wage package. Brown replied that pursuant to the reopener provisions in the governing contract between Respondent and Locals 169 and 1621, the Unions were there to negotiate a wage increase. Anderson then went through the profit-and-loss statement line by line and explained in detail the losses reflected by that statement. Brown stated that the Unions' representatives did not understand the profit-and-loss statement and had given it to the Unions' auditor for his opinion. Haynes at this point stated Respondent was unable to wait any longer, that it intended to decrease its labor costs, and that effective the next payroll period Respondent would institute the $15-an-hour wage rate and the Respondent's insurance package previously offered to the Unions. Brown responded by stating that the Unions would turn the matter over to their attorney.[12]

On 18 July 1984 Haynes addressed a telegram to all three Local Unions in care of William J. Brown, Local 1621's business manager.[13] The telegram reads as follows:

> DURING OUR MEETING HELD ON JULY 16 1984 THE UNIONS CONTINUED TO REFUSE TO NEGOTIATE A DECREASE IN THE CURRENT TOTAL ECONOMIC PACKAGE WITH SAFELITE AND PROPOSED A TOTAL INCREASE OF .75 CENTS INCLUDING AN .18 CENTS INCREASE TO THE UNION HEALTH AND WELFARE PLAN AFTER REVIEWING SAFELITES PROFIT AND LOSS STATEMENT DELIVERED TO THE UNION ON JULY 6 1984. THROUGHOUT THE MEETING SAFELITE CONTINUED TO INSIST THAT THE TOTAL ECONOMIC PASSAGE BE DECREASED FROM THE PRESENT $20.34 WHILE THE UNIONS CONTINUED TO INSIST THAT IT BE INCREASED. THE MEETING ADJOURNED WITHOUT FURTHER MEETINGS SCHEDULED OR AGREED UPON.
>
> IN VIEW OF THE UNIONS CONTINUED INSISTENCE FOR AN INCREASE IN THE TOTAL ECONOMIC PASSAGE AND REFUSAL TO AGREE TO EITHER OF SAFELITES FINAL ALTERNATE PROPOSALS, SAFELITE INTENDS TO IMPLEMENT THE FOLLOWING:
>
> HOURLY WAGE RATE $15.00; SAFELITES PROPOSED MEDICAL AND PENSION PLAN; SAFELITES PROPOSED VACATION AND HOLIDAY PAYMENT PLAN; NO PAYMENT TO THE UNIONS HEALTH AND WELFARE, PENSION, VACATION OR HOLIDAY FUNDS; NO FURTHER PAYMENTS TO THE INDUSTRY FUND. UNION DUES OF .32 CENTS PER HOUR WILL CONTINUE TO BE DEDUCTED FROM BARGAINING UNIT EMPLOYEES PAY AND PAID TO THE UNIONS.

[12] The above description of the 16 July 1984 negotiation meeting is based on the contemporaneous notes of this meeting taken by Respondent's office manager, which were placed into evidence without objection. I have supplemented the description contained in those notes with Brown's and Courtney's testimony only in those instances when I felt that their testimony was consistent with the notes.

[13] I recognize that the telegram is addressed to William J. Graham, rather than William J. Brown; however, it is clear from the record that this was a clerical error, there is no such person as William J. Graham, and the telegram was intended for Brown and, in fact, was received by Brown.

Also on 18 July Attorney Haynes telegrammed Carl Dahl, a Local 718 representative, who was a member of the Unions' negotiating committee, as follows:

> WE HAVE THIS DATE DISCOVERED THAT YOUR UNION DID GIVE THE APPROPRIATE WRITTEN NOTICES REQUIRED BY THE COLLECTIVE BARGAINING AGREEMENT AND SECTION 8 (D) OF THE LMRA BEFORE THESE NEGOTIATIONS BEGAN, SINCE YOU DID REOPEN THE AGREEMENT BEFORE NEGOTIATIONS COMMENCED, THE TELEGRAM SENT BY ME THIS DATE TO BILL BROWN, YOUR SPOKESMAN IN THE NEGOTIATIONS, APPLIES TO YOUR UNION AS WELL AS LOCAL UNIONS 1621 AND 169.

As a matter of fact on 18 July 1984 Respondent, in all nine of its northern California shops, implemented the terms and conditions of employment as set forth in Haynes' 18 July 1984 telegram to Brown, and on that date posted in each one of its shops a memo addressed "To All Auto Glass Installers" from District Manager Anderson, which stated in pertinent part:

> Safelite is making available to you its Medical Benefit Plan and Pension Plan. The Company is discontinuing its contributions to Union Plans.
>
> If you wish to participate in Company Plans you may obtain a Card which you must complete and return to the Store Manager.
>
> You will not be covered by the Company Plans until these cards are completed and returned.
>
> The Journeyman hourly rate, effective Thursday 7/19/84, will be $15.00 per hour.
>
> Vacations and Holidays will be paid directly to you rather than to your Union funds. You will be paid vacation and holiday pay at your regular rate. Paid holidays are:
>
> New Years
> Memorial Day
> Independence Day
> Labor Day
> Thanksgiving Day
> Christmas Day
> Employment Anniversary Day
>
> To be eligible for holiday pay, you must work the scheduled day before and following the holiday.
>
> Vacation pay will equal 80 hours pay after one year of continuous employment and 120 hours after ten years continuous employment. You will be eligible for paid vacation following your next Anniversary date.

2. Analysis and conclusions

As the Board in *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984) stated:

> Section 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." Generally an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good faith impasse in bargaining (case cited). Section 8(d) imposes an additional requirement when a collective bargaining agreement is in effect and an employer seeks to "modify . . . the terms and conditions contained in" the contract: The employer must obtain the union's consent before implementing the change.

Section 8(d) of the Act, which defines the obligation to bargain, is intended to stabilize the agreed-on conditions of employment during the term of a collective-bargaining contract. *Steelworkers v. Gulf Navigation*, 363 U.S. 574 fn. 3, 578 (1960); *NLRB v. General Electric Co.*, 418 F.2d 736, 747 (2d Cir. 1969). Accordingly, that section not only imposes an obligation on each party to a contract to refrain from modifying the contract in the absence of compliance with the statutory notice and waiting period requirements, but also expressly provides that the "duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." In line with that provision, as stated by the Board in *Milwaukee Spring*, it has been consistently held that an employer acts in derogation of its bargaining obligation under Section 8(d), and thereby violates Section 8(a)(5) and (1) of the Act when, during the effective period of the contract and without the consent of the union, it modifies contractually determined benefits or other employment conditions that are mandatory bargaining subjects. *Chemical Workers Local 10 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183–188 (1971), citing with approval *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 886–887 (7th Cir. 1968); *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302, 1307 (9th Cir. 1979). Unless a union consents to the midterm modification, employer defenses, such as that the modification was made in good faith or out of economic necessity, will not bar an 8(a)(5) finding. *Los Angeles Marine Hardware Co. v. NLRB*, supra at 1306–1307 (9th Cir. 1979); *Oak Cliff-Golman Baking Co.*, 202 NLRB 614 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

An unlawful midterm modification may take several forms, including an announced change in a contract provision (*NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 423–425 (1967)) or a refusal to honor an obligation imposed by a collective-bargaining agreement. *Northeast Oklahoma City Mfg. Co. v. NLRB*, 631 F.2d 669, 675 (10th Cir. 1980). Because the question of whether an unlawful modification has occurred may depend on the interpretation given to contract language, the Board may be called on to decide the threshold issue regarding the meaning of a particular provision of the agreement. Thus, the Board in cases of this nature is empowered to interpret the provisions of a collective-bargaining agreement, if necessary, to the adjudication of the alleged unfair labor practice. *NLRB v. Strong*, 393 U.S. 357, 361 (1969); *C & C Plywood Corp.*, supra at 428; *Northeast Oklahoma Mfg. Co. v. NLRB*, supra; *Buck Brown Contracting Co.*, 272 NLRB 951 (1984). However, when the

Board finds that a party to a contract charged with unilaterally changing its terms during midterm, "has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct." *NCR Corp.*, 271 NLRB 1212 (1984), quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965); see also *Plasterers Local 627 (Hart Concrete)*, 274 NLRB 1286 (1985).

In the instant case, as described in detail supra, on 18 July 1984 Respondent modified or abolished several of the economic provisions contained in its contracts with Local 718 and Locals 169 and 1621, as follows: It substituted for Washington's Birthday the employees' employment anniversary dates as one of the contracts' seven paid holidays and, whereas the contracts contained no eligibility requirements, Respondent instituted a requirement that the employees work the day before and after a holiday to be eligible for holiday pay. The contracts' vacation provisions provide 3 weeks of paid vacation for employees employed at least 1600 hours during the period 1 July through 30 June of the preceding year, whereas Respondent substituted 2 weeks of paid vacation after 1 year of employment and 3 weeks after 10 years, with eligibility determined by working at least 1800 hours during the 12 months prior to the employees' employment anniversary dates. Instead of deducting approximately $2.05 an hour from each employee's net hourly wage and transmitting the money to the contracts' vacation and holiday fund, as required by the contracts, for eventual distribution twice yearly to the employees for their vacation and holiday pay, Respondent stopped making these deductions and instead directly paid the employees their hourly rate of pay for their holiday and vacation pay. Instead of contributing to the contracts' health and welfare and pension funds to finance the medical and pension plans designated by the contracts, Respondent stopped making these contributions and substituted Respondent's medical and pension plans for the plans designated by the contracts.[14] Respondent stopped making contributions to the industry promotional fund as required by the contracts; Respondent paid a minimum net hourly wage of $15 to its auto glass installers instead of the $15.71 net hourly wage called for by the Local 718 contract and the $15.84 net hourly wage called for by the Locals 169 and 1621 contract.

In summation, the record establishes that during the term of its contracts with the Unions, Respondent abrogated the health and welfare, holiday and vacation, and pension fund provisions contained in the contracts, and significantly modified the contracts' provisions dealing with holiday and vacation benefits and decreased the employees' net hourly minimum wage rates established by the contracts. Each of these changes, by their very nature, presumably significantly affected the employees' terms and conditions of employment, thus they are mandatory subjects of bargaining. Respondent does not contend that any one of these changes was not a mandatory bargaining subject. Rather Respondent takes the position that it was privileged on 18 July 1984 to make these midterm changes in its contracts with the Unions without the Unions' consent because it had sound reasons to believe that the reopener clauses in the contracts allowed it to place on the bargaining table the contract proposals that it implemented on 18 July 1984 and to implement them after an impasse in the negotiations.[15] I have rejected Respondent's contention for the reasons set forth hereinafter.

The record establishes that Respondent did not have "a sound arguable basis" (*NCR Corp.*, supra) for interpreting the reopener provisions in its contracts with the Unions to allow it during the term of the contracts to place into effect without the Unions' consent its proposal to abrogate the holiday and vacation fund established by the contracts and to significantly modify the contracts' other provisions dealing with the employees' vacation and holiday benefits. The plain and unambiguous language of the contracts' reopener provisions limit reopener negotiations to the employees' minimum hourly wage rate.[16] However, the past practice of the parties in applying the reopener provisions during the 1983 reopener negotiations reveals that they interpreted the provisions as applying to not just the employees' minimum hourly rate of pay, but also to Respondent's level of contributions to the contracts' health and welfare and pension and industry funds, and that the parties considered the level of these contributions plus the employees' hourly rate of pay as a total wage package.[17] This application

[14] The difference between the pension and medical benefits under Respondent's plans and the contracts' plans was not litigated. However, in connection with the complaint's allegation that Respondent violated Sec. 8(a)(5) and (1) by dealing directly with employees, Respondent's vice president of industrial relations Courtney testified that he told employees that the coverage of the Company's medical plan differed in at least two respects from the coverage of the contracts' medical plan; the contracts' plan provides optical coverage and the employees have the option to use a health maintenance organization such as Kaiser, whereas Respondent's plan did not provide such coverage.

[15] Respondent's contract with Local 718 contains a wage reopener providing for wage negotiations to be conducted in both 1983 and 1984 on 1 July, whereas Respondent's contract with Locals 169 and 1621 contains a wage reopener providing for "wage increase" negotiations to be conducted 1 May 1983 for the remaining 2 years of the contract. The 1983 negotiations conducted pursuant to the aforesaid reopener provisions were joint negotiations. The negotiators for Locals 718, 169, and 1621 met together with Respondent's negotiators. During the initial negotiating meeting held 3 June 1983, Respondent and Locals 169 and 1621 agreed that whatever agreement was reached during the negotiations would be effective for 1 year and that Respondent's contract with Locals 169 and 1621, like Respondent's contract with Local 718, would be reopened for renegotiations again in 1984 pursuant to the reopener provision in the Locals 169 and 1621 contract.

[16] The section of the Local 718 contract entitled, "Minimum Wage Rate," which establishes the "minimum straight time hourly rate of pay for wages" and the amount of the contributions that Respondent is obligated to make to the several contractual funds, further provides that at the end of the first and second years of the contract, "wages to be negotiated." The section of the Locals 169 and 1621 contract entitled, "Wages For Auto Glass Mechanics," which established the "minimum straight time hourly rate of wages" and the amount of contributions that Respondent is obligated to make to the several contractual funds, further provided that effective 1 May 1983 the parties to the contract would meet "to determine the wage increase for the remaining two years of this agreement."

[17] During the 1983 negotiations held pursuant to the contracts' wage reopener provisions, Respondent and the Unions negotiated not only for

Continued

of the contracts' reopener provisions in 1983 was consistent with the manner in which Respondent and the Unions conducted themselves under the COLA provisions of the predecessor Glass Management Association contract. The 1979–1982 Glass Management Association contract did not include a wage reopener provision, but instead provided for cost-of-living wage increases at 6-month intervals based on a formula set forth in the contract. The parties to the contract, including Respondent and the Unions, interpreted this provision as meaning that COLA increases would be divided as the Unions determined between the employees' hourly rates of pay and the Respondent's contributions to the health and welfare and pension funds.

As described above, the express language of the contracts' reopener provisions and the way the parties interpreted these provisions in the past and the way the parties applied the COLA provisions in the predecessor Glass Management Association contract, undermine Respondent's contention that it had sound reasons for believing the contracts' wage reopeners were intended to open up the contracts for renegotiations concerning the contracts' holiday and vacation provisions and Respondent's contributions to the contracts' holiday and vacation fund. As a matter of fact, there is no evidence that Respondent had any reason for believing that the contracts' wage reopeners encompassed these matters.[18] Quite the opposite, the composition of the total wage package encompassed by the contracts' reopener provisions must have placed Respondent on notice that the wage reopener provisions did not contemplate the renegotiation of the contracts' holiday and vacation provisions. Thus, it is undisputed that the contracts' total wage package consisted of only the employees' net wages and the Respondent's contributions to the contracts' health and welfare and pension and industry funds. Respondent's contributions to the contracts' vacation and holiday fund, which like Respondent's Unions' dues contributions was deducted by Respondent from the employees' net hourly wages, was not a part of the contracts' total wage package.

It is for all the aforesaid reasons that I find that the contracts' wage reopener provisions did not contemplate bargaining about Respondent's contributions to the contracts' vacation and holiday fund or bargaining to change the terms of the contracts' other holiday and vacation provisions, and that Respondent did not have an arguable basis for interpreting the reopener clauses in either the Local 718 contract or the Locals 169 and 1621 contract as permitting it to renegotiate these matters during the term of the contracts. Accordingly, when Respondent on 18 July 1984, during the term of the contracts and without the consent of the Unions, stopped making the contributions to the holiday and vacation fund required by the contracts, and in other respects significantly modified the holiday and vacation provisions of the contracts, I find that Respondent acted in derogation of its bargaining obligation under Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.[19] See *Campo Slacks, Inc.*, 266 NLRB 492, 497 (1983).

I further find that when Respondent on 18 July 1984 stopped making contributions to the contracts' health and welfare and pension funds, and substituted its own medical and pension plans for the plans designated by the contracts, and decreased the auto glass installers' hourly rate of pay established by the contracts, Respondent violated Section 8(a)(5) and (1) of the Act inasmuch as this conduct, which substantially modified the terms of its contracts with the Unions, was engaged in during the term of the contracts and without the Unions' consent.[20] In making this finding I have assumed that Respondent had sound reasons for believing that the contracts' reopener provisions permitted it to make these changes after bargaining to an impasse with the Unions, inasmuch as the contracts' total wage package included the employees' health and welfare and pension benefits, as well as wages. However, it is settled that "[o]nly a

---

the employees' minimum hourly rates of pay, but for an amount of money that the Unions could divide as they saw fit between wage increases and increases in Respondent's contributions to the health and welfare and pension and industry funds.

[18] My search of the record, Respondent's posthearing brief, and the transcript and exhibits, reveal that the sole argument advanced by Respondent in support of its claim that it had a reasonable basis for believing that the contracts' reopener provisions contemplated the renegotiation of the contracts' holiday and vacation provisions is its argument that at the end of the 1983 negotiations held pursuant to the reopener provisions that "the parties verbally said we'll be back next year to negotiate the economic package" (Tr. 868–869). This argument is based on Vice President of Industrial Relations Courtney's testimony that he telephoned Union Negotiator Brown at some point in time after the last 1983 reopener negotiation meeting, and that during the telephone conversation they decided how much of an increase Respondent's glaziers would receive and, as Courtney further testified, "it was my understanding that there would be an economic reopener the following year" (Tr. 586). It is significant that Courtney failed to describe what, if anything, Brown said to him that led to Courtney's understanding. Moreover, Courtney's understanding that there would be "an economic reopener" in 1984 is consistent with the way in which the parties applied the reopener provisions in 1983, namely, to encompass not just wages, but a total wage package that included the Respondent's health and welfare and pension contributions, besides wages. That Courtney did not in fact believe Brown had said anything to him that could have been reasonably construed as an agreement to reopen the contracts for all economic matters in 1984 is demonstrated by Courtney's failure to bring such an agreement to Brown's attention during the 1984 reopener negotiations when Brown took the position that the contracts' reopener provisions did not allow Respondent to reopen the contracts to renegotiate the economic provisions to the extent that it was attempting. I find it difficult to believe that if Brown had said something to Courtney that could have been reasonably construed as sanctioning Respondent's proposal to renegotiate the vacation and holiday provisions and abrogate the vacation and holiday trust fund provision, Courtney, during the 1984 negotiations, would not have reminded Brown of this.

[19] This is not a situation where, despite the language of the contracts' reopener provisions, the Unions agreed during the 1984 negotiations to reopen the contracts in midterm to renegotiate the contracts' holiday and vacation provisions. Quite the opposite, when Respondent's negotiator during the first negotiating meeting told the Unions' negotiator that Respondent was proposing to renegotiate these matters, the Unions' negotiator objected vigorously and, in effect, told the Respondent's negotiator that the Unions did not intend to negotiate about these matters because the Unions believed that they were not encompassed by the contracts' reopener provisions. The Unions maintained this position throughout the negotiations.

[20] Respondent's contributions on behalf of the unit employees to the Glass and Glazing Industry Trust Fund, an industry promotional fund, does not constitute a mandatory subject of bargaining. Therefore, Respondent was not obligated under Sec. 8(a)(5) of the Act to comply with Sec. 8(d) of the Act before it abrogated that contractual provision. *Finger Lakes Plumbing Co.*, 254 NLRB 1399 (1981); *F.M.L. Supply*, 258 NLRB 604 fn. 3 (1981).

genuine impasse, one not caused by the failure of one of the parties to bargain in good faith, permits an employer to take unilateral action on a mandatory subject without violating the Act." *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956,966 (10th Cir. 1980). No such genuine impasse was possible here, for a substantial cause of the parties' bargaining impasse that would normally have privileged Respondent on 18 July 1984 to implement its 13 June 1984 package of contract proposals was Respondent's insistence that the Unions, as a condition of accepting the 13 June 1984 package of proposals, accept as a part of that package a significant modification in the contracts' holiday and vacation provisions and the abrogation of the contracts' holiday and vacation trust fund provisions. In this regard it is plain that Respondent's aforesaid vacation and holiday proposals, in particular its proposal to stop contributing to the contracts' holiday and vacation fund, were an integral part of Respondent's 13 June 1984 package of proposals that Respondent implemented on 18 July 1984, and that the other proposals in this package were dependent on Respondent's proposal to change the contracts' holiday and vacation provisions and to abrogate the contracts' holiday and vacation fund.[21] By, in effect, conditioning the Unions' acceptance of its 13 June 1984 package of proposals on the Unions' acceptance of that part of the package that changed the contracts' vacation and holiday provisions, despite the Unions' vigorous objections, Respondent engaged in conduct violative of Section 8(a)(5) and (1) of the Act, which precluded the existence of a genuine impasse on the remainder of the proposals contained in Respondent's 13 June 1984 package of proposals. Hence, when it unilaterally implemented the remainder of these proposals on 18 July 1984, Respondent violated Section 8(a)(5) and (1) of the Act, even though it may have had a sound basis for believing that these proposals were encompassed by the contracts' wage reopener provisions. Cf. *Newspaper Printing Corp. v. NLRB*, supra at 966–967 (10th Cir. 1980).

In concluding that Respondent violated Section 8(a)(5) and (1) of the Act when Respondent on 18 July 1984 stopped making contributions to the contracts' health and welfare and pension funds and substituted its own medical and pension plans for the plans designated in the contracts, and decreased the rate of pay established in the contracts, I have assumed that Respondent had sound reasons for believing that the contracts' wage reopener provisions permitted it to make these changes in the employees' terms and conditions of employment after bargaining to an impasse with the Unions. This assumption, however, is without any basis in the case of the wage reopener contained in Respondent's contract with Locals 169 and 1621, which provided, in pertinent part, for the parties to reopen the contract, "to determine the wage *increase*" (emphasis added) for the remainder of the contract's term. In agreement with the General Counsel, I am persuaded that when viewed in a light most favorable to Respondent, this reopener provision can be interpreted as only encompassing an increase, not a decrease, in the contract's total wage package.[22] But, as described in detail supra, Respondent, despite the vigorous objections expressed by Locals 169 and 1621, insisted to impasse and eventually implemented its 13 June 1984 package of proposals that called for a substantial decrease in the contract's total wage package. Neither during the 1984 reopener negotiations, nor during the hearing in this case, nor in its posthearing brief, has Respondent advanced a basis for its contention that it had sound reasons for believing that the reopener provision in the Locals 169 and 1621 contract, which was phrased in terms of negotiating a "wage increase," did not mean what it said. Under the circumstances, I find, in the alternative, that insofar as the employees represented by Locals 169 and 1621 are concerned, that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally instituting its 13 June 1984 package of proposals on 18 July 1984 inasmuch as this conduct took place without the Unions' consent during the term of their contract with Respondent, and Respondent did not have a sound arguable basis for believing that the wage reopener provision in the applicable contract permitted it to engage in this conduct, which decreased the contract's total wage package.

In view of the basis for my decision herein, I have not considered the General Counsel's further contention that because the totality of Respondent's conduct at and away from the bargaining table established that it was bargaining with the Union in bad faith, no genuine impasse existed when Respondent on 18 July 1984 implemented its 13 June 1984 bargaining proposal. Nor have I considered the General Counsel's contention that even if a genuine impasse existed in the case of Respondent's negotiations with Locals 169 and 1621, no such impasse existed with respect to its negotiations with Local 718 because at the outset of the 16 July 1984 negotiation meeting Respondent broke off negotiations with Local 718 pending its investigation of whether that Union had sent a reopener letter to the Federal Mediation and Conciliation Services.

B. *Respondent Deals Directly with Employees*

1. The evidence

As described in detail supra, on 13 June 1984 Respondent's and the Unions' negotiators held their first negotiation meeting pursuant to the wage reopener provisions contained in the parties 1982–1985 contracts at which time they exchanged bargaining proposals. On 14–15 June 1984 Respondent's vice president of industrial rela-

[21] Included in Respondent's 13 June 1984 package of proposals was a $15-an-hour minimum wage proposal that constituted a substantial decrease in the minimum hourly rate of pay established in both the Local 718 contract and Locals 169 and 1621 contract. Respondent's additional proposal to cease deducting the approximately $2.05 an hour from the employees' wages for their holiday and vacation benefits, as required by the contracts, and instead to pay the employees directly for their holidays and vacations, in effect increased the employees' net pay, before taxes and union dues deductions, from what it was under the terms of the contracts. Respondent's vice president of industrial relations, Courtney, very carefully explained this in detail to the Respondent's employees when on 14 and 15 June 1984 he explained Respondent's 13 June proposal to them.

[22] As noted previously, the total wage package included Respondent's contributions to the health and welfare and pension funds as well as wages.

tions, Courtney, accompanied by Respondent's district manager Anderson and Respondent's attorney Haynes, visited each of Respondent's nine shops covered by the Unions' contracts, except for the San Leandro shop. The Unions were not notified about these meetings, and no representative from the Unions was in attendance.

During his 14–15 June meetings with the employees, Courtney did most of the talking. Attorney Haynes, however, answered some of the employees' questions. Although the employees' questions differed from shop to shop, Courtney's presentation to the employees was basically the same at each shop.

Courtney introduced himself, Anderson, and Haynes, and explained that they were there to speak to the employees because Respondent's contracts with the Unions had been reopened for negotiations about economic items and that because Respondent was losing money, the negotiations were very important, and Courtney felt it was essential that the employees be kept informed about the state of the negotiations and that Courtney planned to meet with the employees after each of the negotiation meetings to keep them informed. Courtney stated that Respondent's shops in the district had lost over $350,000 during the past year, that Respondent could no longer afford to subsidize the shops, and the financial losses were occurring not because employees were loafing on the job, but because of Respondent's labor costs. In view of this, Courtney told the employees that Respondent had three options: "One, continue to operate and continue to lose money; two, close the division; or three, propose changes [in the Unions' contracts] that would allow us to operate without losing money." Courtney stated that Respondent had decided "to continue to operate without losing money."

Regarding the 13 June 1984 negotiation meeting, Courtney told the employees that the Unions proposed a 5.5-percent increase that Respondent rejected because it could not even afford the current rate established by the contracts, let alone an increase, and that it was ridiculous for the Unions to think that Respondent could afford a 5.5-percent increase. Courtney explained to the employees that the Unions, like Respondent, had certain options that Courtney told the employees were to either accept or reject Respondent's proposal or do nothing or show their displeasure with Respondent's proposal by striking Respondent. Courtney, with respect to this last option, stated that the Unions had not mentioned the word "strike," but Courtney mentioned this possibility to point out to the employees one of the Unions' options.

Regarding the proposal that Respondent submitted to the Unions during the 13 June 1984 negotiation meeting, Courtney explained the proposal thoroughly, and in detail compared the economic benefits that the employees received under the terms of the current contracts with those they would receive under Respondent's proposal, and answered employees' questions on this subject.

During at least one of the meetings when an employee asked, "What if the union goes on strike and I don't want to go on strike," Courtney responded by stating that "employees would have a choice of striking or not striking." Attorney Haynes during the 14–15 June employee meetings also informed the employees that they had the choice of striking or not striking, and further stated to them that as Respondent understood the Unions' constitution and bylaws and the law of the State of California, if an employee decided not to strike after the unions called the strike, the unions could possibly fine the employee for not striking.

Following the 26 June 1984 negotiation meeting, which has been described in detail supra, Respondent held meetings with its employees on 27–28 June 1984 similar to the above-described 14–15 June employee meetings. The record establishes that at the meeting held at the San Mateo shop on either 27 or 28 June that Courtney, in response to an employee's question about whether Respondent intended to continue to operate if there was a strike, stated that Respondent intended to continue to operate and to do so it would perhaps be required to hire replacements. Also during this meeting when questions were asked by employees about the employees' rights to strike or work if the Unions called a strike, Attorney Haynes stated that the employees were free to strike or not to strike and that this was the employees' decision, not the Respondent's or the Unions'. When employees asked how to go about resigning their union membership and how they should word their letters of resignation, Attorney Haynes told them that Respondent would post on the shops' bulletin boards a sample of how a resignation letter might be worded, but that if the employees wanted to resign it would be up to the employees.

On 27 June 1984 Respondent either distributed to its employees or posted at its shops the following "Notice To All Employees" signed by District Manager Anderson:

> We have been asked to furnish employees with information as to how they can resign from the Union to avoid being fined by the Union in the event of a strike.
>
> The Company has no way of knowing whether a strike will be called. No agreement has been reached. The Union is free to strike at Midnight June 30, 1984.
>
> Under California law, Union employees who continue to work across the picket line may be fined.
>
> Under Federal law, employees are free to strike or are free to work during a strike. The Constitution and By-Laws of the Union, as we understand them, allow employees to submit a resignation anytime before a strike begins.
>
> Any employee that wants to resign to avoid the possibility of a Union fine (if a strike is called) may notify the Union in writing as follows:
>
> "I hereby resign my membership as a member of Local #_____, International Brotherhood of Painters and Allied Trades AFL–CIO, effective immediately. I fully understand that I will be required to continue paying my Union dues as long as I remain employed by Safelite."
>
> DATE:
> SIGNATURE:

> The decision to resign Union membership to avoid being fined for crossing a picket line, is the decision of each employee.
>
> Employees rights to participate in a strike or not to participate in a strike is protected by the National Labor Relations Act. An Employer has the right to permanently replace Economic strikers to continue its business operation in the event of a strike.
>
> Safelite intends to continue operating if a strike is called.

The above description of what occurred at the meetings held by Respondent with its employees on 14–15 June 1984 and at the San Mateo shop on 27–28 June 1984 is based on the testimony of Courtney whose demeanor was good when he testified about these meetings.

Arthur Garcia, an installer employed at the San Jose shop, testified that when Courtney spoke to the employees at this shop on 15 June 1984, he told them, among other things, that if no collective-bargaining agreement was reached between the Unions and Respondent, after 30 June 1984 the Unions could strike, that Courtney did not know if there would be a strike, but if there was one that the employees could cross the picket line or would be permanently replaced and if the employees crossed the picket line the Unions could possibly fine them, but that was a decision the employees themselves would have to make. Garcia also testified that Courtney stated that the contract between Respondent and the Unions was going "to be up" and that if the Unions did strike, Respondent intended to remain open with or without the employees. Courtney did not specifically controvert Garcia's above-described testimony, and I credit it.

James Poda, an installer employed at the San Francisco shop, testified that when Courtney spoke to the employees at this shop on 14 June 1984, he told them that the Respondent's proposal called for a total package of $16.95 an hour with $15 going for wages and the remainder divided up among the employees' fringe benefits and advised the employees that this proposal was the best Respondent could do and it was the "bottom line." Poda further testified that at this point employee Spencer, another installer employed at the San Francisco shop, told Courtney he thought the Union would not accept this proposal but would strike, and asked what would happen if there was a strike. According to Poda, Courtney replied by telling Spencer that Respondent "plans to continue with business as usual, and the men who strike will be replaced," and that Courtney at this point ended his answer and asked if there were any other questions. The General Counsel contends that Courtney responded to Spencer's question by stating that should a strike be successful, Respondent would close down. In support of this contention, the General Counsel apparently relies on Poda's testimony given during direct examination that, in response to Spencer's question that Courtney stated: "[T]he company is going to carry on business as usual. Those who strike will be replaced. That frame of thought went into if the strike did work and the company lost then at that result everybody would be out of work." It is unclear whether the last part of this testimony was meant by Poda to be the words Courtney used or what Poda inferred from Courtney's words. Any doubt about this, however, was removed by Poda's description of this conversation given during cross-examination when he testified in effect that all Courtney stated to Spencer, in response to Spencer's question, was that Respondent "plans to continue with business as usual, and the men who strike will be replaced." I also note that Poda's testimony that Courtney's above-described comments were made during the 14 June meeting of employees at the San Francisco shop is inherently implausible because the Respondent's contract proposal, which Poda testified Courtney explained to the employees, was Respondent's alternative proposal offered to the Unions for the first time during the 26 June negotiation meeting. Courtney, in effect, testified that during the 14–15 June employee meetings he explained to the employees the Respondent's 13 June proposal. None of the several employees who testified about the 14–15 June employee meetings corroborated Poda's testimony that the alternative proposal was explained to them.

Britt Elmore, an installer at the San Mateo shop, testified about Courtney's 14–15 June meeting with the employees at that shop. Elmore had absolutely no memory of what Courtney stated at this meeting. His contemporaneous notes of the meeting by themselves have no intelligible meaning, and Elmore was unable to place the notes in any kind of intelligible context. In short Elmore's testimony was worthless.

2. Analysis and conclusions

The complaint, paragraphs 11(a) and (c), alleges that in violation of Section 8(a)(1) and (5) of the Act the Respondent on 14–15 June 1984, during the employee meetings, bypassed the Unions, dealt directly with employees represented by the Unions, and sought to undermine the employees' support of the Unions by "discussing with employees proposals made to the Unions concerning non-mandatory subjects of bargaining" and by "threatening employees that they would be permanently replaced in the event the Unions called a strike and they chose to support such a strike." The evidence pertinent to these allegations, which has been set out in detail supra, can be briefly summarized as follows.

During the 1984 reopener negotiations with the Unions, the Respondent on 18 July instituted its 13 June 1984 bargaining offer, which significantly changed the employees' economic terms and conditions of employment established by the Unions' contracts. As I have found supra, by engaging in this conduct Respondent violated Section 8(a)(5) and (1) of the Act because the 13 June offer was instituted during the term of the Respondent's contracts with the Unions, without the consent of the Unions, and despite the fact that the terms of the offer were beyond the scope of the contracts' reopener provisions and for this reason were not mandatory subjects of bargaining. On 14–15 June, immediately after the Unions' negotiators had informed Respondent's negotiators that they would not negotiate with Respondent about the 13 June offer because it was not encompassed by the contracts' reopener provisions, Respondent met with the employees represented by the Unions and

described Respondent's 13 June offer and answered the employees' questions about the offer. During these series of employee meetings, Vice President of Industrial Relations Courtney explained the 13 June offer to the employees and compared the benefits that the employees were receiving under the terms of the current contracts with those they would receive under Respondent's proposal, and answered questions from the employees' on this subject. Courtney also told the employees that Respondent could not afford to pay the 5.5-percent increase proposed by the Unions and could not even afford to pay the labor costs established by the terms of the current collective-bargaining contract. He told the employees that because of Respondent's severe financial losses incurred due to high labor costs, Respondent, in order to remain in business, would have to cut its labor costs and that in order to do this Respondent had made its 13 June offer to the Unions and that the Unions had the option of accepting Respondent's 13 June offer or rejecting it and showing their displeasure by striking. Also during the 15 June employee meeting held at the San Jose shop, Courtney further advised employees if in fact there was a strike and if the employees did not cross the picket line and come to work, they would be permanently replaced.

As the Board has recently stated, "an employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations." *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985), citing *United Technologies Corp.*, 274 NLRB 609 (1985). The Board explained that this right is based on the following consideration:

> The goal of the Federal labor policy has always been to create a favorable climate in which a healthy and stable bargaining process can be established and maintained. We believe that permitting the fullest freedom of expression by each party to that process offers the best hope of nuturing that environment. (*United Technologies*, supra at 610.)

In the *United Technologies* cases the Board held that the employer's communications to the union-represented employees concerning the employer's midterm contract proposals, which were beyond the scope of the contract's reopener clause, did not constitute unlawful direct dealing with the employees and bypassing of the union, even though the employer discussed its proposals with the employees after the union objected to the employer's offer and made it clear to the employer that it would only bargain concerning matters encompassed by the reopener clause. The instant case, however, is significantly different from the *United Technologies* cases where the employer did not institute its offer over the union's objection but instead acknowledged to the union that it was offering proposals that were outside the scope of the contract's reopener clause and that it was not mandatory for the union to bargain about the proposals. Here Respondent took the position that its 13 June offer was within the scope of the contracts' reopener clauses and that the offer was a mandatory subject of bargaining; Respondent told the employees during the 14–15 June series of meetings that the employees had the option of accepting Respondent's 13 June offer or striking; and, thereafter, in derogation of Section 8(d) of the Act, Respondent unilaterally instituted the terms of the 13 June offer over the Unions' vigorous objections.

Respondent's 14–15 June communication to the employees that they would have to accept Respondent's 13 June offer or strike can hardly be said to have furthered the "goal of the Federal labor policy . . . to create a favorable climate in which a healthy and stable bargaining process can be . . . maintained," where, as here, Respondent attempted to persuade the employees to accept the 13 June offer even though it knew that the employees' bargaining representatives regarded that offer as a nonbargainable matter outside the scope of the contracts' reopener provisions; the 13 June offer was in fact a nonmandatory subject of bargaining inasmuch as it was outside the scope of the contracts' reopener provision; and Respondent's conduct on 14–15 June in communicating the 13 June offer to the employees was inextricably bound together with its further conduct of unilaterally instituting the terms of that offer without the consent of the Unions in derogation of Section 8(d) of the Act and in violation of Section 8(a)(5) and (1) of the Act. Respondent's direct communications with the employees, in view of the aforesaid circumstances, was reasonably calculated to undermine the right of the Unions under Section 8(d) of the Act and the contracts' reopener clauses to renegotiate only those items included in its contracts with Respondent that were within the scope of the contracts' reopener clauses. It is for this reason I find that Respondent violated Section 8(a)(5) and (1) of the Act when on 14–15 June 1984 it bypassed the Unions and communicated directly with the employees represented by the Unions about those portions of its 13 June 1984 contract offer, which constituted nonmandatory subjects of bargaining.

I further find that as alleged in paragraph 11(c) of the complaint Respondent violated Section 8(a)(5) and (1) of the Act by telling the employees during the 15 June 1984 employee meeting at the San Jose shop, as described in detail supra, that they had the option of accepting Respondent's 13 June offer or striking, and the employees who supported such a strike would be permanently replaced. A strike by the employees caused in part by Respondent's insistence over the Unions' objections that the Unions accept Respondent's 13 June offer would have been an unfair labor practice strike inasmuch as Respondent's offer was a nonmandatory subject of bargaining. By threatening to permanently replace the employees if they supported such a strike, Respondent was threatening to permanently replace unfair labor practice strikers, which constitutes a violation of Section 8(a)(1) of the Act. *Redway Carriers*, 274 NLRB 1359 (1985). Also by making this threat, Respondent violated Section 8(a)(5) of the Act because the threat was a part and parcel of Respondent's other conduct engaged in during the 15 June employee meeting of bypassing the Unions and communicating directly with the employees about those portions of the 13 June 1984 offer that were nonmandatory subjects of bargaining, which conduct, I have

found, supra, by its very nature tends to destabilize and subvert the collective-bargaining process.

The complaint, paragraph 11(e), alleges that in violation of Section 8(a)(1) and (5) of the Act, the Respondent on 14–15 June 1984, during the employee meetings, bypassed the Unions, dealt directly with the employees represented by the Unions, and sought to undermine the employees' support of the Unions by "threatening employees with closure of Respondent's facilities if the Unions did not accept Respondent's bargaining proposals presented to the Unions." The evidence that is pertinent to this allegation and has been set out in detail supra can be briefly summarized.

During his 14–15 June employee meetings Courtney stated to the employees that Respondent's facilities covered by the Unions' contracts had lost over $350,000 during the past year due to the high cost of labor necessitated by the terms of the Unions' contracts and that Respondent could no longer afford to subsidize those facilities. In view of this, Courtney told the employees that Respondent had decided that instead of closing these facilities that it would propose changes in its contracts with the Unions, which would permit Respondent to operate the facilities without losing money. It was in this context that Courtney informed the employees about Respondent's 13 June 1984 contract proposal that had been offered to the Unions and gave the employees a detailed explanation of this proposal.

Based on the foregoing, I find Courtney's statements to the employees carried the implicit warning that unless the Unions and the employees represented by the Unions accepted Respondent's 13 June contract proposal that Respondent would be forced to close the facilities covered by the contracts on account of the high labor costs of Respondent's contracts with the Unions that had caused Respondent to lose approximately $350,000 in the past year. It is undisputed, however, that as a matter of fact, as Courtney explained to the employees, Respondent had lost approximately $350,000 during the past year operating these facilities. I therefore find that Courtney's statement constitutes a reasonable prediction based on objective facts and, as such, was protected by Section 8(c) of the Act. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969). Accordingly, I shall recommend the dismissal of this allegation.

The complaint, paragraphs 11(b) and (d), alleges that in violation of Section 8(a)(1) and (5) of the Act that Respondent during the employee meetings held on 14–15 June bypassed the Unions, dealt directly with employees represented by the Unions, and sought to undermine the employees' support of the Unions by, "informing employees of the possibility that the Unions would call a strike and fine employees who failed to support such a strike, at a time when the Unions were not considering any such course of action" and by "soliciting employees to resign their membership in the Unions." The evidence pertinent to these allegations, which has been set out in detail supra, can be briefly summarized.

During the 14–15 June employee meetings, Courtney told the employees that the Unions had the option of accepting Respondent's 13 June contract offer or rejecting it and striking. He clarified this remark by explaining to the employees that the Unions had not mentioned the possibility of a strike, but that Courtney had brought the subject up because it was one of the options available to the Unions. Respondent's attorney Haynes, who was also present at these meetings, told the employees that in the case of a strike they had the choice of striking or not striking and explained to them that, as Respondent understood the Unions' constitutions, bylaws, and the law of the State of California, if an employee decided not to support the Unions' strike the Unions could possibly fine them for not striking. Also during the 15 June employee meeting held at Respondent's San Jose shop, Courtney stated that if the Unions did strike Respondent in support of their contract demands that the Respondent would permanently replace employees who did not cross the picket line to work and the Unions could possibly fine those employees who crossed the picket line to work. There is no evidence that during the 14–15 June employee meetings any of Respondent's representatives mentioned anything about employees resigning from the Unions. However, during an employee meeting held on either 27 or 28 June at the San Mateo shop to inform the employees about the 26 June negotiation session, it is undisputed that in response to employees' questions about their right to strike or work during a strike called by the Unions, that Attorney Haynes told the employees that they were free to strike or not to strike. When employees asked Haynes how to go about resigning their union membership and how they should phrase their letters of resignations, Haynes told them that Respondent would post on the bulletin boards of its shops a sample resignation letter, but stated that the decision to resign was for the employees to make for themselves.

As summarized above, it is plain that all Respondent did in this case was to bring to the employees' attention the fact that the Unions, pursuant to the Unions' constitution and bylaws, might fine them if they failed to support a strike called by the Unions against Respondent, and in response to employees' request for information on how to go about resigning from the Unions in the case of a strike, Respondent informed the employees that it would provide them with a sample resignation letter, but that the decision to resign was for the employees to make for themselves. Considered by itself and in the context of what else was stated to the employees by Respondent during the employee meetings, this conduct was not reasonably calculated to interfere with employees' Section 7 rights. Consequently, I shall recommend dismissal of these allegations.

C. *Respondent's Refusal to Provide the Unions with Information*

1. The evidence

On 29 August 1984 Special Representative Edward Jones wrote Respondent's division manager, Ken Anderson, on behalf of the Unions, requesting an up-to-date list of the names, addresses, dates of hire, and current wage rates of all Respondent's employees represented by Locals 1621, 718, and 169. Jones, who was employed as an organizer by Local 1621, further advised Anderson

at he had been given permission by Locals 169 and 718 receive this information. Jones testified that the reaons the Unions wanted Respondent to furnish them with is information was so the Unions could administer the nion-security provision in their contracts with Respondt and to update the Unions' files with current informaon so they could administer their contracts with Reondent in other respects.

Respondent did not answer Jones' 29 August letter, so nes on 21 September 1984 wrote Anderson repeating s request for the names, addresses, and dates of hire of employees in the units represented by Locals 169, 8, and 1621, and warned Anderson that if this informaon was not received by 27 September the Unions ould file unfair labor practice charges. In reply, on 25 eptember Anderson telegrammed Jones that "these cords are kept in our Kansas Corporation office; they e enroute to you." Respondent, however, never furshed this information to Jones, as Anderson promised, stead on 8 October 1984 Attorney Haynes wrote Jones:

> This is to acknowledge receipt of your letter to Ken Anderson requesting an up-to-date list of all employees employed within the bargaining unit represented by Glaziers Local Nos. 1621, 718 and 169. Requests for names, addresses, date of hire, and current wage rates of employees represented by Local Nos. 718 and 169 should be made by each Union.
>
> As you know, Safelite presently has pending unfair labor practice charges with the National Labor Relations Board concerning Local No. 1621's intimidation, threat and coercion of Safelite employees in violation of Subsection 8(b)(1)(A) and Subsection 8(b)(2). We have been informed that the regional office of the National Labor Relations Board has determined that those charges have merit and until the violations of the act have been remedied, Safelite is reluctant to provide Local No. 1621 with the names, addresses, date of hire and current wage rates of its employees as you request.
>
> As soon as the unfair labor practice charges have been remedied, please renew your request.

y letter dated 22 October 1984 Jones wrote Haynes acowledging his 8 October letter and told Haynes that, indicated previously in Jones' 29 August letter to Anrson, Jones was requesting the information on behalf all three local unions with their knowledge and connt and repeated his request that Respondent provide m with the requested information.

On 28 February 1985 Carl Dahl, Local 718's business anager, telegrammed Respondent's division manager, nderson, that he was reaffirming the previous requests ade by Jones for the names, addresses, and wage rates Respondent's employees represented by Local 718. In sponse, on 8 March 1985, Anderson telegrammed ocals 169, 718, and 1621 that the names of all Respondt's employees were being continuously furnished to ocals 169, 718 and 1621 on the monthly dues forms rsuant to Respondent's contracts with the Unions, and ked the unions to review those forms and advise Reondent "if the requested information is necessary."

Respondent, as of the date of the hearing in this case, had not furnished the Unions, as requested, with the names, addresses, dates of hire, and wage rates of its employees represented by the Unions. Courtney testified that he was the company official who made the decision, on receipt of the Unions' 29 August 1984 request for this information, not to furnish the information. He further testified that his reason for making this decision was that he learned from talking with Respondent's attorney Haynes that the evidence submitted by Attorney Haynes to the National Labor Relations Board in support of the Respondent's charges against the Unions filed 9 July 1984 revealed that

> the Unions had harassed and intimidated the employees, and that they were continuing to do so. They sent letters to employees, indicating that if they did not pay their strike assessment, the Union was going to get them fired or get their job terminated with the company. The employees had been required to . . . join the Union before the contract called for it . . . one individual, I think, indicated that he had to pay three months in advance.

The record shows that in Case 32–CB–1821 on 9 July 1984 Attorney Haynes, on behalf of Respondent, filed an unfair labor practice charge with the National Labor Relations Board alleging, among other things, that Locals 169, 718, and 1621 violated Section 8(b)(1)(A) and (2) of the Act by "causing or attempting to cause employers to discriminate against an employee in violation of Section 8(a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some grounds other than his failure to tender periodic dues and initiation fees uniformally required as a condition of acquiring or retaining membership," and "by requiring employees by an agreement authorized under subsection (a)(3), the payment, as a condition precedent to becoming a member of such organization, a fee in an amount which is excessive under all the circumstances." These allegations were found to be meritorious by the Board's Regional Office only insofar as they involved Local 169.[23] On 30 October the Board's Regional Office entered into an agreement with Local 169 settling this case, in which Local 169, without admitting that it violated the Act, agreed not to cause or attempt to cause Respondent to discriminate against employees in violation of Section 8(a)(3) of the Act and not to attempt to force Respondent to require employees to become members of Local 169 or pay an initiation fee prior to the time they completed 30 days of employment. It was further agreed that for 60 consecutive days it would post a notice addressed to its members embodying the aforesaid settlement agreement. Respondent was not a party to this settlement agreement, which it viewed as being inadequate. However, the General Counsel by letter dated 7 February 1985 rejected Respondent's appeal and affirmed the settlement. Because compliance with the settlement was presumably held in abeyance

[23] Attorney Haynes' 8 October letter incorrectly states that the charge was found to be meritorious with respect to Local 1621.

pending Respondent's appeal, Local 169, as of the date of the hearing in this case, 12–14 March 1985, had not posted the notice to its members for the 60 days required by the settlement, thus its alleged unfair labor practices had not been remedied.

2. Analysis and conclusions

On 29 August 1984 the Unions requested Respondent to provide them with an up-to-date list of the names, addresses, dates of hire, and current wage rates of employees in the bargaining units represented by the Unions. Because this information was presumptively relevant to the Unions' role as the bargaining agents of Respondent's unit employees, no showing of particularized need was necessary. *Bozzuto's, Inc.*, 275 NLRB 353 (1985); *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978). As described in detail supra, Respondent refused to comply with the Unions' request.

Respondent did not advance any reason for its refusal to provide the Unions with the dates of hire and current wage rates of the employees employed in the units represented by the Unions. In view of the relevance of this type of information to the Unions as the employees' bargaining agent, I find Respondent's refusal to provide this information violated Section 8(a)(5) and (1) of the Act.

Respondent justifies its refusal to furnish the Unions with the names of the employees represented by the Unions by taking the position that Respondent was already furnishing the Unions this information on a monthly basis in the form of monthly union dues payment-remittance statements received by the Unions with the moneys that Respondent deducts from the employees' wages for union dues.[24] There is a serious doubt, however, whether these monthly statements in fact contain the names of all the employees employed in the units represented by the Unions (compare Tr. 536 with Tr. 572–573). In any event, assuming these monthly statements include the names of all the employees, Respondent still was required to provide the names of the employees to the Unions in connection with Respondent's further statutory obligation to provide the Unions with the employees' current wage rates and dates of hire, for otherwise that information would make no sense to the Unions.

Regarding the Unions' request for the employees' addresses, Respondent, in its posthearing brief, argues that it "did not provide the addresses of employees because of a belief that one reason for the Unions' request was a desire to continue to harass employees with regard to dues payments and/or initiation fees which exceeded that which was required by the contract, i.e., payments of dues and/or fees prior to 30 days of employment and payments which exceeded the dues which, were deducted from the employees' pay."[25] However, Respondent did not present any evidence that the Unions harassed employees. Not one employee testified to this effect, nor did a single supervisor or managerial employee testify that employees had stated they were being harassed. The only evidence introduced by Respondent to support its contention that the Unions were harassing employees is the fact that Local 169 in Case 32–CB–1821, as described in detail supra, entered into a settlement agreement in which it agreed that it would not cause or attempt to cause Respondent to discriminate against employees in violation of Section 8(a)(3) of the Act and would not attempt to force Respondent to require employees to become members of Local 169 or pay an initiation fee prior to the time they had completed 30 days of employment. This settlement agreement has absolutely nothing to do with the bargaining unit represented by Local 718. Therefore, it did not justify Respondent's refusal to provide Local 718 with the addresses of the employees employed in Local 718 unit. And with respect to the employees employed in the unit jointly represented by Locals 169 and 1621, the settlement agreement does not warrant the inference that Local 169 engaged in the misconduct encompassed by the agreement because unions and employers enter into such settlement agreements for a multitude of reasons having nothing to do with whether they have engaged in the illegal conduct they have been charged with. Indeed, this settlement agreement states that by entering into it that Local 169 was not admitting it violated the Act. In any event, the terms of the settlement agreement do not warrant the inference that during the time material there was a "clear and present danger of harassment and violence" to justify Respondent's refusal to furnish Locals 169 and 1621 with the names of the employees in the unit jointly represented by those local unions.[26] The settlement agreement does not establish that Local 169 harassed employees as contended by Respondent, or even if, as Respondent contends, the settlement agreement warrants the inference that Local 169 in fact harassed employees in connection with its illegal enforcement of the contractual union-security

[24] Respondent's good faith in raising this defense is doubtful. It was not until the complaint in this case was issued and shortly before the start of the scheduled hearing that Respondent for the first time informed the Unions that they were not entitled to the names of the employees because Respondent was regularly furnishing the names in the form of the monthly union dues statements. Also previously, on 25 September, District Manager Anderson had assured the Unions that all the requested information, including the employees' names, was "enroute to you." Anderson's promise and the Respondent's subsequent repudiation of that promise insofar as it pertains to the employees' names was never explained. Under the circumstances Respondent's belated contention that it was not obligated to provide the Unions with the employees' names because they were already being furnished to the Unions does not appear to have been raised in good faith.

[25] Respondent's defense that it decided not to provide the Unions with the employees' addresses because it thought that the Unions intended to use this information to illegally harass the employees is based on the testimony of Courtney that Attorney Haynes told him that the evidence Haynes submitted to the Board's Regional Office in support of Respondent's charge in Case 32–CB–1821 showed that the Unions had harassed and intimidated employees in enforcing the union-security provisions in their contracts with Respondent in an illegal manner. I note that this testimony was received for the sole purpose of shedding light on the state of Courtney's mind when, as he testified, he decided not to provide the Unions with the requested information. It was not received for the truth of the matters contained therein.

[26] It is well established that there must be more than a speculative concern on the part of an employer: there must be a "clear and present danger of harassment and violence" to justify a refusal to furnish a union with relevant information. See *Shell Oil Co. v. NLRB*, 457 F.2d 615, 618–620 (9th Cir. 1972). Accord: *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1113–1114 (1st Cir. 1975); *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1207 (2d Cir. 1970).

clause, it does not establish that the extent of this misconduct was sufficient to justify Respondent's refusal to furnish the Unions with the addresses of the bargaining unit employees. It is for all the foregoing reasons that I find Respondent violated Section 8(a)(5) and (1) of the Act by its refusal to provide the Unions with the addresses of the employees employed in the units represented by the Unions.

D. *Respondent's Attorney Interviews Employees*

1. The evidence

As described in detail supra, on 14–15 and 27–28 June 1984, Courtney, accompanied by Anderson and Haynes, conducted a series of meetings with Respondent's employees at which time Courtney informed them about the state of Respondent's reopener negotiations with the Unions and explained Respondent's bargaining proposals to them. I have found, supra, that during the employee meetings held 14–15 June 1984 Respondent engaged in certain conduct that violated Section 8(a)(1) and (5) of the Act. On 21 June 1984 Local 1621 in Case 32–CA–6566 filed an unfair labor practice charge with the Board, alleging in substance that since 13 June 1984 Respondent had violated Section 8(a)(1) and (5) of the Act by conducting itself in such a coercive manner as to have interfered with its employees' Section 7 rights and by failing to bargain in good faith with Locals 1621 and 169. It is undisputed that following Respondent's receipt of this charge that Attorney Haynes in order to defend Respondent against the charge's allegations interviewed Respondent's employees on 27–28 June 1984 and questioned them about what was stated to them by Respondent's representatives at the 14–15 and 27–28 June employee meetings. The complaint, paragraph 6(a), alleges that Respondent through Haynes on approximately 27 June 1984 "coercively interrogated [Respondent's] employees in connection with preparing its defense to an unfair labor practice charge filed against Respondent," thereby violating Section 8(a)(1) of the Act. Five witnesses—Haynes and employees Poda, Lenz, Elmore, and Garcia—testified about Haynes' interviews with employees. The significant portions of their testimony are set forth hereinafter.

William Haynes, Respondent's attorney, testified as follows. On 27–28 June 1984 he visited Respondent's several shops in northern California and interviewed several of the Company's employees who attended the 14–15 and 27–28 June employee meetings conducted by Courtney. Haynes testified that as he did not speak from a prepared script or from notes or take notes of the interviews, he was unable to recall his exact words, but that each of the interviews was conducted in the following manner. He spoke to the employees outside the presence of management. He showed the employees a copy of the charge filed by Local 1621 in Case 32–CA–6566, gave them an opportunity to read it, and explained to them that he wanted to interview them about what was stated to them by management during the employee meetings held 14–15 and 27–28 June. Haynes stated that the purpose of his interview was to take a statement from them in preparing Respondent's defense to the allegations made in Local 1621's charge. Haynes also told the employees that they did not have to cooperate with him and were free to leave and not answer his questions, but that he would appreciate it if they cooperated. He also advised them that they had the right to engage or refrain from engaging in union activities, and the Respondent respected those rights, and that they were protected by Federal law. The employees who chose to remain were then questioned by Attorney Haynes about what was stated by Respondent's representatives during the employee meetings that they attended on 14–15 and 27–28 June. Haynes wrote down what the employees told him on a sheet of legal paper, wrote that the employees giving the statements had been assured that Respondent would take no reprisals against them, and asked the employees to sign the statement at the conclusion of the interview.

Britt Elmore, an employee at Respondent's San Mateo shop, testified that sometime in June 1984 Attorney Haynes visited him at the shop and asked him if he would give Haynes a written statement about what Courtney had stated to the employees at the employee meeting held by the Company earlier in June. Haynes told him that since the Union was claiming that Respondent had threatened the employees at this meeting Respondent wanted the employees to submit written statements saying that they were not threatened and to sign the statements. Attorney Haynes showed Elmore written statements signed by some of the Company's other employees and asked him to read them. When Elmore advised Haynes that he would not furnish him with such a statement, Haynes asked the reason for his refusal, and Elmore replied by stating that he just did not want to write anything down and sign it. This ended the conversation. Elmore testified that Haynes did not state to him that his participation in the interview was voluntary or that Respondent would not retalitate against him if he did not provide it with a statement as requested by Haynes and that Haynes did not advise him of his rights under the Act.

Arthur Garcia, an employee at the San Jose shop, testified that Attorney Haynes visited him and employee Ballin on 27 June at the San Jose shop, told them there had been an unfair labor practice charge filed by the union against Respondent. He then gave them a copy of the charge to read and also told them that his purpose in speaking to them was to prepare a defense for Respondent against the allegations in the charge. Haynes told the employees that he wanted to take a written statement from them about what had actually occurred during the company employee meeting they attended 15 June and have them sign it. Ballin stated he would not sign such a statement. Garcia indicated that he would sign a statement only if he was given a copy of what he was signing. Haynes, using leading questions, then took a statement from Garcia about what had taken place during the 15 June meeting and asked Garcia to sign it. Garcia responded by stating he would only sign it if he was given a copy of the statement for his personal records. Haynes responded by leaving with the unsigned statement. Garcia testified that Haynes did not state that Garcia's

best copy available

participation in the interview was voluntary or that there would be no reprisals taken against him if he refused to sign the statement or advise Garcia that he was free to engage in or refrain from engaging in union activities or that his rights in this respect were protected by the Act.

James Poda, an employee at Respondent's San Francisco shop, testified that Attorney Haynes visited him and employee Spencer at that shop on 27 June and told them that the union had filed an unfair labor practice charge against the Company and that the Company needed the employees to make written statements explaining that Respondent did not coerce them at the 14 June company meeting. Spencer told Haynes that the employees were not coerced and that he would be happy to state this in writing. Poda stayed silent. Haynes stated that although a statement signed by Poda and Spencer would be good, Spencer's signature was just as good. Spencer then told Haynes what he remembered as having occurred during the 14 June meeting and, as he spoke, Haynes wrote down what he said on a piece of paper. Poda left the room stating that he did not intend to sign the statement Haynes was writing. Poda testified that Haynes did not tell him his participation at this meeting was voluntary, or that there would be no reprisals taken against him, nor did Haynes explain his rights under the Act.

Randolph Lenz, an employee at Respondent's Pleasant Hill shop, testified that Attorney Haynes visited Lenz and employees Lopez and Meahan at the shop and, in the presence of Courtney, showed them a copy of the unfair labor practice charge filed against Respondent by Local 1621. He read them what the charge alleged and told them he wanted to talk to them about the allegations in the charge, but that they had the choice of staying or leaving and if they chose not to participate in the interview, no reprisals would be taken against them. When all three employees stated that they wanted to stay and listen to what Haynes had to say, Haynes told them he would like them in their own words "to give a rebuttal" to what was alleged in the unfair labor practice charge and to sign the statement they gave. The result was an affidavit dated 28 June 1984 in Haynes' handwriting, which all three employees jointly signed, setting forth what allegedly occurred during the employee meetings conducted by the Respondent. The affidavit ends with the declaration: "I have been informed of the purpose of this statement and assured no reprisals will be taken against me."

2. Analysis and conclusions

The complaint, paragraph 6(a), alleges that Respondent through its Attorney Haynes about 27 June 1984, "coercively interrogated [Respondent's] employees in connection with preparing its defense to an unfair labor practice charge filed against Respondent," thereby violating Section 8(a)(1) of the Act. In support of this allegation the General Counsel argues that in questioning employees Poda, Garcia, and Elmore for the purpose of preparing Respondent's defense to Local 1621's unfair labor practice charge, Respondent violated Section 8(a)(1) because it did not observe the principles of *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), in that Respondent's attorney, when he questioned the employees, did not advise them that their participation in furnishing Respondent with the requested information was on a voluntary basis, nor did he assure them they would not suffer any reprisals, and the questioning occurred in the context of Respondent's illegal direct dealings with the employees. Respondent argues that assuming it failed to comply with the *Johnnie's Poultry* rules, it did not matter because the alleged illegal interrogation did not pertain to any conduct protected by Section 7 of the Act. Respondent's contention is meritorious.

In *Johnnie's Poultry* the Board outlined the permissible manner in which an employer may interrogate an employee concerning matters likely to arise in an unfair labor practice proceeding. The Board held that to render such questioning privileged, an employer (id. at 774–775):

> must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

It is clear, however, that in formulating the *Johnnie's Poultry* standards for those situations where an employer is engaged in questioning employees in order to defend itself against unfair labor practice charges, that the Board assumed that the standards would be applicable only to those situations that involved an employer's interrogation of employees about matters involving their Section 7 rights. For in all cases arising under the Act, which involve allegations of illegal employee interrogation, the Board evaluates the legality of the interrogation according to "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere *with rights guaranteed by the Act*" (emphasis added). *Rossmore House*, 269 NLRB 1176 (1984).

In the instant case it makes no sense to apply the *Johnnie's Poultry* rules because the employees were not questioned about their union sympathies or activities or about any other activities guaranteed by Section 7 of the Act. Nor was their interrogation reasonably calculated to interfere with the Board's statutory obligation to carry out the Act's mandate to protect the employees' Section 7 rights inasmuch as Respondent did not ask the employees if they had spoken to a Board agent or whether they had submitted affidavits to the Board. The employees were only asked to furnish a statement to Respondent's attorney that would inform him of what had been stated to the employees by representatives of management and Respondent's attorney during the meetings previously held by management, which the employees attended. This interrogation was not reasonably calculated to inhibit the employees from engaging in any of the types of protected concerted activity encompassed by Section 7 of the Act, nor was it reasonably calculated to interfere

with the Board's investigatorial and prosecutorial processes. In other words the alleged illegal interrogation by Respondent's attorney in preparing a defense to Local 1621's unfair labor practice charge did not pertain to the employees' involvement in conduct protected by Section 7 of the Act.[27] Accordingly, I shall recommend the dismissal of this allegation in the complaint. See *Mineola Ford Sales*, 258 NLRB 406 (1981).

E. *Respondent's Transfer of Employee James Poda*

1. The evidence

James Poda worked for Respondent at its San Francisco shop as an auto glass installer trainee. He is a member of Local 718, the Union that represents the installers employed by Respondent at that shop. Poda's terms and conditions of employment were established by Local 718's contract with Respondent, which provides that auto glass installer trainees during their first 6 months of employment earn 60 percent of the journeyman hourly rate of pay; 70 percent during their second 6 months; 80 percent during their third 6 months; 90 percent during their fourth 6 months; and at the end of their second year of employment would receive the journeyman hourly rate. Poda having started to work for Respondent on 16 July 1982 normally would not have received his journeyman rate of pay until approximately 16 July 1984. Poda apparently had some prior experience when hired by Respondent and received at least one of his scheduled pay raises at the end of 3 rather than 6 months as called for by the contract. Poda believed that his pay should have been raised to the journeyman rate prior to the conclusion of his second year of employment. In 1984, prior to 27 June, he mentioned this to District Manager Anderson on more than one occasion. Anderson told him that he would check into it.[28] When Anderson failed to do anything about Poda's complaint, on 27 June, Poda spoke to Anderson again as described below.

On 27 June Anderson and Respondent's vice president of industrial relations Courtney accompanied Attorney Haynes to the San Francisco shop, described in detail supra, Haynes interviewed Poda and employee Spencer in the shop's office and Poda left the office after having refused to sign a statement for Haynes. When Poda reentered the shop, he initiated a conversation with Anderson by asking what was happening about his pay raise. Anderson told him that he would not receive the raise because he had not been employed for 2 years, which he stated was the time period a trainee must work before being eligible to be paid journeyman's wages. Poda explained why he felt that he was eligible at the end of his first year of employment to receive journeyman's wages. Anderson then called Courtney over and asked Poda to explain his complaint to Courtney. After listening to Poda's complaint, Courtney told him that he was not familar with the matter and would check into it and speak to Poda about it at a later date. Poda replied by telling Anderson and Courtney that he was months late in receiving his journeyman rate of pay, that he had complained to Respondent a long time ago about this, and that now he intended to go to the Union with his complaint and let the Union handle it. Anderson told Poda, "Do what you have to do" and this concluded the conversation.[29]

A few days following his 27 June conversation with Anderson and Courtney, Poda went to Local 718's offices and brought his grievance to the Union's attention. Subsequently, on Friday, 6 July, Local 718 Business Manager Carl Dahl wrote Anderson stating, among other things, that Respondent was in violation of its contract with Local 718 by failing to increase Poda's pay as required by that contract and asked for an immediate meeting with Respondent to "grieve this matter."

On Monday, 9 July, at approximately 9 a.m., Anderson telephoned Poda at Respondent's San Francisco shop. He began the conversation by asking, "What's this union stuff?" Poda answered, "You know what it is." Anderson asked, "What are you trying to do to me?" Poda answered by asking, "What can I do to you?" Anderson stated, "Okay Poda I'll be—," at which point Poda interrupted Anderson and told him, "don't threaten me," whereupon, Anderson stated, "This is not a threat, this is a promise. I'll be watching you and you make one mistake and you're gone." Poda then changed the topic and asked Anderson about his paycheck, which had been late in arriving, and this ended the conversation.[30]

Later during 9 July, at approximately 12 p.m., Anderson, accompanied by his assistant, Cecil Green, who is Respondent's operations manager, visited the San Francisco shop, and Green, in the presence of Shop Manger Young and Anderson, notified Poda that effective the next workday Poda was being transferred from the San Francisco shop to the Richmond shop. Green told Poda that the Richmond shop was having a difficulty or a problem and that Respondent needed another man there and that effective 10 July Poda was being transferred there to work, where Poda would be working for his "old buddy" Steve Apple. Green made this last remark in a sarcastic tone of voice. Green asked whether the transfer would pose any problem for Poda, and Poda an-

[27] In view of this conclusion, I have not considered the General Counsel's contention that Respondent's attorney in questioning employees Poda, Garcia, and Elmore failed to comply with the criteria set forth in *Johnnie's Poultry*.

[28] Anderson testified that when Poda asked why his pay had not been raised to that of a journeyman's Anderson explained the reason. Poda, as described above, testified that prior to 27 June on those occasions when he casually mentioned the matter to Anderson, Anderson told him he would check into it. I have credited Poda's testimony because his testimonial demeanor was better than Anderson's.

[29] Poda and Anderson testified about the above-described 27 June conversation, which is based on Poda's testimony. Anderson's version did not contradict Poda's. I realize that Anderson did not testify that Poda stated he intended to take his complaint to the Union and let the Union handle it. Anderson did not, however, specifically deny that Poda made this statement and Poda's testimonial demeanor when he testified about this conversation was good.

[30] Anderson testified that the above-described 9 July telephone conversation between himself and Poda did not take place. In fact, Anderson testified that he has never spoken to Poda over the telephone about anything. I have credited Poda's testimony because his testimonial demeanor was good, and Anderson's was poor when they testified about this telephone conversation. I also note that Respondent's shop manager, Young, who Poda testified was the one who notified him about his 9 July telephone call from Anderson, did not corroborate Anderson's denial that he had spoken to Poda over the telephone that day.

swered, "No." Because Poda had never been to the Richmond shop, Green gave him directions on how to get there.[31]

Poda in fact began work at the Richmond shop on 10 July and worked there until he left Respondent's employment on a date not disclosed by the record. The manager of the Richmond shop was Steve Apple, who Poda had worked for in San Francisco when Apple managed that shop.

Depending on the traffic and Poda's speed, it took him between 20 to 25 minutes to drive to the San Francisco shop from his residence and between 45 minutes to an hour to drive to the Richmond shop.

2. Analysis and conclusions

The complaint alleges in substance that Respondent violated Section 8(a)(1) of the Act when District Manager Anderson on 9 July 1984 interrogated Poda about a grievance filed against Respondent by Local 718 and threatened him with discharge because he filed a grievance against Respondent. As I have found supra, on 9 July Anderson telephoned Poda and asked, "What's this union stuff?" and "What are you trying to do to me?" and in almost the same breath promised Poda that he would keep his work under surveillance and discharge him if he made a single mistake. Viewed in context, it is clear that in asking these questions and threatening Poda with discharge Anderson was referring to the grievance that Local 718 filed against Respondent on Poda's behalf. It is also clear that Anderson's questions about the grievance were reasonably calculated to elicit a response from Poda concerning his reasons for filing the grievance with Local 718. Likewise, when viewed in context, it is clear that Anderson's promise to keep Poda's work under surveillance and discharge him if he made a mistake was reasonably calculated to be construed by Poda as a threat to discharge him because Local 718 had filed a grievance on his behalf. I therefore find that by threatening Poda with discharge because his bargaining representative, Local 718, had filed a grievance against Respondent on his behalf Respondent engaged in conduct reasonably calculated to coerce Poda from exercising his rights guaranteed by Section 7 of the Act, and that by engaging in this conduct Respondent violated Section 8(a)(1) of the Act. I also find that because Anderson's above-described interrogation of Poda about the grievance filed by Local 718 on his behalf occurred in the context of Anderson's illegal threat to discharge him on account of that grievance, the interrogation was coercive and constituted a separate additional violation of Section 8(a)(1) of the Act.

The complaint alleges that Respondent's transfer of Poda on 10 July 1984 from its San Francisco to its Richmond shop violated Section 8(a)(1) and (3) of the Act because it was motivated by Poda's union or protected concerted activities. Considering Poda's transfer occurred almost simultaneously with Respondent's knowledge that Local 718 had filed a grievance against Respondent on Poda's behalf concerning his wage complaint;[32] considering Respondent violated Section 8(a)(1) of the Act by threatening to discharge Poda because Local 718 filed this grievance on his behalf and by coercively questioning Poda about the grievance; considering Poda was notified about his transfer on the same day that Respondent first learned that Local 718 had filed a grievance against it on Poda's behalf and within 4 hours after Respondent's threat to discharge Poda because of this grievance, I am persuaded that these considerations in their totality warrant a finding that the General Counsel has established that Respondent was hostile toward Poda because Local 718 had filed a grievance against Respondent on his behalf and that this hostility was a motivating factor in Respondent's decision to transfer Poda from its San Francisco to its Richmond shop.

The remaining question for decision is whether Respondent has established by a preponderance of the evidence that Poda's transfer would have taken place even in the absence of Local 718's grievance on Poda's behalf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983), affirming the standard announced in *Wright Line*, 251 NLRB 1083 (1980). An evaluation of the pertinent evidence follows.

During the time material, Respondent's nine northern California stores, the stores involved in this case, employed approximately 17 auto glass installers. Respondent's West Coast division manager Ken Anderson was responsible for the operation of these stores.

Immediately before Poda's 10 July transfer from the San Francisco to the Richmond shop, the San Francisco shop employed three workers: Young, Poda, and Spencer. Young, a journeyman auto glass installer, was the shop manager and spent all of his time in the shop answering the telephone and making sales. Poda, a trainee auto glass installer, spent most his time away from the shop doing mobile work; he went to the homes and/or businesses of customers to install auto glass. Spencer, a journeyman auto glass installer, was the assistant manager and spent most of his time working in the shop and doing Young's work in his absence. The shop had insufficient work to keep both Poda and Spencer busy and prior to Poda's transfer Anderson expressed his concern to Young about this.

[31] This description of Green's 9 July conversation with Poda is based on Poda's testimony. Green did not testify. Anderson testified that he was unable to remember whether he visited the San Francisco shop on 9 July with Green, but denied that he was present when Poda was notified of his transfer. Anderson also testified initially that it was either Green or Young who told Poda about his transfer, then later testified that Young was the person who told Poda about his transfer. Young testified that he was present when Poda was notified about his transfer, but was unable to recall whether it was himself or Green who told Poda about the transfer, nor could he remember whether Anderson was present when Poda was notified. I credited Poda's testimony because his testimonial demeanor was good when he testified about this matter.

[32] Anderson's testimony that it was not until some date after Poda's transfer, a date he was unable to remember, that he received Local 718's 6 July letter about Poda's grievance, has been rejected because: (1) his testimonial demeanor was poor when he gave this testimony; (2) the letter was mailed from Local 718's office in San Francisco, California, which is located geographically in close proximity to Anderson's office, which is located in Oakland, California, thus there is a strong likelihood that during the normal course of mailing the letter would have been delivered on 9 July to Anderson's office; (3) the content of Anderson's 9 July telephone conversation with Poda, supra, warrants the inference that Anderson was speaking to Poda about Local 718's 6 July letter.

Immediately before Poda's 10 July transfer to the Richmond shop, that shop employed two workers, Steve Apple and Kent Wright. Apple, the shop's manager, was a journeyman auto glass installer and spent most of his time away from the shop doing all of the shop's mobile work. Wright, who was a sales representative and not an auto glass installer, spent all of his time in the shop answering the telephone and making sales. The Richmond shop was a low volume shop. Between 80 and 90 percent of its work was mobile work.

Poda worked under Apple's supervision initially when Apple managed the San Francisco shop. Anderson knew that at times there had been ill will between Apple and Poda and, on one occasion, they had a dispute about Poda's overtime, which was resolved by the State of California. However, Anderson also knew that Poda's relationship with the shop's current manager, Young, was not good. For in April 1984 Young issued Poda a final written disciplinary warning that threatened Young with discharge.[33]

When it transferred Poda from its San Francisco shop to its Richmond shop on 10 July, Respondent did not replace him with another worker, thus leaving two workers in that shop. However in September Respondent employed a third worker there, a trainee installer, for 2 weeks and then sometime in October again employed a third worker there, another trainee installer, who worked until late December. Since then Respondent has only employed two workers at its San Francisco shop.

In the 3-year period immediately prior to Poda's transfer, Respondent transferred approximately 15 installers between the shops involved in this case. As was the case with Poda's transfer, Respondent's practice was not to consult with the transferred employee about the transfer or give the employee advance notice of the transfer.

Division Manager Anderson made the decision to transfer Poda. He testified that he concluded that it did not make sense to have Richmond Store Manager Apple spend virtually all of his work time away from the shop doing mobile work, especially since Sales Representative Wright was not doing a good job working at the desk, so about 1 June 1984 Anderson decided that the make up of the Richmond shop's staff would have to be changed by having Apple work in the shop, just as Young did in San Francisco and, because Wright was not an installer, to terminate him and replace him with an installer from one of Respondent's other shops.[34] Anderson further testified that when Respondent's telephone bill showed that Wright had made unauthorized telephone calls, about 9 July 1984 Anderson decided to implement the above decision to terminate Wright and have Manager Apple do all the Richmond shop's inside work and to transfer an installer from one of Respondent's other shops to do all the Richmond shop's mobile work.

Regarding Poda's selection as the installer who was transferred to the Richmond shop, Anderson testified that he considered transferring an installer from one of the shops located nearest to Richmond, the San Francisco and Oakland shops, and concluded that in the Oakland shop there was sufficient work to keep all the employees employed there busy, whereas in San Francisco there was not enough work to keep installers Spencer and Poda busy. He further testified that in selecting Poda, rather than Spencer, for transfer, he relied on the following considerations: Poda had worked under Apple's supervision previously; Poda did most of the San Francisco shop's mobile work, thus was more experienced in performing this type of work that constituted virtually all the work performed by the installer at the Richmond shop; the Richmond shop was a low volume shop, thus Anderson did not want to transfer a good and experienced worker such as Spencer there because Anderson felt that Spencer would not have enough work to keep him busy and would become bored.

Anderson's above-described testimony establishes that during the normal course of business Poda was transferred as an integral part of Respondent's decision to have the manager of its Richmond shop, like the manager of its San Francisco shop, spend his working time in the shop rather than away from the shop doing installation work, and further establishes that Poda's selection to be transferred to do the Richmond shop's installation work, rather than one of Respondent's other installers, was based on legitimate business considerations and occurred during the normal course of business. I am persuaded that Anderson's testimony is credible because, unlike his testimony concerning other matters, when he testified about his reasons for transferring Poda his testimonial demeanor was good, and viewed in the light of the whole record, his testimony is not inherently incredible nor was it impugned in significant respects either by internal inconsistencies or by the testimony of Shop Manager Young whom the General Counsel called as an adverse witness. Furthermore Anderson's testimony is bolstered by the fact that when Respondent transferred Poda from its San Francisco shop, it did not replace him with another installer.[35] I also find it difficult to believe that Respondent would go to the trouble of discharging Sales Representative Wright, reassigning Shop Manager Apple from doing outside installation work to working solely in the shop, and decreasing the number of its San Francisco shop installers from two to one in order to create a situation that it could use as a pretext for transferring Poda to the Richmond shop because of its antagonism toward him for having authorized Local 718 to file a grievance against Respondent. In this regard, I note that although during normal traffic conditions Poda's transfer added 50 minutes a day to his work commute,

[33] The record does not reveal what Poda did to warrant Young's disciplinary warning. Young testified that although at times Poda was a good worker, at other times he was not a good worker and took an inordinate amount of time to finish his work assignments.

[34] I note that Young testified that sometime prior to Poda's transfer, Anderson discussed with Young his concern about the lack of work in the San Francisco shop for the amount of workers employed there and the fact that he needed another installer at the Richmond shop.

[35] I recognize that Rspondent employed other trainee installers for various periods of time in San Francisco to take Poda's place whenever the volume of work at that location made this necessary. However, since Poda's transfer Respondent for the most part has operated the San Francisco shop with only two workers, and as of the date of the hearing in this case, 15 March 1985, this has been the situation since late December 1984.

when Poda was notified about the transfer and asked by Operations Manager Green whether it posed any problems for him, Poda answered, "No"; there is no evidence the working conditions Poda would expect to encounter at the Richmond shop would be more onerous than at the San Francisco shop; and, while Poda had his differences with Richmond Shop Manager Apple when Apple managed the San Francisco shop, the record reveals that Poda's relationship with the current San Francisco Shop Manager Young was not good inasmuch as only 3 months before the transfer Young had issued a written disciplinary warning to Poda threatening him with discharge.

Based on the foregoing, I find Respondent has established that even absent Poda's grievance against Respondent filed by Local 718, Respondent during the normal course of business would have transferred him on 10 July 1984 from its San Francisco to its Richmond shop. I therefore shall recommend the dismissal of this allegation.

CONCLUSIONS OF LAW

1. Lear Siegler, Inc., d/b/a Safelite Glass, the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Glaziers, Architectural Metal & Glassworkers Union, Local Nos. 169, 718, and 1621, International Brotherhood of Painters & Allied Trades, AFL–CIO, the Unions, are labor organizations within the meaning of Section 2(5) of the Act.

3. (a) Respondent's employees, excluding supervisors as defined in the Act, employed in the job classifications covered by the Respondent's contract with Glaziers Union Local 718 effective from 1 July 1982 to 30 June 1985, and employed by Respondent at its San Mateo, California and San Francisco, California facilities, constitute an appropriate bargaining unit.

(b) Respondent's employees, excluding supervisors as defined in the Act, employed in the job classifications covered by the Respondent's contract with Glaziers Union Locals 169 and 1621 effective from 1 July 1982 to 30 June 1985, and employed by Respondent at its California facilities located in the cities of Richmond, Oakland, San Jose, Pleasant Hill, San Leandro, Hayward, and Fremont, constitute an appropriate bargaining unit.

4. During all times material, Glaziers Local Union 718 has been the collective-bargaining representative of all the employees in the bargaining unit in paragraph 3(a) above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act, and Glaziers Local Unions 169 and 1621 have jointly been the collective-bargaining representative of all the employees in the bargaining unit in paragraph 3(b) above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally ceasing payments to the health and welfare and pension and vacation and holiday funds established by its 1982–1985 contracts with the Unions, and by unilaterally substituting new medical and pension plans for the medical and pension plans required by its 1982–1985 contracts with the Unions, and by unilaterally changing employees' vacation and holiday benefits established by its 1982–1985 contracts with the Unions, and by unilaterally decreasing the employees' minimum hourly rates of pay established by its 1982–1985 contracts with the Unions, and by engaging in the aforesaid conduct during the term of its 1982–1985 contracts with the Unions and without the Unions' consent, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By bypassing the Unions and dealing directly with employees represented by the Unions concerning nonmandatory subjects of bargaining previously rejected by the Unions as subjects of bargaining and by threatening to permanently replace the employees if they supported a strike caused by Respondent's insistence that the Unions' accept such nonmandatory subjects of bargaining, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By refusing to furnish the Unions with unit members' names, addresses, dates of hire, and wage rates, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. By interrogating employee James Poda about a grievance filed on his behalf by his bargaining representative Glaziers Local 718, and by threatening Poda with discharge because Local 718 filed this grievance on his behalf, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of the Act, I shall recommend that it cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

I have found that since 18 July 1984 Respondent has violated Section 8(a)(5) and (1) of the Act by, during the term of its 1982–1985 contracts with the Unions, ceasing to make contributions on behalf of the unit employees to the health and welfare and pension and holiday and vacation funds established by those contracts. In order to dissipate the effects of these unfair labor practices, I shall recommend that Respondent commence making the required contributions to the respective funds and make the unit employees whole by paying all the aforesaid contributions, as provided in the applicable collective-bargaining contracts, which have not been paid and which would have been paid absent the Respondent's unlawful discontinuance of such contributions.[36] In addi-

[36] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. I leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the fringe benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to the provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action. *Continued*

tion, I shall also recommend that Respondent make whole the unit employees for any losses or expenses they may have suffered from Respondent's failure to make the aforesaid contributions.[37] Such sums shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest, as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

I have found that about 18 July 1984 during the term of its 1982–1985 contracts with the Unions, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally substituting new health and welfare and pension plans for the health and welfare and pension plans required by its contracts with the Unions, and which had previously covered the unit employees. In order to dissipate the effects of these unfair labor practices I shall recommend that Respondent be ordered to restore, on the Unions' written request, the health and welfare and pension plans established by the contracts.[38] I shall recommend that Respondent make whole the unit employees for any expenses or loss of benefits they may have incurred as the result of Respondent's substitution of the new health and welfare and pension plans for the previous plans.[39] Such sums shall be computed in the manner set forth in *Ogle Protection Service*, supra, with interest, as prescribed in *Florida Steel Corp.*, supra, see generally *Isis Plumbing Co.*, supra.

Having found that during the terms of its 1982–1985 contracts with the Unions since 18 July 1984 Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally changing the unit employees' holiday and vacation benefits established by the contracts and by unilaterally decreasing the unit employees' minimum hourly rates of pay established by the contracts, I shall recommend that Respondent make the unit employees whole for any losses they have suffered as a result of this conduct. Such sums shall be computed in the manner set forth in *Ogle Protection Service*, supra, with interest, as prescribed in *Florida Steel Corp.*, supra, see generally *Isis Plumbing Co.*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

The Respondent, Lear Siegler, Inc., d/b/a Safelite Glass, Wichita, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Glaziers, Architectual Metal & Glassworkers Union, Local Nos. 169, 718, and 1621, International Brotherhood of Painters & Allied Trades, AFL–CIO, by refusing to furnish the Unions with the names, addresses, dates of hire, and wage rates of its employees in the appropriate bargaining units described as follows:

> (i) All employees of Respondent, excluding supervisors as defined in the Act, employed in the job classifications covered by the Respondent's contract with Local Unions 169 and 1621 effective from 1 July 1982 to 30 June 1985, and employed at Respondent's facilities located in California in the cities of Richmond, Oakland, San Jose, Pleasant Hill, San Leandro, Hayward and Fremont.
>
> (ii) All employees of Respondent, excluding supervisors as defined in the Act, employed in the job classifications covered by the Respondent's contract with Local Union 718 effective from 1 July 1982 to 30 June 1985, and employed at Respondent's California facilities located in San Mateo and San Francisco.

(b) Refusing to bargain collectively with the above-named Unions by unilaterally ceasing to make contributions on behalf of its employees in the above-described units to the health and welfare and pension and holiday and vacation funds as provided for in the collective-bargaining contracts between Respondent and the Unions effective 1 July 1982 to 30 June 1985 during the term of those contracts.

(c) Refusing to bargain collectively with the above-named Unions by unilaterally instituting during the term of its contracts with the Unions its own health and welfare and pension plans for the plans provided for in the Unions' contracts with Respondent with respect to the employees in the above-described units.

(d) Refusing to bargain collectively with the above-named Unions by unilaterally during the term of its contracts with the Unions decreasing the vacation and holiday benefits and wage rates established by the Unions' contracts with Respondent with respect to the above-described unit employees.

(e) Refusing to bargain collectively with the above-named Unions by bypassing the Unions and dealing directly with the employees in the above-described units

---

which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[37] In measuring actual damages, employees should be reimbursed for their actual costs. For example, with respect to health and welfare expenses the employees shall be reimbursed for only those costs that would have been paid by the health and welfare plan in existence under the 1982–1985 collective-bargaining contract, minus costs that were actually paid by Respondent's insurer pursuant to the health and welfare plan Respondent substituted for the contractual plan.

[38] In order to allow the Unions ample opportunity to consider whether to request the reinstatement of the previous health and welfare and pension plans, while not leaving the matter open indefinitely, I shall recommend that the Unions be required to make their decision within 60 days of the date of the Board's decision. If the Unions do not request the reinstatement of the health and welfare and pension plans that were in effect prior to 18 July 1984, the plans Respondent substituted for them will remain in effect. Respondent will have 40 days after the receipt of the Unions' written request to replace its company plans with the previous plans.

[39] As noted supra, the employees should be reimbursed only for their actual costs.

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

concerning nonmandatory subjects of bargaining rejected by the Unions as subjects of bargaining and by threatening to permanently replace employees if they support a strike caused by Respondent's insistence that the Unions' accept such nonmandatory subjects of bargainining as a part of Respondent's contract proposal.

(f) Interrogating employees about grievances they file with the above-described Unions against Respondent and threatening employees with discharge for filing such grievances.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On written request, furnish the above-described Unions with the names, addresses, dates of hire, and wage rates of its employees in the above-described appropriate bargaining units.

(b) On written request of the above-named Unions, restore making payment on behalf of the employees in the above-described units to the health and welfare and pension and vacation and holiday funds established by its contracts with the Unions effective 1 July 1982 to 30 June 1985.

(c) On written request of the above-named Unions, restore the holiday and vacation benefits and wage rates of the employees in the above-described units so as to conform to the provisions contained in its contracts with the Unions effective 1 July 1982 to 30 June 1985.

(d) On written request of the above-named Unions, and in the same manner as set forth in the remedy section of this decision, rescind the health and welfare and pension plans that it instituted in July 1984 and reestablish the health and welfare and pension plans that were in existence under its contracts with the Unions effective 1 July 1982 to 30 June 1985.

(e) Make whole the employees in the above-described units by making the contributions to the health and welfare and pension and holiday and vacation funds, as provided in the above-described applicable collective-bargaining agreements, which were not paid and would have been paid absent the Respondent's unilateral discontinuance of such contributions during the term of the agreements, and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make such contributions, as set forth in the remedy section of this decision.

(f) Make whole the employees in the above-described units, as set forth in the remedy section of this decision, for any losses or expenses they may have suffered as a result of the unilateral conduct of Respondent during the term of its contracts with the Unions in decreasing the employees' holiday and vacation benefits, decreasing their wages, and substituting its own health and welfare and pension plans for the plans established by the Unions' contracts.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(h) Post at each of its places of business in Northern California copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint allegations not specifically found herein be dismissed.

---

[41] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Communications Workers of America, Local 11509, AFL–CIO (A T & T Information Services) *and* Sharon M. Jones. Case 21–CB–9693

12 May 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, STEPHENS, AND CRACRAFT

On 12 February 1987 Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Communications Workers of America, Local 11509, AFL–CIO, San Diego, California, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] We deny the General Counsel's motion to strike the Union's exceptions to the judge's decision on the grounds that they failed to comport with the form required in Sec. 102.46 (b) of the Board's Rules and Regulations.

Theodore R. Scott, Esq., for the General Counsel.
Donald A. Hon, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried in San Diego, California, on 21 November 1986.[1] This proceeding commenced with a charge filed by Sharon M. Jones, an individual, on 21 August. A complaint was issued on 16 September alleging that Communications Workers of America, Local 11509 (Respondent or the Union) has violated Section 8(b)(1)(A) of the National Labor Relations Act by notifying Jones that she had been charged with violating the Union's internal rules by working during a strike; and she would be subsequently informed of the trial date on these charges. The Union admits the Employer, A T & T Information Services (Employer or AT&T) meets one or more of the Board's jurisdictional standards and I so find. The Union acknowledges that it is a labor organization within the meaning of Section 2(5) of the Act. Respondent admits notifying Jones as alleged in the complaint but denies it violated Section 8(b)(1)(A) of the Act.

The parties appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs were timely filed and were considered in my review of the record. After consideration of the record and the demeanor of the witnesses, I find, for the reasons stated below, that the Union did violate Section 8(b)(1)(A) of the Act.

Facts

The facts are primarily undisputed. Jones had sporadic employment with AT&T. As here pertinent, she was hired as a temporary employee about April 1979. At that time she executed a dues-checkoff form after being told it was a condition of employment.[2] After a short layoff, Jones returned to work about 5 March 1980 and, as here pertinent, continues as an AT&T employee. She executed another dues-checkoff form when she was rehired on 5 March 1980 under a similar understanding it was a condition of employment. Jones never executed a membership application, took an oath of membership or gave any other indicia of membership in Respondent or any other Union.[3] The mere tendering of dues does not make an employee a member of the Union and Respondent does not so argue. Respondent admits in its brief that Jones was not a member.

In June the Union engaged in a strike against AT&T. Jones worked during the strike. Two union members, Jennifer M. Miller and Ann Naughton, observed Jones crossing the picket line and independently filed charges against her with the Union. Respondent, on 11 August, processed these charges and sent Jones the following letter:

> You have been charged with violating the Union Constitution, Article XIX, Section 1
>
> d. Disobeying or willfully failing to comply with any lawful decision or order of the Union or Local.
>
> e. Working without proper Union authorization, during the period of a properly approved strike (AT&T, June 1, 1986 through June 26, 1986) in or for an establishment which is being struck by the Union or Local.
>
> You will be notified of your trial date and time at a later date.

[1] All dates are in 1986 unless otherwise indicated.

[2] There was no evidence adduced why dues checkoff was a condition of employment but the General Counsel indicated on the record, without refutation, that the condition arose from a union-security clause in the operative collective-bargaining agreement.

[3] The Respondent argued on brief that Jones cast a ballot in a certified union election in March 1982. This is a bare assertion not raised at hearing or the subject of any probative evidence. On the contrary, Jones testified, without dispute or refutation, that she never attended any union meeting or voted in any union sponsored election. Based on demeanor and the unrefuted testimony of Jones, I find that she did not do anything to indicate union membership. The Union failed to adduce any evidence that it considered Jones a member or had any basis for such a conclusion. Jones did use the union dental insurance program but under conditions obtaining for nonmembers that were described as less favorable than those available to members.

> You have the right to select a member of the Local as counsel, the right to produce and cross examine witnesses, present documentary evidence and to be heard on your own behalf. If you have any questions you may contact this office.

The letter was signed by Robert B. Sarsfield, the Respondent's secretary-treasurer.

The day after she received the letter Jones called the Union and was referred to Carol Stegall, whom the parties stipulated held the office of executive vice president with the Union. Jones informed Stegall that she was not a union member and requested she be sent any documents she executed reflecting she was a member. Stegall refused saying it was not necessary because "I was receiving CWA literature, as a matter of fact, made me a member." About 21 August, Jones again telephoned Stegall and they had a similar conversation and Stegall told Jones to "wait for my summons and appear in [Union] court." Neither Stegall or any other representative of Respondent appeared and testified. Jones' testimony is totally unrefuted, and this factor, cojoined with her forthright demeanor, leads me to credit Jones' testimony.

Jones did not receive any further communications from Respondent. Stegall informed both Miller and Naughton that the Union dismissed the charges against Jones. The date(s) of these communications is not a matter of record. The Union did write a letter to the Board's Regional Office informing a field examiner that the Union would drop the charges against Jones. The letter was dated 13 November, about a week before the trial herein. Jones was informed by the Region at some unspecified date. When Jones learned of the Union's representation to the Region is not a matter of record. The record clearly indicates that Respondent has never informed Jones that the charges have been dropped and all union records on the matter expunged from its files. There was no testimony from any of Respondent's representatives or any documentation that the Union did in fact take such action and/or expunged the charges from its files.

Section 8(b)(1)(A) of the Act has been consistently found to provide that it is an unfair labor practice for a labor organization to "restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act." Included in these Section 7 rights is the right to refrain from engaging in protected concerted activities, including strikes. *Machinists (Boeing Co.)*, 185 NLRB 380, 381 (1970); *Communications Workers Local 1170 (Rochester Telephone)*, 194 NLRB 872 (1972).

The Supreme Court in *Scofield v. NLRB*, 394 U.S. 423 (1969), listed the requirements for the lawful imposition of union discipline under the Act as follows:

> Section 8(b)(1)(A) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy which Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.

Respondent argues that the matter is moot and the Board is estopped from pursuing Jones' charge for the Board has previously dropped charges against the Union when similar union processes had been initiated then "summarily dropped, upon a showing of nonmembership in the Union." *Patterson v. Stage Employees IATSE*, 323 F.2d 368 (10th Cir. 1963), and *Lanigan v. Electrical Workers IBEW Local*, 327 F.2d 627 (7th Cir. 1964). The cited cases are found inapplicable to this proceeding for they involved actions where no remedy could be afforded at the time the proceedings were before the courts. In this case, the Board can require that the Union cease and desist from such actions and post a notice informing employees that their public rights are protected. Also, the cited cases do not involve the Respondent's practice of sending charges to nonmembers. No proceedings involving charging nonmembers for working during a strike were cited by Respondent. The Respondent's actions are clearly beyond the ambit described by the court in its *Scofield* decision, supra. Cf. *Textile Workers UTWA Local 1029, Granite State Joint Board v. AFL–CIO*, 409 U.S. 213, 217 (1972); *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984). That the Union's charges did not mention a fine is not an exculpating factor. As the General Counsel notes in her brief, the Board's decision in *Oil Workers Local 6–578 (Gordy's Inc.)*, 238 NLRB 1227, 1231 (1978), enfd. 619 F.2d 708 (8th Cir. 1980), found:

> Threatening to file charges constitutes "restraint" and "coercion" within the meaning of Section 8(b)(1) without requiring a showing that the notice of the potential penalty was explicitly brought to the attention of the charged employee. *Communications Workers of America, AFL–CIO (Rochester Telephone Corp.)*, 194 NLRB 872, 873 (1972) (written charges filed against a nonmember).
>
> The Board also held in the *Gordy's* decision, id., ". . . fines are implicit when disciplinary proceedings are initiated or threatened without an express limitation as to the range of sanctions available; this is most obviously true in the case of a resigned member who ipso facto cannot be expelled.

This same logic applies to nonmembers who also cannot resign to escape any discipline nor be expelled in lieu of monetary penalties.

Respondent's assertion of estoppel is without any support in the record. The Board has not been shown to have waived its obligations under the Act previously or acted in any manner that would have estopped it from investigating Jones' charge and issuing a complaint based thereon. Respondent's argument that the Board is estopped is found to be without merit. To adopt their argument would inappropriately relieve the Union of its recordkeeping obligations, and the Board would be its surrogate in determining that employees are members. In this case, the representation of nonmembership by the employee the day after being informed charges had been filed against her and she would be subjected to a trial did not even stir the Union to commence an investigation. Instead, the aggrieved person was informed that she would be subjected to a trial before the union would even consider her representation of nonmembership. To

adopt Respondent's arguments would eviscerate the Act, and leave the Union free to continue to coerce and intimidate nonmember employees. I find that the Respondent's letter in this case was a coercive and restraining missive.

The Respondent also argues that it dropped the charges at some unspecified time, rendering this proceeding moot. Its action was never related to Jones, the one person restrained and coerced by the charges. As the Board held in *Gordy's*, id.:

> Faced with the possibility of action against him, the employee may well be, for practical purposes, impelled to forego his statutory right not to honor the unions' picket line rather than risk involvement in a lawsuit whose outcome he cannot predict.

The Union's action could coerce Jones and other nonmembers who learn of the event, or are similarly treated into foregoing their statutory right to cross a picket line and work in the future.

Other factors mitigate in favor of finding a violation in this case. For example, Jones was not notified the charges were dropped, notice was only given to the Regional Director. The Respondent did not admit that it violated the Act. On the contrary, its defense indicates that it has an established practice of charging employees who cross picket lines without regard to their status as nonmembers and awaits some outside parties' intervention to prove that the employees were not properly the subject of internal union disciplinary measures. Thus, there was an erroneous understanding that its actions did not violate the Act. The Respondent did not promise to refrain from similar coercion in the future. Rather, its argument indicates that it intends to continue the practice of relying on the Board or others to inform it if the employees it charges are nonmembers. Finally, there was no evidence adduced by Respondent that indicates the charges have in fact been dropped and its records expunged.

Considering the circumstances of this case, I find that the unfair labor practice is not de minimis. An important Section 7 right has been infringed, the right of a nonunion member to refrain from engaging in protected concerted activity in violation of Section 8(b)(1)(A) of the Act.

CONCLUSION OF LAW

By processing internal union charges against Sharon M. Jones, who is not and never was a union member, for failing to honor a Union picket line and working during a strike, the Union restrained and coerced an employee in the exercise of the rights guaranteed by Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act.

REMEDY

Having found that the Union engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The General Counsel seeks the imposition of a visitatorial clause but has not shown that it is warranted in the circumstances of this case; therefore, the request is denied.

The Respondent will be required to post a remedial notice to employees and members because the object of Respondent's unfair labor practice was a nonmember, a notice to members would fail to provide the needed reassurance and information to nonmembers that they can exercise their Section 7 rights. *Steelworkers (Newport News Shipbuilding)*, 239 NLRB 82 (1978).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Communications Workers of America, Local 11509, AFL-CIO, San Deigo, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing Sharon M. Jones, or any other employee who is not a member of the Union, in the exercise of rights guaranteed them by Section 7 of the Act, by processing charges against them because they exercised their right to cross a picket line and refrained from engaging in a work stoppage called by the Union.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Expunge from its records any references to the filing of internal union charges against Sharon M. Jones.

(b) Dismiss any pending charges against Sharon M. Jones.

(c) Notify Sharon M. Jones, in writing, that it has taken these actions.

(d) Post at its San Diego, California facilities copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Deliver to the Regional Director for Region 21 signed copies of the Appendix for posting by AT&T Information Services, the Company willing, at its San Diego, California facility, in places where notices to employees are customarily posted.

---

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce Sharon M. Jones or any other employee who is not a member of the Communications Workers of America, Local 11509, AFL–CIO, in the exercise of the rights guaranteed them by Section 7 of the Act, by processing union charges against them because they exercised their right to cross a picket line and refused to honor a work stoppage called by the Union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL expunge from our records all references to the filing of internal union charges against Sharon M. Jones.

WE WILL dismiss any such internal union charges pending against Sharon M. Jones.

WE WILL notify Sharon M. Jones, in writing, that we have taken the ordered actions.

COMMUNICATIONS WORKERS OF AMERICA
LOCAL 11509, AFL–CIO

Yusuf Mohamad Excavation, Inc. *and* **International Union of Operating Engineers, Local No. 673, AFL–CIO.** Case 12–CA–12053

12 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 30 January 1987 Administrative Law Judge Irwin Kaplan issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Eduardo Soto, Esq., for the General Counsel.
Dennis F. Fountain, Esq. (Belleville & Aspinwall, P.A.), of Longwood, Florida, for the Respondent.
Travis E. Woodham, of Orlando, Florida, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. This case was tried before me in Orlando, Florida, on 15 September 1986. The underlying charges were filed by the International Union of Operating Engineers, Local 673, AFL–CIO (Charging Party or Union) on 20 May 1986 and gave rise to a complaint and notice of hearing dated 29 July 1986 (amended at the hearing).[1]

In essence, it is alleged that Yusuf Mohamad Excavation, Inc.[2] (Respondent), violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by laying off seven employees on 14 May 1986 because of their union activities. Further, it is alleged that Respondent independently violated Section 8(a)(1) of the Act by a statement to one of the laid-off employees linking the layoffs to the union activities.

The Respondent filed an answer conceding, inter alia, jurisdictional facts and the supervisory and agency status of certain individuals but denying that it committed any unfair labor practices. According to the Respondent, the decision to lay off employees was predicated solely on business considerations unrelated to union activities. The Respondent noted, inter alia, that the alleged discriminatees were separated "contemporaneously with the discharge of other employees as a result of a work slow down."

Based on the entire record, including my observations of the demeanor of the witnesses as they testified, and after careful consideration of the posttrial briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Yusuf Mohamad Excavation, Inc., is a Florida corporation engaged in the building and construction industry as a road building and land development contractor and maintains an office and place of business in Orlando, Florida. During the past 12 months, the Respondent, in connection with its aforenoted business operations, purchased and received at its Orlando place of business products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Florida. It is admitted, the record supports, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

The Respondent has been engaged in the business of land clearing and general excavation in the Orlando, Florida area for the past 12 years. Yusuf Mohamad is Respondent's owner and president. According to Mohamad, because a major customer, the Anden Group of Florida (Anden) had instructed him to hold off further excavation work on a property known as the "Lindfield job," he decided to lay off a number of employees, mostly heavy equipment operators on 14 May 1986.[3]

Mohamad testified that after working on the Lindfield job for about 2 days, he was called by Ralph Spano, an owner of Anden, and told: "[W]e've got problems, please stop. Remove the equipment from the job." A followup letter dated 9 May from Spano to the attention of Nick Luxon, Mohamad's assistant in charge of contract negotiations stated as follows:

[1] At the hearing, par. 5 of the complaint was deleted.
[2] The name of the Employer appears as amended at the hearing.

[3] All dates hereinafter refer to the year 1986, unless otherwise indicated.

> I regret to inform you that the subdivision known as Lindfield P.U.D. scheduled to start on or before April 30, 1986, has been rescheduled to a later date.
>
> Per our discussion, and my discussion with Mr. Mohamad, I have elected not to continue any site work until all the situations that are troubling this project are resolved. [R. Exh. 2.]

The Lindfield job involved a substantial amount of "dirt work" and, as such, the use of operators and heavy equipment, i.e., dozers. According to Mohamad, he had planned to employ his operators from his Lake Buena Vista project (Buena Vista) where, assertedly, the bulk of the clearing and dirt work was completed, on the Lindfield job. Thus, when the Lindfield project was put on hold, Mohamad, assertedly, did not have enough work to maintain those operators and instructed James Long, the general superintendent, to lay them off. Long testified that he in turn told his several area superintendents, on a one-to-one basis, that they had to reduce their crews and to select employees for layoffs where the work was least needed.[4] Patrick Crowe, the area superintendent at the Buena Vista location, Respondent's largest project, selected the employees (majority of the alleged discriminatees) laid off from that job.[5]

The union activity began in early May, approximately 2 weeks before the layoffs. Then, some eight employees had expressed among themselves their unhappiness with working conditions, which led one of them, Keith Dominy, on 2 May, to contact the Union and arrange a meeting. The meeting was held on 5 May after work about 5:30 p.m. at the Waffle House, across the street from the Buena Vista jobsite. There, Dominy, along with fellow operators Donald Graham and Richard Uber met with Union Business Agent Travis (Ed) Woodham and they discussed union representation. Dominy testified that over the next few days he obtained signed union authorization cards from eight employees across the street from the jobsite at a Texaco station.[6]

On 12 May, a second meeting with Business Agent Woodham was held at a 7-Eleven store, a half mile from the jobsite. At this meeting, Dominy, Graham, and Uber were joined by employees Walter Whitebirch, Roger Owens, and Michale Desmondez. All of them with the exception of Desmondez were laid off on 14 May.[7]

According to the General Counsel, on 15 May, Superintendent Crowe acknowledged that the employee layoffs were linked to their union activities. Whitebirch testified that he met Crowe on 15 May (1 day after the layoffs), around 4:30 p.m., at the 7-Eleven store and initiated a brief conversation. As further testified by Whitebirch, he told Crowe that he knew the employees were fired because of the union cards and the latter in response stated, "Yes, if I knew about the Union before anybody else in the Company, that I could have straightened it out and everybody would have kept their jobs." Whitebirch then assertedly asked Crowe whether he would hire him back, to which the latter responded, "No, there wasn't no [sic] work." Crowe denied any such conversation with Whitebirch or ever having made any reference to the Union. Crowe acknowledged, however, that on a number of occasions after the layoffs, he and Whitebirch passed each other going in and out of the 7-Eleven store, where they "probably" exchanged greetings.

After Whitebirch was laid off, he obtained other employment immediately next to his former jobsite. He was laid off from that job on 30 May. According to Whitebirch, that same day he had a conversation with Mohamad's brother, Shake, who told him that Respondent had obtained two new accounts and would be rehiring employees. Whitebirch testified that Shake asked him whether he had signed a union and, when Whitebirch denied that he had, Shake suggested that Whitebirch approach Long or Crowe about getting his job back.[8] Later that day, Whitebirch approached Long at the Buena Vista project and asked him if the Company was hiring. Long assertedly asked Whitebirch his name and whether he signed a union card. Whitebirch testified that when he answered in the negative, Long reached into a truck and pulled out a piece of paper and inquired of Whitebirch why he had signed a union card. According to Whitebirch, although he did not see the contents on the piece of paper, he had guessed that his name was listed as a union card signer and, as such, he explained to Long that he signed because he had not received a wage increase. Whitebirch was assertedly told by Long that the Company was not hiring. According to Long, on the occasion in question, Whitebirch asked him whether he could get a job but as he, Long, did not then know whether the Company could use Whitebirch, he referred Whitebirch to Crowe.[9]

B. *Discussion and Conclusions*

The General Counsel, citing the Board's causation test in discriminatory 8(a)(3) discharge cases, as set forth in *Wright Line*,[10] contends that he had made a prima facie showing to support an inference that the "employees' union activities were a motivating factor in Respondent's decision to lay them off." This, assertedly having been accomplished, the General Counsel also contends that the Respondent failed to meet its burden by showing that the disputed layoffs would have occurred notwithstand-

[4] Respondent employed approximately 100 employees on some 8 or 9 projects.

[5] The record disclosed that 10 employees had been laid off between 14 and 17 May including the 7 alleged discriminatees and 2 other employees had resigned (Jt. Exh. 1).

[6] Dominy named only seven of the card signers: himself, Donald Graham, Gordon Martin, Roger Owens, Richard Uber, Wally Whitebirch Jr., and an employee named Roy. Dominy may have inadvertently omitted the name of Gregory Nelson, an alleged discriminatee. The record is silent otherwise regarding Nelson's union activity. As for the employee named Roy, the record disclosed that this individual had to be Roy Brunner. (See Jt. Exh. 1.)

[7] It also appears that all of them with the exception of Desmondez, had signed union authorization cards and are alleged discriminatees. (See fn. 6, supra.) Although Brunner also signed a union card and was laid off on 14 May, he is not an alleged discriminatee.

[8] Mohamad's brother "Shake" is not alleged to be a statutory supervisor or agent of Respondent. The individual referred to as "Shake," did not appear as a witness.

[9] It is not alleged that Long's comments to *Whitebirch* on the occasion in question, independently constituted a violation of Sec. 8(a)(1).

[10] 251 NLRB 1083 (1980).

ing the protected or union activity, as required under *Wright Line*.[11]

In assessing whether the General Counsel has established a prima facie case as a threshold matter, it is noted that the record disclosed certain critical elements tending to support the allegations. Thus, the record clearly revealed that at least six of the seven alleged discriminatees had engaged in union activities shortly before they were laid off. These same employees, inter alia, had signed union authorization cards and attended a union meeting near the jobsite only 2 days earlier. Although Respondent informed these employees that they were laid off for lack of work, it is noted, that they had worked overtime each of the preceding 3 weeks.

As for other critical elements, "knowledge" and "animus," the General Counsel relies almost entirely on statements assertedly made by Crowe and Long to Whitebirch, after the layoffs had occurred. It is noted, however, that the testimony of Crowe and Long, if credited, reflect that the statements ascribed to them could not have been made. For example, Crowe denied having a conversation with anyone about the Union. In particular, Crowe denied that he had any conversation with Whitebirch after the layoffs. According to Crowe, he first learned about the Union in preparation for the instant trial. Long, for his part, admitted that Whitebirch approached him for a job subsequent to the layoffs, but asserted that he merely referred him to Crowe.

As noted previously, Whitebirch testified that he met Crowe at the 7-Eleven store the day after the layoffs and that Crowe confirmed that the employees were discharged because of their union activities. According to Whitebirch, Crowe told him that if he knew about the Union before the others (presumably, Mohamad and Long), "he could have straightened it out and everybody would have kept their jobs." I find it implausible and highly unlikely that Crowe made this statement, noting particularly that Whitebirch also testified that immediately following Crowe's statement he, Whitebirch, asked about a job and was told by Crowe that he could not hire him because there was not any work. In rejecting Whitebirch's testimony, it is noted that it is somewhat incongruous for Crowe to confirm that the Union was the core of the problem and in the next breath state that there was not any work. Contrary to the General Counsel, I also fail to discern how "Whitebirch's testimony is corroborated by Crowe's admission that he had seen Whitebirch at the 7-Eleven store many times after May 14." Crowe admitted only that he saw Whitebirch at the store on a number of occasions and that they had exchanged greetings; he denied that he conversed with Whitebirch. The fact that Crowe saw Whitebirch frequently at the 7-Eleven store, without more, does not mean that Crowe would confide in Whitebirch or that his testimony corroborated Whitebirch's in any meaningful sense. Such chance meetings between them could be anticipated particularly where, as here, Respondent's jobsite as well as Whitebirch's home and work location were all in the same immediate area of the 7-Eleven store in question.

On 30 May, Whitebirch was laid off from his new job. According to Whitebirch's uncorroborated testimony, at some unspecified time that day, he learned from Mohamad's brother Shake, that Respondent had obtained two new accounts and would rehire employees. Shake assertedly asked Whitebirch if he had signed a union card, which the latter denied, and Shake then assertedly referred Whitebirch to Long or Crowe.

As noted previously, Shake is not alleged to be a statutory supervisor or agent. In fact, the record is devoid of any evidence regarding Shake's connection with the Respondent. Still, the General Counsel urges that an adverse inference is warranted against the Respondent for its unexplained failure to call Shake as a witness, citing *NLRB v. Cornell of California*, 577 F.2d 513, (9th Cir. 1978), enfg. 222 NLRB 303 (1976), and *KBMS, Inc.*, 278 NLRB 826, 848–849 (1986). These cases are factually distinguishable and inapposite. In both cases, the Respondent relied on employee statements of disaffection as a basis for withdrawing recognition from an incumbent union. Here, unlike the cited cases, the General Counsel relies on the uncalled witness' statement as binding against Respondent. In these circumstances, in which the General Counsel has not made an effort to explain his own failure to call Shake as a corroborative witness, and noting particularly an absence of any supervisory or agency allegation, I find that an adverse inference is improper. Compare *Wayne Construction*, 259 NLRB 571, fn. 1, par. 2 (1981), in which the Board refused to draw an adverse inference noting that there was no basis for inferring that a co-owner was not equally available to both the Respondent and the General Counsel.

Having rejected Whitebirch's testimony regarding his conversation with Shake on 30 May, as binding against Respondent, I also find little reason to credit his account of his subsequent conversation with Long that same day. Although it is undisputed that Whitebirch approached Long about his job, the testimony regarding what transpired between them on that occasion in virtually all other respects is in conflict.

In rejecting Whitebirch's version in material respects, it is noted that the General Counsel has largely substituted opinion, conjecture, and speculation for probative evidence. For example, according to Whitebirch, after he denied signing a union card (in response to Long's inquiry), Long asked Whitebirch his name and pulled out a sheet of paper and questioned Whitebirch why he had signed a union card despite the aforesaid denial. The General Counsel characterized the sheet of paper as a "hit list" of union supporters. In support thereof, the General Counsel noted that Crowe had compiled a list of names of employees to be laid off. However, as noted previously, the record is devoid of any credible evidence of Crowe's knowledge of union activity.[12] I also find

[11] Id. at 1089.

[12] Respondent's "Employment Termination" forms indicate that each of the alleged discriminatees was recommended to be rehired (R. Exhs. 1(a)–(g)). Most of these employees were supervised by Crowe. These records tend to cast further doubt on the General Counsel's claim that Crowe prepared a "hit list" of union supporters who were not to be recalled.

plausible and credible Crowe's explanation for delineating at that time the best and needed employees from those less needed to meet Respondent's exigencies. In any event, there was no showing that the piece of paper assertedly referred to by Long was the same list compiled by Crowe. Significantly, in terms of discounting Whitebirch's testimony as probative evidence is that he admittedly never saw what was on the piece of paper in question.

According to Long's testimony (implicitly), he did not have to refer to any list of names because he had recognized Whitebirch from his earlier employment. In these circumstances, noting also an absence of any other animus or knowledge ascribed to Long, I find no cogent basis to reject his assertion that he recognized Whitebirch, particularly because the latter had left Respondent's employ only 2 weeks earlier.

In the instant case, it is noted, that virtually all the union activity took place off the jobsite. Although the Board has not hesitated to infer Respondent's knowledge of employees' protected activities from the surrounding circumstances in appropriate cases, the evidence does not support such an inference. Compare, *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046, 1049 (1985) (the respondent, conducted a series of "coercive meetings" on the first working day after the discharge to prevent the union from organizing); *Matai (U.S.A.) Inc.*, 281 NLRB 327, 332 (1986) (while the respondent's supervisors had denied that they were told about the alleged discriminatee's union activities, they admitted that they were told that union cards were passed around and that union supporters were identified).[13]

Aside from the General Counsel's failure to demonstrate by credible evidence that Respondent harbored antiunion sentiments or that Respondent had knowledge of the employees' union activities, the record disclosed still other factors tending to militate against a prima facie case. Thus, in addition to the seven alleged discriminatees laid off on 14 May, two other employees, Roy Brunner and Randy Ellis were also laid off for lack of work that same day and five other employees left Respondent's employ shortly thereafter. (Jt. Exhs. 1(a)–(e)). Collectively, this group represented Respondent's largest reduction in force; the vast majority of them, including the alleged discriminatees, were operators. In this regard, it is noted, that the Respondent did not hire or rehire another operator until 2 June when Brunner, a union card signer, was rehired. Ellis, on the other hand, was not involved in union activities and has not been recalled. Operator Gregory Nelson was also laid off on 14 May and has not been recalled. Nelson, an alleged discriminatee did not testify nor is there any evidence that he engaged in union activities.

The record disclosed that Respondent hired or rehired 17 equipment operators between 4 June and 3 September, but did not recall any of the alleged discriminatees. However, the record is largely silent regarding their overall qualifications or for which of Respondent's eight or nine projects they were assigned to work. Further, the record disclosed that after the layoffs, relatively little work was performed by equipment operators at the Buena Vista jobsite, where the alleged discriminatees had been hired primarily to work. In any event, the record is far from clear that Responent maintained any formal or consistent policy regarding recalling laid-off employees.

Although Respondent's reasons for its actions are not free of doubt,[14] the Board has observed that even when the record raises "substantial suspicions" regarding employee discharges, the General Counsel is not relieved of "the burden of proving that Respondent acted with an illegal motive." *Affiliated Hospital Products*, 245 NLRB 703 fn. 1 (1979). Here, the record failed to establish any animus or knowledge of union activities on the part of Respondent. This, as well as the other factors noted above, persuades me that the General Counsel has failed to prove, prima facie, that Respondent acted with an "illegal motive." Accordingly, I shall recommend that the allegations be dismissed in their entirety.

CONCLUSIONS OF LAW

1. The Respondent, Yusuf Mohamad Excavation, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local No. 673, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not proved by a preponderance of the credible evidence that Respondent laid off employees in violation of Section 8(a)(3) and (1) of the Act.

4. The General Counsel has not established that Respondent independently violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The complaint is dismissed in its entirety.

[13] In *Davidowitz*, the Board also noted an active "rumor mill" or "grapevine" so that hardly anything of significance escaped management's attention.

[14] The timing of the layoffs, inter alia, is not free of suspicion coming 2 days after a union meeting. On the other hand, the layoffs followed the shutdown of the Lindfield project, as ordered by Respondent's customer (Anden) and this project has not resumed operations. According to Mohamad, he had planned on using the Buena Vista operators (the laid-off employees) on the Lindfield project.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

P.I.E. Nationwide, Inc. *and* **Charles William Antonopulos** *and* **Sidney Boonstra** *and* **Peter H. Advocaat** *and* **Wilbert A. Hofstra.** Cases 7–CA–25346, 7–CA–25358, 7–CA–25381, and 7–CA–25559

13 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 23 January 1987 Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

A. Bradley Howell, Esq., for the General Counsel.
Joseph A. Schwachter, Esq. (Littler, Mendelson, Fastiff and Tichy), of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. The charges in the instant proceeding were filed by Charles William Antonopulos (7–CA–25346) on 30 December 1985, Sidney Boonstra (7–CA–25358) on 6 January 1986, Peter H. Advocaat (7–CA–25381) on 10 January 1986, and Wilbert A. Hofstra (7–CA–25559) on 28 February 1986 (Charging Parties). The order consolidating cases, consolidated amended complaint, and notice of hearing issued 15 April 1986 alleging that P.I.E. Nationwide, Inc. (Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act, by threatening the Charging Parties with harassment by other employees and with closure of the Grand Rapids and Kalamazoo terminals unless they agreed to participate in a proposed employee stock investment plan and by coercing the Charging Parties into joining the plan.

The case was tried before me on 20 and 21 May 1986 at Grand Rapids, Michigan. The parties were represented by counsel at the hearing and were afforded opportunity to be heard and to present evidence and argument. The General Counsel and Respondent filed briefs. On the entire record, my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following[1]

FINDINGS OF FACT

In 1984 Respondent lost $16 million. In 1985 through September it was losing approximately $5 to $6 million per month. In the accounting period September 1984/September 1985 the Company lost $50 million. At the meeting in Atlanta in July 1985[2] top members of Respondent's management met. At this meeting it was announced that I.U., Respondent's parent company, could no longer justify putting money into Respondent; that something had to be done about the Company's financial condition. Three options were considered: First, the Company could continue to operate as it had and go out of business by the end of the year; second, it could downsize by selling certain portions of its business; and third, it could launch an Employee Stock Ownership Plan (ESOP). It was determined that the third option was the best alternative; if organized properly, implementation of the ESOP program would result in a reduction in the Company's operating cost by $54 million. This could be done, however, only if there were 100-percent participation in the ESOP program.

Subsequent to the Atlanta meeting, officials of Respondent described the plan to the Union. The Union gave the Company its blessing and advised Respondent's management that it preferred to see efforts at stabilization rather than closure.

In August, in Chicago, another meeting was held. This one was attended by management personnel of the Company's 11th region. Basically, the same matters were discussed at the Chicago meeting as had been considered earlier in Atlanta. Jack Shang, president and chief executive officer of the Company, and Brian Kulman, its vice president of traffic described the Company's economic plight to those present and advised them that Respondent was on the brink of going out of business and had to do something desperate to reduce operating costs. Those present were then told about the ESOP plan and that its implementation was a must; that 90-percent participation by both management and rank-and-file employees would be necessary to success while 70-percent participation was necessary for SEC approval. The members of management from the various terminals were told that they were to go back and relay what they had heard to the employees at those terminals. Both the voluntary aspect of the plan and the desperate financial plight of the Company were to be relayed.

During the period following the Chicago meeting, the various members of management at the terminals in the Company's region 11 tried to sell the ESOP program to the rank-and-file employees. At the Grand Rapids terminal the sales manager, Gordon Wolters, was concerned because only about half of the employees initially agreed

[1] The complaint alleges and the answer admits that the Board has jurisdiction and that the Union (International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) is a labor organization within the meaning of the Act.

[2] Hereinafter all dates are in 1985 unless otherwise indicated.

to sign up. A meeting of all Grand Rapids employees was scheduled.

On the morning of 30 September the meeting was held. It was attended by 10 or 12 employees of the Grand Rapids terminal, whether on duty or not. At the beginning of the meeting, Gordon Wolters and Steve Borkowski, the Grand Rapids terminal manager, addressed the employees briefly. They described to the employees the financial difficulties the Company was suffering and necessitated the implementation of the ESOP program. They stated that the plan was voluntary, but they were concerned for their jobs. They told the employees that they were all in the situation together and if the program did not succeed they, management, and rank-and-file employees were all facing a loss of employment. They then introduced John Rogers, the Regional Sales Director, who was visiting the Grand Rapids terminal for the specific purpose of addressing the employees with regard to the importance of the ESOP program.

Rogers played a video tape for the employees, which featured Jack Shang explaining the pros and cons of the ESOP program. According to the taped presentation, employees volunteering to participate in the ESOP program would be required to give up 15 percent of their pay in exchange for stock in the Company. The purpose of the ESOP was to afford financial relief to the Company to enable it to continue to operate. Shang urged the employees to take the 15-percent cut and to sign up for the program. He noted that management personnel as well as rank-and-file employees would be participating; that this was necessary because the Company was losing money. He said that although participation was voluntary, 90-percent participation by everyone was necessary for success.

Following the Shang presentation Rogers addressed the employees. He told them that the ESOP program was an absolute must; that the Company could not go on the way it was going; that as Jack Shang had said in the video presentation, the Company had to have 90-percent participation but would like 100 percent; that it was a time when everybody had to reach back and not only contribute, to work for the Company, but to protect everybody's job. He reiterated what Shang had said in the earlier presentation that the Company was losing large amounts of money and that the reason the Company was introducing the ESOP was to turn the Company around financially, but that its future was uncertain at that time.

In addition to the various speeches by management personnel and the video presentation, several pieces of written material were distributed. There was a prospectus that noted that participation was voluntary with a 4 October deadline,[3] a pamphlet, describing the Stock Investment Plan, a beneficiary election form, a question and answer pamphlet, and an election to participate form. Employees were told to take the application forms, read the material, and think about it. Each employee who received the election to participate form had his name already filled in at the top. Charging Parties Boonstra and Hofstra wrote "no" on their applications, but did not turn them in at the meeting. Charging Parties Antonopulos and Advocaat wrote "no" on their application forms and turned them back to management after the meeting.

After the meeting and after Antonopulos returned his application to Borkowski, the latter engaged him in conversation. Borkowski said, "So you think the plan is a bunch of bullshit!" Antonopulos replied that he did not feel that way at all; that he just did not feel that he could afford to commit 15 percent of his wages over 5 years and raise a family of four children. Borkowski then told Antonopulos that if the Company folded, he, Antonopulos, would be personally responsible for over 11,000 jobs.[4] Borkowski asked Antonopulos if he could live with that.

About noon on 30 September Borkowski engaged Advocaat in conversation about the ESOP program. Borkowski asked Advocaat what it would take to change his mind. Advocaat replied that he would be willing to participate, but that his financial situation at the present made it impractical.

On the evening of 30 September, Hofstra turned in his application form with the work "no" on it. Hofstra explained that he did not want to participate because he was anticipating retiring in the near future. Borkowski said that he did not like the looks of the "no" on Hofstra's application and added that he wished that Hofstra would reconsider. Hofstra replied that he felt that he would not be able to do much good for the short time that he had left working. Borkowski said that the Company would like to have Hofstra as part of the team; that he would like to have Hofstra sign up.

The week of 30 September–4 October was a very emotional week for both rank-and-file employees and for management personnel. There was a lot of talk between the two groups about the ESOP and also among the rank-and-file employees themselves. Debate was heated about the pros and cons of the plan. On 1 October Borkowski called Boonstra into his office and asked him if he had made up his mind yet as far as the ESOP program was concerned. Boonstra replied that he had not. The same day, about noon, Borkowski engaged Advocaat in conversation. Borkowski asked Advocaat if he had changed his mind about participating in the ESOP program. Advocaat replied in the negative, adding that it was impractical for him to participate. He suggested that perhaps he could sign up at a later date, like May 1986. Borkowski stated that that would be impossible, that Friday, 4 October was the deadline.

About 5:30 or 6 p.m. on 1 October, Advocaat had a conversation with two other employees, Dick Christianson and Bob Pearson, in the drivers' room. He was asked by one or both of them why he had not signed up for the ESOP program. Advocaat replied that he thought that the program was supposed to be voluntary. The reply was that the program was voluntary, but that it was like the army: "You don't volunteer 'no,' you only volunteer 'yes.'" An argument followed, there was some

[3] The deadline was established by the SEC.

[4] Borkowski denied making this statement but admitted telling Antonopulos that he would be *partially* responsible. I credit Antonopulos' version.

name-calling, and the discussion became heated. Advocaat was told that if he thought he could get another job, why didn't he go find one and make room for others who wanted to work. Advocaat replied, "Don't steal from me! Shut the place down then." His adversaries answered, "That would be just fine. Then we would all be out of a job." Advocaat slammed the door angrily and left.

On the evening of 1 October, a conversation occurred in the drivers' room between Wolters and Advocaat. Wolters told Advocaat to give serious consideration to signing up with the ESOP plan. He stressed that it was very important for him to do so, commenting that Advocaat was considered a leader among the employees, and urged him to show leadership by signing up. Once again Advocaat stated that it was impractical for him to sign up at that time. Wolters said, "Well, you know they are going to shut the place down, and I am 52 years old, and damn it, I am too old to go looking for other work."[5]

On 1 or 2 October Borkowski approached Antonopulos while at work and asked him if he had thought anymore about the ESOP. Antonopulos replied that he had been looking through the prospectus, but still could not see how he could afford the plan without refinancing his house. He added that interest rates and closing costs were too high. Borkowski said that Antonopulos might have to sell his property up North.

On 2 October another conversation took place in Borkowski's office between Advocaat and Borkowski. Borkowski asked Advocaat if he had changed his mind and was ready to sign up for the stock plan. Advocaat replied negatively stating that he did not intend to change his mind. Borkowski reminded Advocaat that if there was not a high enough participation, there was a possibility that the terminal would be shut down.[6] Advocaat then advised Borkowski that he had been in a heated argument the night before in the driver's room, referring to his discussion with Christianson and Pearson about the ESOP. He added that he did not appreciate the treatment he had been getting from fellow employees. Borkowski stated that it was a very emotional situation; that there were a lot of people concerned for their jobs. He added that if Advocaat did not sign up for the ESOP program, he could expect more of the same.

On the afternoon of 2 October, a conversation took place in the drivers' room between Borkowski and employee Edward Klinge. Borkowski asked Klinge if he was ready to sign his ESOP application. Klinge replied that he was not; that he would do some thinking about it. Borkowski said, "We sure could use your help on this. We need it." Klinge then asked how they were doing at the Kalamazoo terminal. Borkowski answered that they did not yet have anyone signed up there. When Klinge asked what they were going to do there, Borkowski replied that if the Kalamazoo employees did not sign up to participate in the ESOP, the Company would probably close the terminal and run it out of Grand Rapids.

On the evening of 2 October Borkowski again asked Advocaat if he had reconsidered and was willing to sign up for the ESOP. He added that he felt that Advocaat was one of the leaders of the men and that it was of paramount importance that he show that leadership by signing up and preserving the Company.

On 2 or 3 October Borkowski invited Antonopulos into his office and again asked him if he had changed his mind about participating in the stock plan. Antonopulos replied that he had not; that he could not afford it. Borkowski stated that it would be rough on everybody financially; that he, himself, was trying to think of ways to earn money around the house to make up the difference. Antonopulos asked Borkowski if he knew anyone at the terminal who was participating in the plan and who was raising a large family. Borkowski supplied the name of another employee.

According to the testimony of employee Sid Boonstra, on the morning of 3 October a meeting was held at the Grand Rapids terminal. Rogers, Wolters, and Borkowski were present as were the drivers. Rogers told those present that none of the employees at the Kalamazoo terminal had signed up for ESOP and because of that the Company would probably close that terminal and run its business out of the Grand Rapids terminal.[7] Employee Robert Pearson testified, "I do not know if it was at that meeting or not but I do remember some discussion on Kalamazoo. That [it] could possibly be serviced out of Grand Rapids." Pearson could not recall if he heard this from Rogers or from one of the other employees.

Also on 3 October, in an incident that occurred in the drivers' room in the presence of several drivers, Wolters addressed Sid Boonstra.[8] He said that he probably would regret saying it, but was going to say it anyway. He then reminded Boonstra of an earlier time when Boonstra had been ill, when Wolters and other employees had come to his aid. He then said that he and the others now needed Boonstra's help. Boonstra said that the situations were not the same. Wolters stated that he, Boonstra, would be leaving for the Netherlands in a couple of weeks to start up an export business. He suggested that Boonstra "quit being the leader [of opposition to the ESOP] and do them all a favor"; quit right then and "get the hell out" if he did not like the Company. Wolters, by the accounts of witnesses, appeared very sincere and had tears in his eyes. To those present the impression was that Wolters was afraid of losing his job. The tension at this meeting was great. Half an hour later Wolters apologized for his earlier remarks.

Borkoski, that day, called Boonstra into his office and asked him if he had made up his mind on the ESOP program. Boonstra replied that he had and that it was "No!" Borkowski stated that that would be very detrimental to

[5] Wolters testified that he made remarks concerning these matters during a meeting in the breakroom on 2 October.

[6] To the extent that Borkowski's testimony appears to be in conflict with that of Advocaat concerning this conversation, I credit Advocaat.

[7] Rogers denied making this statement. I credit Boonstra. Employee DeGroot's testimony on the subject was inconclusive.

[8] Wolters basically admitted the statements attributed to him by Boonstra, but stated that they were made at a different time at a group meeting.

the Company and added that they probably would lose their jobs.[9]

Also on 3 October employees Antonopulos and Hofstra received letters from Borkowski dated 2 October stating:

> Dear Employee;
> Re: Ryder/P.I.E. Stock Investment Plan
>
> We have one more day to enlist your participation in the Stock Investment Plan.
>
> Our records indicate that you have not signed up to participate. I know this is a serious matter that you and your family must consider carefully. I would urge you to decide promptly. The future of your Company and your job depends on the active support of this program by everyone involved.
>
> A majority of the employees have signed cards and more are participating every day. But we need about 1200 more cards signed before midnight on Friday. Every Participant Counts.
>
> We all need to pull together and make this happen now. Help your fellow employees by signing up today.
>
> Sincerely yours,
> /s/Steve Borkowski
> Terminal Manager

On the evening of 3 October, Klinge, after giving serious consideration to the conversation between Boonstra and Wolters that had occurred several hours earlier, called Wolters at his home and advised him that he intended to sign his application to participate in the ESOP program the following afternoon.

Meanwhile, the same evening, Borkowski again called Advocaat into his office and asked him if he changed his mind and was ready to participate in the ESOP plan. Advocaat replied that he had not changed his mind and did not foresee himself changing it. While he was either on his way into or out of Borkowski's office, on this occasion, Wolters took the opportunity to remind him of the great importance of participating in the plan because of the financial condition of the Company. He added that (without sufficient participation) there would probably be some closings, if not of the entire system, then perhaps of individual terminals.

Also on the evening of 3 October, Borkowski called Hofstra at his home and told him to reconsider and join the plan. Hofstra replied that he did not feel that he should because he would need the money for his anticipated retirement and he was only working 2 or 3 days a week at the time. Borkowski stated that he sure would like to have Hofstra join and be a part of the plan.

Later in the evening of 3 October, Advocaat had lengthy conversations on the telephone with his family about his possible participation in the ESOP program. In one conversation with his oldest son, he was advised to sign up to avoid harassment and in order to protect his job while he looked for another one. He decided to sign up the following day and did so.

At 8 a.m. on 4 October, a meeting was called at the Grand Rapids terminal. Present for management were Rogers, Wolters, and Borkowski. Drivers were in attendance. Rogers read a progress report on the percentage of participation in the ESOP program at various terminals. He noted that Kalamazoo had signed up 100 percent while certain other stations had signed up 85 percent. Shortly after the meeting, about 9:30 a.m., Boonstra and Borkowski discussed the ESOP issue. Boonstra commented that he had never experienced so much pressure as during that week. Borkowski offered that he had been under a lot of pressure himself the day before. Boonstra assumed that Borkowski meant that his pressure came from the men. He noticed a tear trickle down from Borkowski's eye as he, Boonstra, turned away to go to work. Borkowski said, "Well, I hope you are on our side," and added that if the employees did not sign up for the plan, both Boonstra and Borkowski would lose their jobs.

Also, shortly after the 8 a.m. meeting Hofstra was called into the office. John Rogers was present, later to be joined by Wolters and Borkowski. Rogers asked Hofstra how old he was when the Company hired him. Hofstra replied that he had been hired in 1981 when he was 49 years old. Rogers opined that it was awfully good of the Company to give Hofstra a job at that age, then added, "You know, if you don't join up [in the ESOP], the rest of the employees are going to treat you like shit. They are going to shun you and not talk to you."[10] Wolters said that he would like Hofstra to sign up as a favor to him. Borkowski then added that he wished that Hofstra would sign because he wanted him to be a member of the team, to help the Company out so that it could make a go of it. Rogers then went to the telex and read something off a message about an employee in Chicago who said he was planning to retire in January, wished Rogers all the luck in the world, was behind Rogers all the way, and was going to sign up for the program. Hofstra, who felt that if he did not sign up, the Company would go under, signed a few minutes later.

Later in the morning of 4 October, Borkowski and Klinge had a conversation in the drivers' room about the ESOP. Klinge told Borkowski that he was not ready to sign. Borkowski replied, "We need your help bad, and it is getting close to the deadline." The deadline was, in fact, that day. That afternoon Klinge signed the application to participate in the ESOP, based on his witnessing of the Boonstra/Wolters conversation of the day before.

[9] Borkowski admitted stating that if the Company did not get the required amount of participation in the ESOP plan, both Boonstra and he stood possibly to lose their jobs.

[10] Rogers testified how he tried to convince Hofstra that although the latter would soon be retiring and would not need the ESOP program, the other employees would still need it to keep their jobs. When Hofstra offered to sign up for the ESOP program in return for a guaranteed 5-day week, Rogers stated that he could not do so because of bargaining rules. This description of the conversation is credited. However, Rogers denied telling Hostra that the rest of the employees would shun him if he did not sign up for the ESOP program. With regard to this statement, I credit Hofstra. Although Wolters and Borkowski testified that Rogers did not say anything to Hofstra, during this conversation, about the attitude of other employees, it is clear that they were not present during the entire conversation and could not have heard everything that was said. (See Tr. vol. II, p. 15.)

About 4 p.m. on 4 October, Antonopulos punched in and was shortly thereafter called into Borkowski's office. Borkowski unfolded a computer printout and showed it to Antonopulos explaining that the printout indicated the terminals throughout the country that had turned in 100-percent participation in the ESOP program. He stated that Grand Rapids had achieved only 90-percent participation and had to do better. Antonopulos asked Borkowski if he was trying to imply that if Grand Rapids did not turn in 100-percent participation the Company would close that terminal. Borkowski replied, "I don't know, they might," and added that, at that time, only Antonopulos and Mike Victor had not agreed to participate in the ESOP program and that Victor was being unreasonable. Borkowski then stated that he did not mean it to be a threat; however, it would be rough for Antonopulos to work alongside employees who had joined the plan; that it could get ugly; and that he had already seen it.[11] Antonopulos asked if it would be possible to sign up at some future date but Borkowski said that the signatures would have to be in by that weekend. That evening, about 6 p.m., Christianson came into the drivers' room during Antonopulos' break and asked if he had signed up. When Antonopulos replied that he had not, Christianson said that he had no respect for anyone who had not signed up and that as far as he was concerned the Company would be better off as soon as Mike Victor and Antonopulos were gone. He added that he would be watching for Antonopulos every chance that he got.

On the evening of 4 October, Hofstra and Antonopulos signed up for participation in the ESOP program. Boonstra also signed his application on 4 October and returned it to John Rogers.

The Respondent's terminals maintain a telex system for business purposes. They are not to be used for personal messages and at the Grand Rapids terminal rank-and-file unit personnel are not permitted to use the telex.

During the week of 29 September through 4 October, a large number of telex messages were received at the Grand Rapids terminal, sent from other terminals, asking people to sign up for the ESOP plan. A few came in early in the week, many more by 3 and 4 October. After receipt of these telex messages, Borkowski and perhaps other members of management posted a number of them on the bulletin board next to the timeclock where the employees checked in and placed others on the table in the drivers' room where the drivers hung up their coats, had lunch, and took their breaks.

Charles Antonopulos testified that he saw a number of these telex messages on 2, 3, and 4 October. One such message referred to the low percentage of participation in the ESOP program at Grand Rapids and stated: "We vote to close." Antonopulos did not notice who had signed this telex message. He saw another that read: "What is wrong with you employees who have not signed up for the plan? Don't you know jobs are hard to come by?" Still another that Antonopulos testified to seeing read: "85 percent of something is better than 100 percent of nothing."

Boonstra credibly testified to seeing telex messages on the table in the drivers' room, one of which read, "Grand Rapids had 43 percent. We vote to close."[12] Others he saw read, "Please sign up for this plan. I need my job." Boonstra testified that the only other times that he noticed telex messages in the drivers' room was when the terminal received some congratulatory message from management concerning how well the terminal was doing.

Advocaat testified to seeing one telex message posted, which was an ESOP update listing the terminals in the region and showing the number and percentage of employees who had signed up for the ESOP program. This message also said that if certain terminals did not show a high enough percentage, some terminals could be closed down, especially end-of-the-line terminals. Grand Rapids[13] is an end-of-the-line terminal. Advocaat saw this message on 3 October. Advocaat saw other messages that read, "Please sign up for the plan and save our jobs."

After catching sight of these telex messages, Advocaat called the 800 number provided for employees who had questions concerning the ESOP program. He asked the individual who answered the call[14] if the information contained in the telex was true. He was told that the machinery was in place to close down the system, that participation was not high enough.

Management personnel testified concerning the telex messages. Borkowski agreed that normally rank-and-file office employees did not use the telex but stated that they did so occasionally. He admitted that regardless of who had sent the messages, management or nonmanagement, it was he who placed the telex messages on the table in the drivers' room and posted them, or some of them, on the bulletin board. Borkowski testified that he did this in order to show the drivers what the extent of participation was at other terminals inasmuch as he had been asked questions on the subject by various employees.

Rogers testified that the various terminals were using the telex messages to campaign on behalf of the ESOP program but he did not personally know who was sending the messages. He testified that the regional manager eventually sent out a message himself stating that the ESOP messages must stop. Before the messages were stopped, however, during that week, the region was updated twice a day, once at noon and once at 6 p.m. These updates showed how many people were employed at each terminal in the region, how many of them had signed up for the ESOP program, and what percentage of employees had signed up. Rogers could not recall

[11] Borkowski admitted telling Antonopulos that he could expect some friction or disagreements if he did not sign up for the plan but denied using the terminology ascribed to him by Antonopulos. I credit Antonopulos.

[12] Boonstra testified that he did not see who signed this message or did not recognize the signature.

[13] Rogers testified that he could recall no such message and that none could have issued from the regional office. However, Rogers also testified that he did not see the telex messages in the breakroom. I credit Advocaat that he did, indeed, see such a message and that it probably originated from outside Grand Rapids.

[14] This person was unidentified.

seeing the message concerning end-of-the-line terminals but admitted that he had been told at the time that one existed. Rogers denied that there had been any messages concerning the closing of terminals if participation was not great enough.[15] On the other hand, he also testified that he did not see but did hear about the messages concerning Grand Rapids having only 43-percent participation, "We vote to close."

Gordon Wolters testified to seeing 100 to 150 telex messages on the table in the drivers' room, but saw none concerning end-of-the-line terminals. He did recall seeing one that mentioned a low percentage of participation at Grand Rapids, which was signed by someone other than a managerial person. Wolters testified that rank-and-file employees have access to the telex equipment. He did not take the message seriously.[16]

Like the other members of management, Borkowski denied that he ever saw the end-of-the-line telex message concerning which Advocaat testified. He also could not recall such a message being mentioned by any of the drivers.

Analysis and Conclusion

There is no dispute that Respondent in 1984 and 1985 was in dire financial difficulty and that the planned implementation of an ESOP plan was the only alternative to closing down some of its terminals or going out of business altogether. After obtaining the agreement of the Union, Respondent's top management told its regional officers to relay to their terminal employees the company's financial condition and the need for 100-percent participation in the ESOP program.

At the September 30 meeting at the Grand Rapids terminal, management emphasized to the rank-and-file employees that if the ESOP program did not succeed, both management personnel and rank-and-file employees would be facing loss of employment. Management explained at this meeting that the ESOP program required all management and rank-and-file personnel to sacrifice 15 percent of their salary or wages in exchange for stock in the Company and that this would enable the Company to continue to operate. To succeed, it was stated, 90-percent participation was necessary.

Subsequent to this initial meeting at the Grand Rapids terminal other meetings followed. Sometimes these meetings were attended by several members of management and a number of drivers and sometimes these meetings took the form of one-on-one confrontations. It was during these subsequent meetings where, the complaint alleges, incidents of 8(a)(1) threats occurred, which resulted in the Charging Parties being coerced into joining the stock plan.

Thus, in the consolidated amended complaint, paragraph 10 alleges that Steve Borkowski, on 2 October, threatened an employee (Advocaat) with continued harassment by other employees if he refused to participate in the Stock Investment Plan. In my estimation, however, there was no threat involved in this incident. Both participants were aware that emotions were high among those employees who were in favor of the ESOP program and those who were against it. Indeed, Advocaat had just had an argument with Christianson and Pearson about the ESOP program the night before and it was his reporting of this argument to Borkowski that elicited the latter's remarks that the situation was an emotional one; that there were a lot of people concerned for their jobs; and that if Advocaat did not sign up for the ESOP program, he could expect more of the same.

In my opinion, Borkowski's remarks were not meant as a threat but an expression of a well-founded opinion based on his observation of the conditions around him as well as on Advocaat's report of the incident that had occurred the night before. Such expressed opinions by supervisors concerning possible harassment of one employee by fellow employee's taking opposite positions on labor-related problems have not been found to be violative of the Act where there is no evidence of involvement by the supervisor in the harassment or any ratification or adoption of the harassing acts of rank-and-file employees by an employer or its supervisors.[17]

Paragraph 15 of the complaint contains a similar allegation, namely that Borkowski, Wolters, and Rogers threatened employees (Antonopulos and Hofstra) with harassment by other employees if they refused to participate in the Stock Investment Plan. Again, I find Rogers' statement to Hofstra and Borkowski's statement to Antonopulos concerning the attitude of other employees towards them if they should fail to sign up for ESOP merely expressions of their opinions; predictions rather than threats, and not violative of the Act.[18]

Paragraphs 11 through 14 contain allegations of threats to close terminals if enough employees employed at these terminals did not agree to participate in the ESOP program. Paragraph 11 alleges that Borkowski and Wolters made such threats concerning the Grand Rapids terminal on 2 October to Advocaat. The record indicates that Borkowski told Advocaat on that date that if there was not a high enough participation in the ESOP program, there was a possibility that the Grand Rapids terminal would be shut down. The record also indicates that Borkowski also told Klinge on that date that if the Kalamazoo terminal employees did not sign up to participate in the ESOP program, the Company would probably close the terminal and run it out of Grand Rapids.

Paragraph 12 alleges that Respondent posted notices in the drivers' room threatening closure of the Grand Rapids terminal if the employees refused to participate in the Stock Investment Plan. The record indicates that a large number of telex messages were received at the Grand Rapids terminal during the first week of October. A number of these telex messages, all having to do with the ESOP program, were posted or placed on the table located in the drivers' room by management personnel.

[15] In particular, Rogers denied that the regional offices have authority to close or even recommend the closing of terminals. This fact does not, however, preclude the possibility that such a message was, nevertheless, received.

[16] Wolters testified that although he was initially angered by this message, he and certain rank-and-file employees later laughed about it.

[17] *Thomsons Newspapers*, 234 NLRB 649 (1978); *Purolator Products*, 270 NLRB 694, 712–713 (1984); *Neo-Life Co. of America*, 273 NLRB 72, 73 (1984).

[18] Ibid.

One such message referred to the low percentage of participation of Grand Rapids employees and stated: "We vote to close." Another message, seen posted on 3 October, stated that if certain terminals did not show a high enough participation, that some terminals could be closed down, especially end-of-the-line terminals. When Advocaat called the 800 telephone number listed on the SIP[19] prospectus and asked if the posted message was true, he was told that the machinery was in place to close down the system, that participation was not high enough. I conclude that regardless of who sent these messages, management was responsible for bringing them to the attention of rank-and-file employees.

Paragraph 13 alleges that John Rogers, on 3 October, threatened employees with the closure of the Kalamazoo terminal if enough employees at the Kalamazoo terminal refused to participate in the Stock Investment Plan. Record evidence indicates that Rogers told employees at a group meeting that none of the employees at the Kalamazoo terminal had signed up for the ESOP program and that the Company would probably close that terminal and run its business out of the Grand Rapids terminal.

As noted supra, while Advocaat was either on the way into or out of Borkowski's office, on the evening of 3 October, Wolters told him that (without sufficient participation) there would probably be some closings, if not of the entire system, then, perhaps, of individual terminals. Although paragraph 13 of the complaint does not mention this alleged threat, paragraph 11 alleges that Wolters made this threat on 2 October. I find that the statement was made on 3 October.

Paragraph 14 of the complaint alleges that Borkowski, on 4 October, threatened an employee (Antonopulos) with closure of the Grand Rapids terminal if he did not participate in the Stock Investment Plan. The record reflects that on that day Borkowski, in answer to Antonopulos' question about the possible closure of the Grand Rapids terminal if there were not 100-percent participation in the ESOP program, replied, "I don't know, they might."

Though paragraphs 11 through 14 allege that Respondent threatened closure of terminals unless the allegedly threatened employees joined the ESOP program, I do not consider the statement made to be threats at all. Given the context in which the statements were made, I find them merely forecasts of things to come based on the reality of the situation. Thus, it is clear that the Company was faced with a financial crisis that allowed it just so many options: First, to go out of business; second, to reduce operations; third, to implement a successful ESOP program. The Company chose the implementation of the ESOP program as its course of action.

To be successful the ESOP program would require the participation of 90 to 100 percent of all personnel, both management and rank-and-file. If the ESOP program failed due to lack of participation, the result would have to be one of the other two alternatives. Managerial personnel did their best to explain the situation to all employees including the Charging Parties by advising them of the critical nature of the problem. In short, they predicted that unless everyone was willing to give up 15 percent of his salary or wages toward stock investments to make the ESOP program a success, they would all be out of work. Through some verbal arm-twisting, cooperation was acheived and all the Charging Parties agreed to join the program. In some cases the Charging Parties and other employees agreed to sign up for ESOP because of peer pressure and fear for personal safety, in other cases because they actually feared that the entire system or their terminal would close down if they did not participate in the program, and in still other cases because they were sympathetic towards the expressed concern of others that they might lose their jobs. For whatever reason the Charging Parties signed, it was not because of any activity on the part of management that could remotely be considered in violation of Section 8(a)(1) of the Act for the statements made by managerial personnel concerning closure were not made as threats of retaliation but as forecasts of the consequences of the failure of employees to participate in the program designed to save the Company and the jobs of all concerned.

In a case[20] that clearly is not on all fours with the instant case, but that is, nevertheless, instructively parallel, the Board found no violation with respect to the comparable portions of that case. Thus, in the *Raskin* case, as here, the employer was faced with somewhat sudden and acute financial setbacks that required relatively immediate operational changes. Unlike Respondent herein, Raskin closed down its operation rather than first approach the union or its employees to discuss alternatives to closure. Shortly after closure, however, Raskin advised the union that it would be able to reopen its plant if it obtained certain concessions from the employees in the unit represented by the union. The union refused the employer's overtures stating that it would not be willing to settle for less than that for which the contract provided. As noted supra, in the instant case the Union agreed to the Company's obtaining concessions from the unit employees in order to stay in business.

Despite the Union's objections in the *Raskin* case, the employer in that case went to the employees directly and offered an ESOP plan whereby the employees would become owners of the company in return for giving up certain wages and fringe benefits to which they were entitled under the existing contract. Raskin told the employees that if they accepted the Respondent's proposal, it would reopen the plant under somewhat changed business conditions,[21] but if they refused it would stay closed or would sell the plant to a third party.

In the instant case, as noted, the Respondent told the employees that if they accepted the ESOP proposal the Company would continue in business but if they refused the proposal, the entire system or certain terminals would close. Thus, in the *Raskin* case the employer "promised" employees that the plant would be reopened if there were contract concessions while in the instant

[19] Stock Investment Plan.

[20] *Raskin Packing Co.*, 246 NLRB 78 (1979).

[21] Raskin, previously a wholesale meat packing company, would thereafter reopen as a custom meat packer.

case the Employer "threatened" employees that the plant would be closed if there were no contract concessions. One situation is the obverse of the other.

In the *Raskin* case the Board agreed with the reasoning of the administrative law judge that the respondent did not violate Section 8(a)(1) of the Act by these discussions between management and its employees. If there were no violations in the *Raskin* case, I can find no basis for finding a violation here.

Having found that the allegations of threats are without merit, I consequently find that the Charging Parties were not coerced into joining the Stock Investment Plan and shall recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. Respondent, P.I.E. Nationwide, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated Section 8(a)(1) of the Act.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act. I issue the following recommended[22]

ORDER

The complaint is dismissed in its entirety.

---

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Litton Microwave Cooking Products Division, Litton Systems, Inc. *and* United Electrical, Radio and Machine Workers of America, Local 1139 *and* United Electrical, Radio and Machine Workers of America (UE). Cases 18–CA–7323, 18–CA–7572, and 18–CA–7689

15 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 9 December 1983 Administrative Law Judge Bruce C. Nasdor issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The judge found that the Respondent had the right to relocate work, actually bargained in good faith over the relocation decisions, and had the discretion to discharge employees not in good standing with the Union. We disagree.

The Work Relocation

The judge found that the parties' collective-bargaining agreement, effective from 1 October 1979 to 31 October 1982, included a broad management-rights clause[3] that permitted the Respondent's unilateral relocation of its international and commercial lines from Plymouth, Minnesota, to Sioux Falls, South Dakota. He found that pursuant to this clause the Respondent had previously moved its countertop oven production from Minneapolis to Sioux Falls. According to the judge, the Union's failure to file Board or civil charges, or to request bargaining over the countertop relocation decision, indicated its belief that the Respondent had the right to transfer work. He found further support for this position in Union Financial Secretary Rocco DeMaio's statement during 1982 contract negotiations that the Respondent did not need a new management-rights clause because, under the current contract, the Respondent "had the right to do anything it wanted."

The clause does not reserve to the Respondent the right unilaterally to relocate work.[4] Indeed, 13 distinct issues are reserved to the Respondent's sole discretion, but work relocation is not among them. "While the Board acknowledges that a labor organization may waive the statutory rights granted to it and to the employees it represents, we will not lightly infer such a waiver, which must be in 'clear and unmistakable' language."[5] Work relocation is not clearly and unmistakably included in the management-rights clause.

Nor does the Union's failure to challenge the Respondent's earlier conduct concerning the countertop work prove the Union's acquiescence to the relocations we are considering. From 1977 until 1981, the bargaining unit experienced several layoffs. In response to DeMaio's inquiries regarding the reasons for the series of layoffs, however, the Respondent's representative consistently assured DeMaio that the layoffs were due to lack of work. In contrast, when the Respondent sought to relocate the international and commercial lines from Plymouth to Sioux Falls, it formally notified the Union in writing, as well as orally, of its plans to transfer the production operations to the Sioux Falls facility within a particular time frame. Immediately on receipt of the notification, DeMaio requested bargaining over the decisions and effects. Contrary to our dissenting colleague, we conclude that the events surrounding the earlier layoffs do not indicate union acquiescence, forever waiving its bargaining rights.[6]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Because we cannot identify a specific contract term that the Respondent's relocation decisions modified, we conclude that the Respondent did not violate Sec. 8(d). See *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984), affd. sub nom. *Auto Workers v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

[3] The full text of the clause is as follows:

> Management Rights
>
> 3A. All of the customary rights of management are reserved to the Company except as they are modified by the terms of this Agreement. These rights include, but are not limited to the right to direct the working force, to hire, to discipline, to discharge for cause, to schedule work, to establish reasonable rules, to classify, to assign, to promote, to transfer, and to determine size of work force, layoffs, product and production methods.

[4] The contract does not contain a zipper clause.

[5] *Universal Security Instruments*, 250 NLRB 661, 662 (1980) (quoting *Allied Mills*, 218 NLRB 281, 286 (1975)), enfd. in relevant part 649 F.2d 247, 256 (4th Cir. 1981). See also *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[6] See, e.g., *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970), enfd. 454 F.2d 303 (7th Cir. 1971); *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969).

Continued

DeMaio's statement during the 1982 negotiations does not support the judge's conclusion. The statement, made in the context of the already completed countertop work relocation, did not refer to possible future relocations. It can hardly constitute a conscious, unequivocal waiver of the Union's right to bargain over future relocations.[7] Moreover, if, as the judge found, the earlier contract clearly reserved this right to the Respondent, the Respondent would not have needed to propose a more detailed clause in 1982.

In sum, there is nothing in the management-rights clause that affirmatively authorizes the Respondent to transfer bargaining unit work outside the unit nor is there sufficient evidence in the parties' bargaining history that would justify such an interpretation.

Having determined that the Union did not waive the right to bargain about relocation decisions, we must decide whether the Respondent's decisions constitute mandatory bargaining subjects. We find that the Respondent was obligated to bargain about the decisions. In pre-relocation conversations with DeMaio, the Respondent's vice president of human resources Phillips and its vice president of manufacturing Dowling repeatedly emphasized that the most significant factor in the relocation decision was the wage differential between the Sioux Falls and Plymouth facilities.

No party seriously disputes that labor costs were the most important consideration in the Company's decisions. Consequently, we find that under *Otis Elevator Co.*, 269 NLRB 891 (1984), the Respondent's decisions to relocate the international and commercial lines turned on labor costs and therefore were mandatory bargaining subjects.[8] By failing to bargain in good faith with the Union over those relocations, the Respondent violated Section 8(a)(5) and (1).[9]

As the Respondent's relocation decisions were mandatory bargaining subjects, it follows that the Respondent was obligated to provide information the Union requested, which was relevant to the relocations and necessary for and relevant to the Union's role as collective-bargaining representative.[10] The judge found that the Union's information requests were "vague generalizations" seeking nonexistent or irrelevant material and, further, that the Respondent was unaware of or did not rely on any information not provided to the Union. The record convincingly demonstrates, however, that the Respondent failed to provide relevant, available information.

The Union's frequent requests for studies were not so vague that the Respondent could escape its obligation to provide relevant, available information which would have allowed the Union to understand and discuss intelligently the relocation issues. In fact, the record indicates that the Union's requests were highly specific. Thus, in its 5 November 1981 letter to the Respondent, the Union requested, inter alia, the following information about the proposed international line relocation:

> 1. On June 11, 1981, Tom Phillips, in a phone conversation, stated to me, Rocky DeMaio, that Litton was losing three million dollars a year on the Range operation at the Minneapolis plant. He also said Litton was studying the feasibility of the continuous operation of the line at the Minneapolis plant and the possible relocation of that operation.
>
> Based on this conversation, the U.E. requests that Litton supply the Union with the Financial Data which documents that the Range line was operating at a three million dollar a year loss.
>
> 2. In Tom Phillip's [sic] letter of October 30, 1981, Litton indicated that it has completed one phase of an analysis of production requirements and based on that analysis concluded that it is more economical to manufacture certain models in the Sioux Falls plant.
>
> From this letter it appears that Litton is now engaged in a wide ranging analysis of cost comparison[s] which go beyond the operations of the Range line. The cost comparisons are between the Sioux Falls and Minneapolis plants. Based on this fact, the Union requests Litton to provide the Union with a copy of the analysis referred to in Tom Phillip's [sic] letter of October 30, 1981. This information is necessary to enable the Union to intelligently

---

The burden of proving waiver is on the party alleging it, and the Respondent has not met that burden. The record in this case does not contain enough evidence about the Respondent's gradual elimination of countertop work from the Minneapolis area to prove that the series of layoffs due to lack of countertop work was so similar to the Respondent's relocations of the international and commercial lines that the Union's failure to challenge the countertop layoffs would constitute a waiver of the Union's right to challenge future work relocations.

[7] Although the Chairman correctly states that, in the context of labor arbitration, a party's failure to object to another party's contract interpretation may prevent future challenges to that interpretation, he mistakenly applies that arbitration waiver standard to the statutory waiver at issue in this case. The waiver of a statutorily protected right must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, supra.

[8] We find that, under any of the views expressed in *Otis Elevator*, supra, the Respondent was obligated to bargain with the Union over its decisions to relocate unit work.

[9] Contrary to the judge's findings, the Respondent never bargained about the decisions with the Union. The "various meetings" to which the judge alludes did not satisfy the Respondent's bargaining obligation because those meetings concerned primarily the information the Union requested, which the Respondent refused to provide.

[10] See *Whitehead Bros. Co.*, 263 NLRB 895, 900 (1982); see also *Safeway Stores*, 252 NLRB 682, 685–686 (1980).

bargain over the impact and the Company decision to transfer the work to Sioux Falls.

3. The Union also requests that Litton provide it with a copy of any cost analysis considered in making the decision to transfer work from Minneapolis to Sioux Falls. The Union also requests all other analyses, surveys, or studies referred to in Tom Phillip's [sic] October 30, 1981 letter which deals with the relocation or transfers of other work now being performed at the Minneapolis plant.

The Union letter also requested details concerning how and why the Respondent made its decision, the decision's effects on employees, what would be necessary to keep the work in Minneapolis, and the Respondent's financial condition, including market share and profit-and-loss information.

Regarding the commercial line, the Union reiterated the above request and asked for "a complete breakdown on variable overhead, complete breakdown on labor, copies of all studies made, [and] copies of all analysis made."

Before relocating the two lines, the Respondent provided the Union only with comparative wage data, general statements that relocating was necessary due to "hourly wage rates, commonality of products and production methods, and . . . duplication of line support personnel, etc.," and variable overhead information and a cost-per-unit projection based entirely on wages and hours. At various times, the Respondent claimed that the rest of the requested information was either nonexistent, privileged, or irrelevant. Although the Union repeated and clarified its requests on several occasions, indicating that it could not offer concessions without the information, the Respondent never provided it.

The Union's need for information is demonstrated merely by showing the "probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities."[11] The Union's requests for studies and analyses were not fishing expeditions. Rather, the Union sought additional relevant information with which it could determine the meaning of the information already provided and develop reasonable bargaining proposals.

Although the Respondent at times denied the information existed, we find it difficult to believe that such a large and complex corporation would decide on and implement a major plant relocation without considerable studying and analysis.[12] Furthermore, the Respondent's testimony calls into doubt the asserted nonexistence of the information. The 5 November 1981 information request referred to specific studies and analyses the Respondent mentioned to DeMaio. On 19 March 1982 in a discussion with union officials, including DeMaio, the Respondent's vice president Phillips said that the requested information must have been gathered somewhere and considered, and that he would try to get it.

Furnishing information is fundamental to the duty to bargain in good faith. By failing to furnish the requested information, the Respondent refused to bargain in good faith and thus violated Section 8(a)(5) and (1) of the Act.

The Refusal to Discharge Pursuant to the Union-Security Clause

We also disagree with the judge's dismissal of the complaint allegation that the Respondent failed to honor the union-security clause. Although the judge correctly stated the Board's deferral policy,[13] he misunderstood the substance of the charge concerning the Company's failure to enforce the union-security clause.[14] The arbitrator's award, issued 6 December 1980, sustained the Union's grievance over the Company's memorandum advising employees that it would not discharge them for failing to pay union dues. The arbitrator essentially found that the word "may," as used in the union-security clause, requires the Company to discharge employees failing to pay dues.

Rather than seeking enforcement of that award, the General Counsel and the Union are asking us to consider an unfair labor practice charge based on events that occurred after the arbitrator's award issued. The Union charged that the Respondent

[11] *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

[12] See *Safeway Stores*, supra at 686.

[13] The judge, citing *Malrite of Wisconsin*, 198 NLRB 241, 241–242 (1972), enfd. in relevant part sub nom. *Electrical Workers IBEW Local 715 v. NLRB*, 494 F.2d 1136 (D.C. Cir. 1974), also stated that parties seeking to enforce an arbitration award are best served in a judicial proceeding.

[14] The union-security provision states:

> 2A. All employees shall, as a continuing condition of employment with the Company, become members in good standing of the Union on or before the forty-fifth (45th) calendar day following the beginning of their employment, or on or before forty-five (45) calendar days after the effective date of this Agreement, whichever is later, and shall maintain such membership in good standing in Union during the life of this Agreement.
>
> 2B. When the Union notifies the Company that an employee covered by this agreement has failed to pay the monthly Union dues that are uniformly levied against all members and by reason thereof is no longer in good standing in the Union, the Company may discharge such employee. The Company need not reinstate such employee if he subsequently pays his dues and regains good standing in the Union, after being discharged. The Union will save the Company harmless from any loss, cost, or damage resulting from the discharge of any employee under the terms of this SECTION. In no case shall the Company be required to discharge an employee where such discharge would be in violation of State or Federal Law.

violated Section 8(a)(5) and (1) by failing in June 1981 to discharge certain delinquent employees pursuant to the contract's union-security clause. Under similar circumstances involving "events which occurred *after* the arbitration hearing,"[15] the court in *Malrite* held that "deferral is not appropriate with respect to an issue not considered by the arbitration panel."[16] Because the events underlying the instant charge occurred after the arbitration hearing, indeed after the arbitrator's award issued, the arbitrator could not have considered them in making his award. Accordingly, we find deferral inappropriate.[17]

In so finding, we rely on the evidence that the arbitrator had considered only whether the Company's interpretation of its obligations under the contract's union-security provision, as published in a memo, was correct. Following the Union's request that certain named employees be discharged for failure to comply with the terms of the union-security provision, the Company expressly rescinded the memo that the arbitrator had ruled was an incorrect interpretation of the contract. The Company nevertheless continued to refuse to honor the Union's request to comply with the terms of the union-security provision, without supplying any other reasons for doing so. Whatever new, unexpressed reasons it had for failing to comply with the provision could not have been considered in the arbitration proceeding.

Although deferral is inappropriate, the arbitrator's special expertise in interpreting the contract is useful to our resolution of the unfair labor practice issue. As stated above, the arbitrator determined that the parties' collective-bargaining agreement requires the Respondent to discharge employees who have not paid their union dues. We find the arbitrator's decision reasonable because any other interpretation of the language would conflict with the employees' contractual membership requirement and render the union-security provision meaningless. The word "may" simply allows the Company not to discharge an employee if that discharge would violate the law.

After the Union presented a list of delinquent employees and requested their discharge pursuant to the union-security clause, the Respondent refused to do so and, thereby, refused to bargain in violation of Section 8(a)(5) and (1) of the Act.[18]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3.

"3. By failing and refusing to bargain with the Union in good faith over the decision to relocate the international and commercial lines work from Plymouth, Minnesota, to Sioux Falls, South Dakota, the Respondent violated Section 8(a)(5) and (1) of the Act."

2. Substitute the following for Conclusions of Law 6, 7, and 8.

"6. By failing and refusing to provide the Union with requested available information necessary for and relevant to its function as exclusive collective-bargaining representative, the Respondent violated Section 8(a)(5) and (1) of the Act.

"7. By failing and refusing to honor the union-security clause, the Respondent violated Section 8(a)(5) and (1) of the Act.

"8. The above-described violations of the Act constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act."

THE REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, take certain affirmative action designed to effectuate the policies of the Act, and post an appropriate notice. We shall order the Respondent to bargain with the Union concerning its decision to relocate the international and commercial lines from Plymouth to Sioux Falls, furnish the Union with the requested information, and honor the union-security provision of its 1979–1982 collective-bargaining agreement with the Union.

We shall also order the Respondent to restore the status quo ante by transferring back to Plymouth the work of the international and commercial

[15] *Electrical Workers IBEW Local 715 (Malrite) v. NLRB*, supra, 494 F.2d at 1139 (emphasis in original).

[16] Ibid.

On remand from the court to consider the postarbitration hearing charges, the Board found the employer violated Sec. 8(a)(5) and (1) by engaging in individual bargaining. *Malrite of Wisconsin*, 213 NLRB 830 (1974).

[17] Regarding the Chairman's position that the Board is compelled to defer to the prior arbitration award here, we acknowledge that there are strong considerations in favor of following prior awards as precedent when, as here, a new incident gives rise to the same issue covered by a prior award; and in fact we have given substantial weight, below, to the arbitrator's interpretation of the union-security clause. Since, however, it is possible for there to be inconsistent arbitration awards interpreting the same contractual provision, it cannot be that the Board must reflexively defer to an arbitrator's contractual interpretation in a case like this involving subsequent events. For a discussion of the use by arbitrators of prior awards as precedent, see Elkouri & Elkouri, *How Arbitration Works*, 365–388 (3d ed. 1973). Cf. *Teamsters (Anheuser-Busch)*, 277 NLRB 1097 (1985).

[18] See *Spear Meat Co.*, 256 NLRB 117, 119 (1981).

Having refused even to respond to the Union's request that it honor the contractual union-security clause, the Respondent cannot now claim that the Union's notice to employees was defective in defense of its own unlawful conduct. See *Independent Stave Co.*, 248 NLRB 219, 220 (1980); *California Blowpipe & Steel Co.*, 218 NLRB 736, 751 (1975). Consequently, we need not pass on the judge's discussion of whether the Union fulfilled its fiduciary obligations.

lines that was relocated to Sioux Falls and by offering the discharged, laid-off, or suspended bargaining unit employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions with backpay dating from the time of their discharge, layoff, or suspension computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Litton Microwave Cooking Products Division, Litton Systems, Inc., Plymouth, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain collectively in good faith with United Electrical, Radio and Machine Workers of America (UE), and its Local 1139, with respect to the decisions to relocate the international and commercial lines work from its Plymouth, Minnesota facility to Sioux Falls, South Dakota.

(b) Failing or refusing to furnish the Union with available information necessary for and relevant to its function as bargaining representative.

(c) Failing or refusing to bargain with the Union by failing and refusing to comply with the union-security provision of its 1979–1982 collective-bargaining agreement with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain collectively in good faith with the Union concerning any decision to relocate the international and commercial lines from Plymouth to Sioux Falls.

(b) Promptly furnish the Union with the studies, analyses, and other information requested which will enable the Union to engage in intelligent bargaining.

(c) Transfer back to the Plymouth plant the international and commercial lines work previously performed at that facility by bargaining unit employees represented by the Union.

(d) Offer to those employees discharged, laid off, or suspended as a result of the work relocation from Plymouth to Sioux Falls immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make those employees whole by providing them with backpay dating from the time of their discharge, layoff, or suspension, in the manner set forth above in the remedy section of this decision.

(e) Honor the union-security clause in the 1979–1982 collective-bargaining agreement.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Plymouth, Minnesota facility copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN DOTSON, dissenting in part and concurring in part.

I must disagree with my colleagues' reversal of the judge's finding that the broad management-rights clause in the parties' collective-bargaining agreement, along with the past practice of the Union in dealing with work relocation and the union business representative's comments during negotiations, permitted the Respondent's unilateral relocation of its international and commercial lines from Minnesota to South Dakota. Contrary to the majority's assertion, the Union's failure to challenge the relocation of the countertop stove work was not a "single incident," but rather represented a significant pattern established from 1977 through 1981, and included at least three separate layoffs of employees from the Minnesota plant due to the transfer of work. As the judge noted, although the Union was aware of the situation, it failed to file charges against the Respondent or to even request bargaining over the gradual transfer of all the

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

countertop work to the South Dakota plant. In the labor arbitration area, which deals almost exclusively with contract interpretation, when one party repeatedly fails to object to the other party's interpretation of a contract clause, such lack of protest has been held to represent acceptance of the interpretation and to prevent a later challenge to the course of action undertaken.[1] In the circumstances here, I think the Union's prior silence is no less significant and its "acceptance" of the Employer's interpretation no less persuasive.

In addition to the Union's lack of action concerning the transfer of the countertop work, the comments made by business representative DeMaio during the 1982 contract negotiations between the Respondent and the Union are significant. During the negotiations, the Respondent proposed a management-rights clause which specifically gave it the right to unilaterally transfer work. DeMaio rejected the proposed clause, stating that it "covers what they [the Respondent] do now, they don't need anything more." The Respondent evidently withdrew its proposal at that time. In the context of the above-mentioned past practice of the Union and the broadly worded management-rights clause in the contract, DeMaio's admission as to the breadth of the existing management-rights clause supports the judge's conclusion.

The majority asserts that DeMaio's statement did not refer to possible future relocations, but rather referred to the already completed countertop work relocation. Such an argument is puzzling, since in the normal course of contract negotiations, what has happened in the past is generally an indication of how the parties will interpret a contract clause in the future. In addition, at the time of the negotiations, the Respondent had already decided to relocate the international and commercial lines and had made clear that although it was willing to bargain over the effects of the moves, it felt it had no obligation to bargain about the moves themselves. If DeMaio's comment had referred only to past incidents, as argued by the majority, one would think it applied to the Respondent's decisions concerning the international and domestic lines as well as the countertop work.

Finally, the majority maintains that if the existing management-rights clause had clearly reserved the right of relocation to the Respondent, there would not have been a need for the Respondent to propose a more detailed clause. In view of the two unfair labor practice charges filed by the Union over the international and domestic lines relocations however, it is understandable that the Respondent would wish to more clearly detail the exact nature of its rights. In fact, one can forcefully argue that the Respondent's withdrawal of its proposal after hearing DeMaio's remark indicates that the Respondent believed that the Union was conceding that relocation was already covered within the existing clause. Accordingly, in light of these factors, I would adopt the judge's dismissal of this allegation in the complaint.

I agree with my colleague's adoption of the judge's dismissal, for the reasons set forth in his decision, of the allegations concerning the assignment of overtime and the processing of grievances. I also agree with my colleagues' conclusion, contrary to the judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to honor the union-security clause, but in doing so, would find that the Board should defer to the arbitrator's interpretation of that clause.

The majority states that deferral to the arbitrator's decision is inappropriate here because rather than seeking enforcement of the arbitration award, the Union is asking us to consider an unfair labor practice charge based on events which occurred after the arbitrator's decision had issued. Relying on the D.C. Circuit's opinion in *Malrite*,[2] they note that "deferral is not appropriate with respect to an issue not considered by the arbitration panel." Rather than deferring, the majority states that the arbitrator's special expertise in contract interpretation is useful, that the arbitrator's interpretation of the clause is reasonable, and that based on this interpretation the Respondent has violated Section 8(a)(5) and (1) by refusing to comply with the Union's request that certain delinquent employees be discharged. In my view, the majority is misreading *Malrite*.

Malrite involved two issues, one concerning the interpretation of a contract provision as to whether more than one employee could work certain shifts as "combo operators" and the other concerning an allegation that the employer unlawfully engaged in individual bargaining with certain employees in order to convince them to work as combo operators. The employer sought and received from two of its employees an agreement to work in this capacity. The union protested, and the matter was submitted to arbitration. The arbitration panel determined that the employer violated the contract by assigning employees to work as combo operators on the shifts at issue. After the arbitration hearing closed, but prior to the issuance of the arbitration award, three more employees were as-

[1] See Elkouri & Elkouri, *How Arbitration Works*, 406–407 (3d ed. 1978), and cases cited therein.

[2] *Electrical Workers IBEW Local 715 (Malrite) v. NLRB*, 494 F.2d 1136 (D.C. Cir. 1974).

signed combo operator duties. When the arbitration decision issued, the employer refused to comply with the award. Rather than seek judicial enforcement of the award, the union filed an unfair labor practice charge with the Board, alleging a violation of Section 8(a)(5) through the employer's unilateral changes in terms and conditions of employment.

The Board, in *Malrite of Wisconsin*, 198 NLRB 241 (1972) (*Malrite I*), dismissed the complaint in its entirety, stating that it was deferring to the arbitration panel's decision in the case. On review, the D.C. Court of Appeals found that deferral was appropriate only with respect to the contractual issue concerning the assignment of combo operators to the shifts at issue. With respect to the unfair labor practice charge over the individual bargaining, the court found that deferral was inappropriate, since all three of the individual bargaining charges related to events which occurred after the arbitration hearing,[3] and therefore could not have been considered by the arbitration panel. Thus, the court remanded this aspect of the case to the Board for a determination on the merits.

In *Malrite of Wisconsin*, 213 NLRB 830 (1974) (*Malrite II*), the Board found that the employer had violated Section 8(a)(5) by engaging in individual bargaining with the three employees in question. The Board also expressly noted that it made no finding as to whether the employer violated the Act by changing from single employees to combo operators on the shifts at issue, since that aspect of the case had been deferred to the arbitral award.

The present case also involves two issues: the proper interpretation of the union-security clause in the contract and the application of that clause to certain employees as requested by the Union. The first of these issues was considered and resolved by the arbitrator, who found that the clause required, rather than permitted, the Employer to discharge employees who did not comply with the union-security provisions. The second issue, which involves the Employer's refusal to comply with the clause, was not presented to the arbitrator because at that time the Union had not requested that any employees be discharged. Relying on *Malrite*, the majority finds deferral to the arbitrator's decision inappropriate because the events underlying the instant charge occurred after the arbitration hearing and thus could not have been considered by the arbitrator. While I agree that deferral is not appropriate with respect to the discharge of the specific employees at issue in the instant charge,[4] *Malrite* compels us to defer to the arbitrator's interpretation of the union-security clause, the resolution of which is an essential aspect of the case now before us.

Since *Spielberg Mfg. Co.*,[5] the Board has consistently held that it will defer to an arbitration award where the proceedings have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the Act. In addition, the Board has required that the issue involved in the unfair labor practice proceeding must have been fully presented to, and considered by, the arbitrator.[6] Here, as in *Malrite*, the *Spielberg* requirements have been met. In both cases, one of the two issues presented to the Board was not considered by the arbitrator because the events giving rise to the issue occurred after the arbitration hearing concluded. However, the majority has articulated no reason why this case should differ from *Malrite* in deferring to that issue which was fully presented to, considered, and resolved by the arbitrator.

The resolution of the contract clause in this case is fundamental to the resolution of the unfair labor practice charge on which we are ruling. The arbitrator resolved the contractual issue by interpreting the union-security clause as requiring the Respondent to discharge employees who are not in compliance with union membership provisions. In so finding, he did not determine whether the Respondent had violated the Act. This failure to address the statutory issue, however, does not preclude deferral. In *Bay Shipbuilding Corp.*, 251 NLRB 809, 810 (1980), the Board stated that it will defer to an arbitrator's interpretation of the contract even where the arbitrator does not address the Act, so long as the factual findings made in the course of resolving the contractual issue resolve the unfair labor practice at issue as well. Here, by engaging in their own interpretation of the contract prior to addressing the merits of the application of clause, the majority implicitly recognizes that the contract interpretation issue has been presented to us as part of the unfair labor practice charge. The other aspect of the unfair labor practice charge, involving the application of the union-security clause to specific employees, was not presented to, or addressed by, the arbitrator. In light of the fact that the contract interpretation issue has been determined by the arbitrator in a way which resolves this aspect of the

[3] The events concerning the two employees who had been approached by the employer prior to the arbitration hearing were deemed untimely in the unfair labor practice case.

[4] As no party has requested it, deferral pursuant to the Board's policy articulated in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 570 (1984), is inappropriate. See *NCR Corp.*, 271 NLRB 1212, 1213 fn. 7 (1984), and cases cited therein.

[5] 112 NLRB 1080 (1955).

[6] *Raytheon Co.*, 140 NLRB 883 (1963).

unfair labor practice charge, I do not understand why my colleagues would not agree to defer to the arbitrator's contract interpretation and then make their determination as to the application of the clause based on the facts before us. Indeed, this is the very outcome of the holding in *Malrite*, on which the majority purports to rely.

Based on the foregoing consideration, I would defer to the arbitrator's interpretation of the contract and then proceed to resolve the application of this clause to specific employees on the merits. In so doing, I would reach the same conclusion as my colleagues and find the Respondent violated Section 8(a)(5) by its refusal to honor the union-security clause.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain collectively in good faith with United Electrical, Radio and Machine Workers of America (UE), and its Local 1139, with respect to any decision to relocate the international and commercial lines work from Plymouth, Minnesota, to Sioux Falls, South Dakota.

WE WILL NOT fail or refuse to furnish the Union available information necessary for and relevant to its function as bargaining representative.

WE WILL NOT fail or refuse to bargain with the Union by failing and refusing to comply with the union-security provision of our 1979–1982 bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain collectively in good faith with the Union concerning any decision to relocate the international and commercial lines work from Plymouth to Sioux Falls.

WE WILL promptly furnish the Union with the studies, analyses, and other information requested which will enable the Union to engage in intelligent bargaining.

WE WILL transfer back to the Plymouth plant the international and commercial lines work previously performed at that facility by bargaining unit employees represented by the Union.

WE WILL offer those employees discharged, laid off, or suspended as a result of the work relocation from Plymouth to Sioux Falls immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any resultant loss of earnings and other benefits, less any net interim earnings, plus interest.

WE WILL honor the union-security clause in the 1979–1982 collective-bargaining agreement.

LITTON MICROWAVE COOKING PRODUCTS DIVISION, LITTON SYSTEMS, INC.

James L. Fox, Esq., for the General Counsel
Francis X. Dee, Esq., for the Respondent in Case 18–CA–7323.
Mathias J. Diederich, Esq., for the Respondent in Cases 18–CA–7572 and 18–CA–7689.
Robert Z. Lewis, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried at Minneapolis, Minnesota, on April 25, 26, 27, and 28, 1983, and June 7 and 8, 1983. The consolidated complaint alleges that Respondent violated Sections 8(a)(1), (3), and (5) and 8(d) of the National Labor Relations Act (Act).

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material herein, a Delaware corporation with offices and places of business in Plymouth, Minnesota and has been engaged in the manufacture, sale, and distribution of microwave cooking products. During the 12-month period ending December 31, 1981, Respondent, in the course and conduct of its business operations, sold and shipped from its Plymouth, Minnesota facility, products, goods and materials valued in excess of $50,000 directly to points outside the State of Minnesota.

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

United Electrical, Radio and Machine Workers of America (UE) and its Local 1139[1] (the Union), have

[1] The Local is included as amended at the hearing.

been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Issues

1. Whether the Respondent relocated certain bargaining unit work in repudiation of its bargaining obligations under the Act.

2. Whether Respondent modified or repudiated the collective-bargaining agreement by refusing to respond and/or unduly delaying responses to grievances filed at the third step of the grievance procedure.

3. Whether Respondent repudiated or modified the collective-bargaining agreement by refusing to comply with an arbitrator's award concerning the assignment of overtime work.

4. Whether Respondent repudiated or modified the collective-bargaining agreement by refusing to discharge employees pursuant to the union-security clause of the contract.

Background

As of 1972, Respondent was producing microwave ovens at four facilities located in the Minneapolis, Minnesota metropolitan area, and had been a party to successive collective-bargaining agreements with the Union covering employees at those facilities. The violations are alleged to have occurred during the term of the collective-bargaining agreement effective from October 1, 1979, to October 31, 1982. In late 1976, Respondent operated a countertop microwave oven assembly plant in Minneapolis for domestic use. In early 1977, Respondent commenced to operate a new plant in Sioux Falls, South Dakota, and began producing countertop microwave ovens for domestic use in this new plant. Eventually Respondent stopped building the countertop microwave ovens for domestic use in Minneapolis entirely, and produced all of these particular ovens in Sioux Falls. The transfer of this work was completed by November 1981, when the Union and Respondent commenced to discuss the transfer of the international line from Minneapolis to Sioux Falls.

In 1977, 1978, and 1979, Respondent laid off a large number of employees. Prior to the inception of the Sioux Falls plant, there were over 1200 employees in the Minneapolis bargaining unit. As the number of employees at the Sioux Falls plant increased, the number of employees in the Minneapolis plant decreased. By the time the parties began to negotiate in 1979, there were less than 700 employees in the Minneapolis bargaining unit, and by November 1981, there were only 300 to 350 bargaining unit jobs left in Minneapolis. In 1980, the Union organized Respondent's employees at the Sioux Falls plant, but as of the time of the instant hearing, the parties had not entered into a collective-bargaining agreement covering these employees.

The Relocation of the International Line

Rocco DeMaio, financial secretary of Local 1139, and Thomas Phillips, vice president of Human Resources both testified with respect to the bargaining concerning the relocation of the international and commercial lines from Minneapolis to Sioux Falls. In the main, there are few discrepancies in their testimony and where such exist, they will be pointed out.

Phillips testified that he called DeMaio on March 3, 1981, although DeMaio remembers the date as June 1981, and told him that Respondent was commencing a process to determine where it could most effectively manufacture its product. He advised DeMaio that Respondent was losing $3 million per year on its range business and this loss triggered the study.

The dates of the telephone call, and telephone calls to follow, are not critical to the outcome of this case.

According to DeMaio during the course of the first telephone calls he told Phillips that the Union wanted to be kept informed of the progress of the study and requested bargaining concerning any decision that was made. Phillips testified that DeMaio also asked whether the international line was being moved to Sioux Falls and that he replied all options were being studied, and Respondent would advise the Union when the studies were completed.

On June 11, 1981, Phillips returned a call to DeMaio. DeMaio asked if Respondent was moving its range and international lines to Sioux Falls, and why it was installing a 50-cycle generator in Sioux Falls. Phillips responded that the 50-cycle generator had been planned for some time, and Respondent was moving one of the two generators in Minneapolis to the Sioux Falls plant. Phillips told DeMaio there were no definite plans to move the international range line to Sioux Falls but the operations people were still looking at alternative ways to manufacture. Phillips said he would let DeMaio know when the Company was getting serious and DeMaio responded that if they decide to move it, "we are going to bargain over it."

On either June 20 or 22, 1981, Phillips again called DeMaio and told him that a couple of models were going to be manufactured in Sioux Falls until the Company could catch up on a back order situation. Phillips advised DeMaio that Respondent was continuing with its study but no decision had yet been reached. The testimony of Phillips and DeMaio is consistent that the next conversation took place by telephone on October 20, 1981, when Phillips called DeMaio and told him that Respondent was having some problems with A.E.G., its representative in Germany. He requested DeMaio keep it confidential, to which DeMaio agreed. Phillips advised DeMaio that Respondent was still looking at the alternatives for manufacturing its products. Phillips advised DeMaio that no decision had been reached as a result of any study.

DeMaio testified that Phillips called him on October 29, 1981, and told him that the study was continuing, that no decisions had been made, and that he would let DeMaio know as soon as he learned anything further. Phillips wrote to DeMaio on October 30, 1981, advising DeMaio that Respondent had completed one phase of its analysis of production requirements; Respondent had determined it would be more economical to produce cer-

tain international line models in Sioux Falls, that, as a consequence, there would be a "substantial reduction in force" of Minneapolis bargaining unit employees, and Respondent was willing to discuss the effect of the work transfer with the Union.

DeMaio received and read the letter as he was talking to Phillips and Director of Human Resources Bates. This conversation between DeMaio, Phillips, and Bates was over the telephone speaker in Phillips' office. After Bates and DeMaio discussed the layoff, Phillips asked DeMaio if he had received the October 30 letter. DeMaio responded that he was just reading it and asked where the Company would build the models in Sioux Falls. Phillips explained they had four lines and one would be devoted to the international models. DeMaio suggested that they meet to discuss the matters to which Phillips agreed and a meeting was set for November 5, 1981.

Apparently during the same telephone conversation, DeMaio asked Bates what it would take to keep the jobs in Minneapolis and Bates replied that it was an economic issue and that such factors as unemployment compensation and workmen's compensation entered into it and there was not much control that the Union had over those types of things.

Although the meeting on November 5, 1981, was attended by several representatives for both parties, the chief spokesmen were DeMaio and Phillips.

DeMaio and Bates initially discussed an arbitration award by arbitrator Miller. Bates said the Respondent would follow the award as he understood it. Bates further told DeMaio that Respondent would be willing to go to an expedited arbitration if the Union did not agree with Respondent's position, but DeMaio refused, stating that the Union would do everything it could to enforce the award.

DeMaio gave Phillips a letter dated November 5, 1981, containing 11 questions which Phillips began to answer. DeMaio then read and gave to Phillips the remainder of this letter denoted "formal request." Addressing himself to the first part of the formal request, Phillips told DeMaio he had never said that Respondent was losing money. Phillips stated the Company was not bankrupt and was a money making business. Phillips continued by telling DeMaio there was no study or analysis, and that the Respondent's proposal to transfer the International Model to Sioux Falls was based on a comparison of the cost of building units in Sioux Falls, vis-a-vis Minneapolis. Dowling, vice president of manufacturing, delineated the microwave market and pointed out measures which Respondent had taken to reduce costs. DeMaio responded that the union had to have all of the information described in the November 5 letter. Dowling explained there was an $8 to $10 per unit difference between manufacturing in Sioux Falls compared to Minneapolis, and DeMaio requested a breakdown of those figures. Dowling was not prepared at that time to give a detailed breakdown. Phillips then responded to the remainder of the information in the formal request, advising DeMaio it was irrelevant. DeMaio stated it was relevant, Phillips maintaining otherwise, and that he, Phillips, did not think the Respondent had an obligation to bargain over the decision to transfer the work. Phillips maintained that Respondent was there to discuss the effects of the decision to transfer the work. After a caucus, Phillips replied to DeMaio's request that the Union have all of the information set forth in its November 5 letter, that Respondent would provide the information it had looked at in formulating its proposal. While Phillips recalled DeMaio making a proposal on "effects" the following day, DeMaio in his testimony remembered that he gave Phillips a proposal on the "impact" during the November 5 meeting. Phillips stated he would respond to the "effects" proposal in writing. After the November 5 meeting, at approximately 5:30 p.m., Phillips called DeMaio and told him he had been reading the "formal request." Phillips said the information requested was not relevant but there were some relevant items the Respondent was willing to make available. Phillips said he would like a response from the Union. They agreed to meet on November 6 the next day.

On November 6, 1981, Phillips reviewed the 11 questions on page 1 of DeMaio's November 5 letter, summarizing his answers. Dowling then went over some information on the cost comparison between Sioux Falls and Minneapolis. He stated the major difference was the wage rates, although he indicated there was a difference in workmen's compensation rates and unemployment compensation rates. Dowling explained the average hourly rate in Minneapolis was $6.89 an hour, whereas in Sioux Falls it was $4.55 an hour. The difference was $2.34 an hour for each unit employee, or 34 percent. Dowling stated that he had used the same standard hours to manufacture a unit in Minneapolis and in Sioux Falls. He said the labor costs were about $27 per unit in Minneapolis, whereas in Sioux Falls it was a little over $18 per unit. Accordingly, it costs $9.58 per unit more in Minneapolis than in Sioux Falls. He also pointed out that the consumer model being produced in Sioux Falls and the international model in Minneapolis had a common cavity, i.e., the inside of the oven, and that by consolidating the two operations, the Respondent would only need to carry one inventory of raw goods rather than two. DeMaio asked if the Minneapolis rate included the rate paid in the fabrication or paint shops, and Dowling explained the rate was an assembly rate. Phillips pressed DeMaio for a proposal, and DeMaio told Phillips he would get back to him by Monday or Tuesday of the following week at the latest. The meeting that day, November 6, occurred on a Friday. Either Dowling or Phillips told DeMaio that if the Union came back with a proposal in the area of $4 to $4.20 per hour Respondent would look at it. Phillips told DeMaio the only information the Company was looking at was the wage differential between Sioux Falls and Minneapolis. DeMaio continued to take the position that in order to make a proposal it needed all of the requested information. Phillips told DeMaio that some of the information requested was not relevant, but Respondent would provide the union with that information which was relevant.

On Wednesday, November 11, 1981, Phillips reached DeMaio by telephone at DeMaio's office. He asked DeMaio if the Union had a proposal to which DeMaio responded that he had mailed a letter to Phillips stating

that the Union was renewing its request for information set forth in its November 5 letter. Phillips replied that the Respondent had already made available to the Union all of the information relevant to the Company's proposal. In a letter dated November 11, 1981, Phillips advised DeMaio that Respondent had made a preliminary decision to transfer line 1 to Sioux Falls, but it was still willing to discuss the entire situation. Subsequently DeMaio hand-delivered his letter of November 11 to Phillips, and Phillips responded with another letter dated November 13 stating that Respondent would transfer the international line, and that the Union had been given the relevant information Respondent considered when reaching its tentative decision.

The parties met again on November 17, 1981. DeMaio requested that the international line not be moved. Phillips again asked DeMaio if the Union had a proposal and DeMaio responded that the Union needed information. DeMaio stated that Respondent was asking the Union "to buy a pig in a poke," and that it was not fair to the employees not to have the information. Phillips told DeMaio that Respondent had already given the Union all of the information that Dowling and his operations group had looked at, DeMaio had all of the relevant information and there was nothing else Phillips could give him. DeMaio again requested studies and analyses. Phillips advised him that there were no formal studies that had been conducted by the operations people, and any analyses that had been done were the ones that had been shared with the Union, that the Union had all of the relevant costs. Dowling advised DeMaio that the unit cost difference included fringes such as unemployment insurance and workmen's compensation insurance, and DeMaio responded that the Union had no control over those items. DeMaio and the union representatives caucused. When they came back, DeMaio stated that the Union could not make a proposal and that it needed all of the information described in his letter of November 5, 1981. Dowling told DeMaio that the Union was aware of all of the information he and his group had used in an effort to decide where the work should be produced. Phillips told DeMaio he was reasonably sure that without a union proposal, the final decision would be made to move the work from Minneapolis to Sioux Falls. Apparently at the conclusion of the meeting DeMaio told Phillips that the ball was in his court. Phillips understood this to mean that it was up to the Respondent to make the decision.

On November 19, 1981, Phillips wrote to DeMaio stating that a decision had been made to transfer the international models to Sioux Falls. On the same day, DeMaio wrote a letter to Phillips restating his request for the information referred to in his November 5, 1981 letter.

DeMaio's testimony reflects that on November 6, 1981, the layoff occurred.

Relocation of the Commercial Line

In early March 1982, Phillips called DeMaio and told him that the studies regarding the relocation of the commercial line were underway and it was time to make a decision.

On March 9, 1982, Phillips met with DeMaio and other representatives of Respondent and the Union. Phillips explained that the studies of the various alternatives as to where Respondent should manufacture its product had been ongoing. He stated further that Respondent was now in a position in which Dowling and his operations group were prepared to make a proposal about moving line 2 to Sioux Falls. He stated that the reason was basically the same as that for transferring the international line, there was a significant cost difference between manufacturing in Minneapolis and Sioux Falls. DeMaio requested the same information he had earlier requested in his November 5, 1981, letter. Phillips advised DeMaio that some of the information requested was relevant and some was not, but Respondent would share with the Union the data it had looked at when examining the feasibility of moving work to Sioux Falls. Phillips said the Company wanted to make its decision by March 19, 1982. Dowling stated there was a $9 to $11 cost differential between manufacturing in Minneapolis and Sioux Falls, and that there were about 20 different models. Dowling said the figures were based on an average rate of about $6.80 an hour in Minneapolis and $4.50 to $4.55 in Sioux Falls. He also said there would be other savings by reason of "economies of scale," i.e., Respondent could save money by bringing all of its manufacturing together in one place. Onasch, a member of the union committee, and DeMaio asked a few questions to which Dowling responded. Committee member Wacker asked if the wage difference was the big thing, and Dowling replied affirmatively. Union representatives wanted to know if the range line was moving to Sioux Falls, and the Respondent replied it had no plans to move the range line, but it could not guarantee the range line would never be moved in the future. DeMaio stated that the rate for "A" assemblers was higher than $6.89 per hour, and Bates replied that if a higher rate had been used in the calculations there would be an even greater difference than the $9 to $11 which Respondent was relying on in its calculations. DeMaio requested a seniority list for Sioux Falls, and Phillips said he would get one for him. During this meeting, Phillips gave DeMaio a draft of a memorandum which Bledsoe, the division president, was preparing to distribute. At the conclusion of the meeting, union representatives asked some questions about new products and Respondent stated it was not considering any new product.

Later that day, DeMaio wrote to Phillips requesting cost information, seniority lists for Sioux Falls and Minneapolis, and the same information he had requested in his letter dated November 5, 1981. On March 10, 1982, prior to the receipt of DeMaio's letter of March 9, Phillips wrote to DeMaio setting forth the cost differentials discussed during the meeting of March 9 and reiterating the necessity for making a decision by March 19, 1982. After receiving DeMaio's March 9 letter, Phillips wrote a letter dated March 12, 1982, to DeMaio, pointing out the cost data had already been provided, together with the seniority lists for Minneapolis and stating that a Sioux Falls list would be provided as soon as one was available. In this letter Phillips mistakenly stated that Re-

spondent wanted to make a decision by April 19, 1982. On March 17, 1982, letters were again exchanged by the parties. DeMaio wrote Phillips making a formal request for information as stated in his November 5, 1981 letter. DeMaio concluding by stating that the sooner the Respondent gives the Union all of the requested information the sooner the Union could look at it. On March 17, 1982, Phillips called DeMaio to inquire about a response because March 19 was drawing close. During the call, DeMaio said he had until April 19 and Phillips checked his March 12 letter, saw the error, called DeMaio back and told him of the mistake and wrote a confirming letter which was hand delivered on March 17, 1982.

The parties met again on March 19, 1982. At the outset DeMaio repeated his demands for more information. He wanted a breakdown on "variable overhead" and all of the information described in his November 5, 1981 letter. DeMaio asked for "studies" and Phillips said the Union had received all the relevant information. Phillips advised DeMaio there were no formal studies, booklets, or anything of that character and that the Union had the analysis Phillips had made reference to in his letters. Onasch asked about "transportation costs," and Phillips said he did not know such costs but assumed the information had been gathered and he would try to get it. Phillips said he would check to make sure that the $6.89 per hour rate was the correct assembly rate. DeMaio wanted to know if the "office people" were in the "variable overhead" figure, and Phillips replied negatively. At the conclusion of the meeting DeMaio requested that Respondent not transfer the work and stated that the Union needed all of the information it had requested. Phillips stated he would get back to the Union with the two items, the transportation costs and verification of the $6.89 per hour assembly rate.

On March 23, 1982, Phillips wrote a detailed letter to DeMaio explaining how standard labor hours were calculated, how the average hourly rate was established, what was included in the variable overhead rate, and how the wage differential between Sioux Falls and Minneapolis had been computed. The letter further extended the date for a decision to move to March 26, 1982, and was hand delivered to DeMaio on March 23. DeMaio wrote a letter to Phillips, dated March 25, 1982, and presented it to Phillips at the next meeting which was held on March 26, 1982.

At the March 26, 1982 meeting the Union had no proposal. DeMaio gave Phillips a letter requesting more information. Phillips responded to some of the requests. He told DeMaio the transportation costs amounted to $1.50 per unit, and that the personal time, fatigue and delay calculations were timestudy numbers. Phillips stated further that no increases were anticipated for either Minneapolis or Sioux Falls. He explained that his prior reference to seniority referred to increases which would be given as the employees progressed through the various steps. DeMaio again requested studies and any analysis. Phillips told DeMaio the Union had all of the relevant information and that their were no analyses or studies, and that there was nothing Respondent could show the Union that it had not already made available. Phillips testified in detail as to why he did not respond to the balance of the items requested by DeMaio. In some instances the information simply did not exist. For example, total production costs for each type of unit, a breakdown for Sioux Falls and Minneapolis. Respondent does not keep such costs. In other instances DeMaio's requests were ambiguous. For example, the selling price for each item. There are three selling prices, the prices to a distributor, a dealer, and the customer. Other questions Phillips testified he found impossible to answer unless each unit was followed through the plant. DeMaio stated he was not prepared to go ahead until he received the information described in both letters. Phillips advised DeMaio that the date for a decision had been extended 1 week and that he was certain that Dowling would make a decision unless a union proposal was forthcoming.

Later that day, on March 26, 1982, Phillips called DeMaio and told him the decision had been made to transfer the commercial line to Sioux Falls. Phillips also sent a letter to DeMaio confirming the conversation and stating, "as I indicated to you at our meeting this morning, the Company has provided you all the relevant information on which the proposal to you was based."

The Arbitration Award Relative to the Assignment of Overtime

The Union filed a grievance regarding the assignment of overtime in the fabrication shop. On August 21, 1981, the arbitrator, Richard J. Miller, rendered his decision. DeMaio concedes that he did not understand any part of the arbitrator's decision–not one paragraph. In this regard he wrote to Miller asking for clarification. Thereafter, the arbitrator and the parties exchanged a series of eight letters in an effort to clarify the award. Finally, the arbitrator wrote a letter apologizing for the confusion and expressing the hope that any future arbitration will not need clarification because of "this sort of confusion." Without detailing the various letters, suffice it to say that the parties each felt that its respective position was sustained by Miller.

When the parties met on November 5, 1981, the first subject of discussion was Miller's arbitration decision. According to the testimony of DeMaio, Bates stated that the decision was a split one and Respondent was not going to abide by it, rather it would follow the prior system unless the Union would agree to pick another arbitrator and hear the case again. DeMaio allegedly responded to Bates that the Union was not going to pick arbitrators until Respondent gets a decision they like, and that the Union would do everything necessary to enforce the award including going to the National Labor Relations Board. DeMaio testified further that Bates responded the National Labor Relations Board would only tell the parties to go back to arbitration. According to Phillips, Bates told DeMaio that Respondent was going to follow the arbitrator's award as it was originally rendered. Phillips testified that Bates told DeMaio that in order to get the matter resolved as quickly as possible, Respondent was willing to proceed to an expedited arbitration. DeMaio refused this offer and took the position that the Union wanted Respondent to follow the last letter of clarification issued by arbitrator Miller.

On July 19, 1982, DeMaio wrote Bates asking why the Respondent would not abide by Miller's decision. Bates responded that he had explained the Respondent's position to the Union on November 5, 1981. In his letter, Bates restated the Respondent's position, that it remains as it was at the arbitration hearing, as summarized in its brief. Bates further states that Respondent believes its position was affirmed by Miller's award. Moreover, according to Bates, Miller's clarifications served only to confuse, and are at odds with his original decision. Bates' letter continues that the Respondent offered an expedited arbitration before another arbitrator and that this offer stands. He also referred to the fact that the Union had subsequently filed another grievance on the same issue.

Refusal to Process Grievances

The complaint alleges that the violation occurred during the time period from August 2, 1981, through June 29, 1982. In 1976 and 1979, the Union proposed changes in the grievance and arbitration procedures of the expiring collective-bargaining agreement. The Union wanted a resolution of a grievance in favor of the grievant, in the event that the Respondent did not respond to a grievance in a timely matter. The Respondent consistently rejected the Union's proposal and the matter was ultimately resolved by an agreement that the failure of the Respondent to answer a grievance within the time limits prescribed in the contract would cause the grievance to automatically move to the next step. The parties ultimately agreed that a failure on the part of the Respondent to answer a grievance within 10 days after a third-step meeting would give the Union the right to take the grievance to arbitration. The parties agreed subsequently to deviate from the 10 days and rather, allow a 30-day period within which the Respondent must answer, in order to grant it more leeway.

The contract which is applicable specifically provides inter alia,"failure on the part of the Company to answer a grievance within 10 working days after a third step meeting . . . may cause the grievance to be moved to step 4 at the discretion of the Union."

DeMaio testified that he and Joe Miller, field organizer, prepared two lists, one reflecting the grievances filed during the critical period and the second list reflecting those grievances where no written response had been received by the Union within 30 days of the third-step meeting. General Counsel's Exhibit 29 captioned "List of Grievances with no response or other explanation" contains several errors and omissions. Testimony by DeMaio reveals that during the critical period, Respondent was actively engaged in meeting with union representatives over many grievances and that second-step replies and many third-step written replies were provided by the Respondent and many grievances were being disposed of by being dropped, honored, or resolved in some other manner.

Testimony by DeMaio reflects that the parties were engaged, during the period August 2, 1981, through June 29, 1982, in administering the grievance procedure. It is evident, however, that Respondent failed to observe its contractual obligations by failing to respond to some grievances and by delaying beyond 30 days some of its responses.

Failure to Honor the Union-Security Clause

The duration of the applicable collective-bargaining agreement is from October 1, 1979, to October 31, 1982. During negotiations for this contract the Union engaged in an economic strike. Apparently it is the strike replacements who continued in Respondent's employ after the cessation of the strike, who the Union seeks to have discharged. The record is not explicit in this regard because of DeMaio's evasive responses and his memory gaps. As the matter stands, it is not critical to the resolution of this allegation of the complaint.

The germane part of the union-security clause states "when the Union notifies the Company that an employee covered by this agreement has failed to pay the monthly dues that are uniformaly levied against all members and by reason thereof is no longer in good standing in the Union, the Company may discharge such employee. . . ." (Emphasis added.)

The Respondent issued a memorandum on December 7, 1979, stating in essence that the decision to pay or not to pay monthly union dues was one for each new employee to make, and that the Respondent takes no position regarding that decision. Moreover, Respondent concludes that it may terminate employees for failure to pay monthly dues if it elects to do so but it has no obligation to discharge new employees. Therefore Respondent decides in that memorandum that it will not discharge new employees who make the decision not to pay monthly union dues.

Thereafter on December 12, 1979, the Union filed a grievance that resulted in an arbitration decision dated December 6, 1980. Arbitrator Lindquist interpreting section 2 of the collective-bargaining agreement sustained the Union's grievance concerning the 1979 memorandum. The arbitrator did not address the question of whether the employees involved should be discharged, based on the Union's contention and advice that this question was not before the arbitrator and he was not to confront any issue of discharge of the particular employees.

It was not until May 12, 1981,[2] that DeMaio allegedly sent letters to a group of employees advising them that they were delinquent in not paying their union dues.

On June 17, 1981, DeMaio met with Phillips, and requested that Respondent discharge the 14 employees in question. Phillips responded that he would have to do some checking and get back to him. DeMaio then confirmed his oral request with a letter dated June 18, 1981. The letter states inter alia "this is to confirm our conversation on June 17, 1981, where the Union requested the Company to enforce the union-security clause with respect to the following employees who have refused to join or maintain their membership in the Union after being properly notified of their delinquency of [sic] the Union." The letter also states that the Union expects the Company to enforce the union-security clause of the

[2] The date is incorrectly set forth as 1982 in Respondent's brief.

agreement with respect to these employees. DeMaio gave Phillips copies of the letters the Union has sent to the individual employees.

On June 22, 1981, Phillips and DeMaio spoke by telephone. Phillips told DeMaio that he was being "cagey" in that he did not state in the letter that he wanted the employees terminated. DeMaio advised Phillips that he did not want to see anybody get terminated but "they failed to pay their union dues, they [sic] were ample time, they refused to pay, therefore, they got to be terminated." Phillips responded that if DeMaio really wanted these people terminated he would have to do some checking again. Phillips allegedly also stated that perhaps in the next contract they would have to change that language. At the end of the conversation Phillips said that he would check and see what has to be done and get back to DeMaio.

By memorandum dated July 17, 1981, Respondent rescinded its December 7, 1979 memorandum. The July 1981 memorandum states "on December 7, 1979 the company sent a letter to all bargaining unit employees stating it was the company's opinion that based on the collective-bargaining agreement with the Union there was no obligation for the company to discharge an employee for failure to pay monthly dues to the Union. This became a matter of arbitration between the Company and the Union and as a result of that arbitration, the Company now rescinds the letter of December 7, 1979." The document was signed by Tom Phillips.

Thereafter, prior to any response from Phillips, on July 7, 1981, the Union filed the charge which is the subject of this proceeding.

Some of the delinquencies included initiation fees although the union security-clause does not require payment of initiation fees.

Apparently, the General Counsel takes the position that in order to determine what "a member in good standing" means one would have to read the International constitution and bylaws. There is no evidence that the employees were afforded access to the International constitution or the local bylaws nor is there any evidence that they had copies of the collective-bargaining agreement or the arbitrator's decision.

On January 6, 1982, DeMaio sent Respondent a letter requesting that it enforce the union-security clause with regard to the two employees who were notified of their delinquencies in the November 24, 1981 letters.

Conclusion and Analysis

The Relocation of the International and Commercial Lines

Counsel for the General Counsel relies heavily, if not entirely on *Milwaukee Spring Division*, 265 NLRB 206 (1982), to support its position.[3] In *Milwaukee Spring* the employer relocated work due solely to comparatively high labor costs. The Board found a midterm modification of the contract within the meaning of Section 8(d) and thus violations of Section 8(a)(1), (3), and (5) of the Act.

Recently the Board requested and obtained a remand of the *Milwaukee Spring* case from the Court of Appeals for the Seventh Circuit. Oral argument was held on September 20, 1983. Therefore, neither *Milwaukee Spring* nor *Los Angeles Marine Hardware* offers much in the way of direction at this juncture.

In my opinion, the broad management rights clause in the pertinent contract and the pattern and history of layoffs establishes that Respondent reserved onto itself the right to relocate work from Minneapolis to Sioux Falls.

During the 1982 negotiations, Respondent proposed a management-rights clause which DeMaio rejected while acknowledging that Respondent did not need such a clause because it "covers what they [Respondent] do now, they don't need anything more." Thus DeMaio recognized that Respondent "had the right to do anything it wanted under the current language."

The history of Respondent's past actions reflect that it began to produce countertop ovens in Sioux Falls, gradually decreasing employment in Minneapolis, until finally there was no countertop production in Minneapolis, it was all in Sioux Falls. It is evident from the record that the Union was aware of this.[4]

The local union disseminated various written letters and documents ascribing layoffs at Minneapolis to the transfer of work and the buildup of the complement of employees to Sioux Falls. The attempt by DeMaio to disavow the Union's connection to the various newsletters and shop papers was, suffice it to say, most unconvincing. There is no question in my mind that these were authored by someone in the Union and disseminated by the Union. Shop chairperson Onasch conceded that he had written a number of the articles.

In my opinion Respondent bargained for and acquired the right to transfer work and layoff employees. Thus, in my view, under the circumstances of this case, the layoffs that were necessitated by the transfer of work are not rendered illegal. The record evidence is replete with past layoffs and no objection by the Union.

Past practice, the tenure of prior negotiations, and the overall conduct of the parties convince me that they believed the Respondent had the right to transfer the work. Indeed, not only did the Union fail to file charges or commence civil actions, it never even requested bargaining over the decision to gradually transfer work (countertop) and staff Sioux Falls.

As counsel for the Respondent points out, Onasch, the Union's local president at the time, allowed that the only thing the Union could do was "to make sure that the layoffs, bumping and recalls are administered properly under the terms of the contract.

Examination of the very detailed dynamics of various meetings between DeMaio and Phillips demonstrates to me that Respondent bargained in good faith as regards the decision to transfer the two lines. DeMaio maintained throughout that he wanted to bargain if a decision is made to move, i.e., after not before. I believe Respond-

[3] *Los Angeles Marine Hardware Co.*, 235 NLRB 720 (1978), also serves as a basis for his contentions.

[4] These events occurred prior to November 1981.

ent gave him ample opportunity to both influence the decision and bargain over same before it was made, and to bargain over the effects of such a decision.

Throughout the meetings, DeMaio insisted that he be made privy to "studies," which Respondent continued to maintain were nonexistent. At one point he even took the position that the Union would not bargain until it received the "studies." Moreover, DeMaio never explained the relevancy of some of the requested information although Phillips questioned same.

Phillips testified, and I was impressed with his demeanor and credibility, that he was not aware of any information that had been considered by Respondent which was not provided to the Union. As Respondent's chief negotiator, he certainly knew what was, and was not, available.

In my opinion Respondent provided the Union with all relevant information. Respondent never advanced an "inability to pay." To the contrary, it maintained it was solvent and making money.

When pressed for the basis or need for the information which Respondent considered irrelevant, DeMaio's responses fell into the realm of vague generalization. See *Southwestern Bell Telephone Co*, 173 NLRB 172 (1968). In that case, cost was not asserted as the reason for subcontracting, thus detailed cost information would not have made subcontracting any more or less permissible, so there was no probability of relevance. Cases cited by the General Counsel, *Teleprompter Corp.*, 227 NLRB 705 (1977), and *Goodyear Atomic Corp.*, 266 NLRB 890 (1983), are inapposite. In Teleprompter the Respondent advanced a "plea of poverty." Accordingly, respondent was found to have violated Section 8(a)(5) of the Act by refusing to furnish the union with financial records regarding its local facilities for examination, in order to substantiate its claim that it was financially unable to grant wage increases. In *Goodyear*, Respondent had three defenses none of which was that the information was unavailable. The major defense was raised against releasing requested information to the union that involved medical confidentiality and the applicability of the Privacy Act. DeMaio's generalizations applied as equally to the hearing as at the bargaining table. "To bargain intelligently" are buzz words. His responses that he did not know how the Union was going to use the information until they got it (the information) speaks for itself. It is meaningless and without substance. As of March 26, 1982, when the decision to relocate the work to Sioux Falls was communicated to DeMaio, he was still insisting upon receiving nonexistent "studies" and information which he could not, or would not demonstrate as relevant.

When there is any conflict in the testimony of DeMaio and Phillips, I fully credit Phillips who testified precisely, unequivocally, and unambiguously. By way of contrast, DeMaio, who destroyed his notes of the bargaining sessions, was evasive and clearly bent on making his case. I vividly recall the inordinate delays between questions and answers. Based on my observations he would not hesitate to contrive and I therefore discredit him.

Accordingly, I recommend that the allegations that Respondent relocated bargaining unit work in derogation and repudiation of its bargaining obligations under the Act be dismissed.

The Arbitration Award Relative to the Assignment of Overtime

After the arbitrator's decision issued there was a torrent of letters between the Union, Respondent and the arbitrator, giving rise to a complete muddle as to just what the arbitrator had decided. DeMaio testified that the award was so confusing to him he could not understand a single paragraph in it. The Respondent maintained that it would follow the award pursuant to its interpretation of same. The arbitrator stated in one of his many letters that his letter of clarification should "not be construed as a reversal, modification or being at odds with the arbitration award."

Respondent did agree to an expedited arbitration to allay the confusion but the Union was not willing to do this. After reading the exchange of documents between the parties I can readily understand why no one really understood what the arbitrator had concluded. I therefore would not hold the Respondent liable under this set of circumstances. What this issue boils down to is Respondent choosing to follow the arbitrator's original award and the Union choosing to pursue subsequent perceived modifications. Moreover, the Board has always encouraged the utilization of the collective-bargaining process. An error in contract interpretations does not automatically violate Board law. At most there is a possible violation of the collective-bargaining agreement, but in view of the history of bargaining, which is of some duration and in good faith, I recommend dismissal of this allegation. See *Bemis Bros. Bag Co.*, 143 NLRB 1311 (1963).

Refusal to Process Grievances

The parties negotiated a contract speficially providing what the result would be when the Union does not receive a written answer within 10 days after a third-step meeting. The solution is that this may cause the grievance to be moved to step 4 at the discretion of the Union. What the Union and the General Counsel are seeking is police action over the collective-bargaining agreement by the Board. In my view, the proper forum would be for the Union to bring an action under Section 301 of the Act.

The evidence establishes that the parties were actively engaged in meetings to resolve a large number of grievances, and as a matter of fact Respondent did give written replies in many instances and there were grievances that were disposed of. In my opinion the parties have agreed to a means for remedying the problem, and they should be left to their own devices without Board intrusion. I therefore will recommend that this allegation be dismissed.

Failure to Honor the Union's Security Clause

The language in the union-security clause specifically uses the word "may." If the parties had intended that discharge was dictated they would have employed obli-

gative rather than permissive language. The word "may" simply does not occasion a mandate.

If the General Counsel and the Union are seeking to enforce the arbitrator's award they are in the wrong forum. Noncompliance with an arbitrator's award is not a matter for the Board. Thus, the parties should not be permitted to invoke intervention by the Board. The parties would best be served if left to proceed to the usual conclusion after having resorted to arbitration to seek judicial enforcement. See *Malrite of Wisconsin*, 198 NLRB 241 (1972).

The consequences in discharging employees because of their failure to conform to a union-security clause has been addressed before. Thus an administrative law judge stated with Board approval in *Jack Watkins, G.M.C.*, 203 NLRB 632, 635 (1973), "Moreover, the Board has for many years had a policy that the union security provisions relied upon in justification for discharge must be expressed in clear and unmistakeable language." The administrative law judge continues that this is not asking too much because of the extreme consequences that can legally be imposed on a nonconforming employee.

Moreover, the Union has a fiduciary obligation to the employees. See *Western Publishing Co.*, 263 NLRB 110 (1982)

The General Counsel has not proved by substantial evidence that the Union has met its fiduciary obligations. The union secretary who allegedly mailed the delinquent notices to employees was never called as a witness, nor were any employees produced. It appears in some instances that the Union was trying to collect dues retroactively, thus ignoring the grace period. There is also evidence of improper notification to employees and errors by the Union in the computation of arrearages.

Based on the foregoing it is my recommendation that this allegation of the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By transferring the work from the international and commercial lines to Sioux Falls, Respondent did not violate Section 8(a)(1), (3), and (5) and Section 8(d) of the Act.

4. Respondent did not fail to respond, or unduly delay responses to grievances in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

5. Respondent did not refuse to comply with an arbitration award concerning the assignment of overtime in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

6. Respondent did not refuse to provide available information to the Union in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

7. By failing to discharge employees pursuant to the union-security clause, Respondent did not violate Section 8(a)(1) and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

It is recommended that the complaint be dismissed in its entirety.

---

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

W. B. Skinner, Inc. *and* Operating Engineers, Local Union No. 3. Case 32–CA–5053

15 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 24 April 1984 Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel and the Charging Party each filed exceptions and supporting briefs, and the Respondent filed a brief in response to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge correctly concluded, at footnote 10 of his decision, that the pleadings and the record show that the Respondent is "an employer engaged primarily in the building and construction industry" within the meaning of Section 8(f) of the Act.

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board overruled *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973), abandoned the conversion doctrine, and modified unit scope rules in 8(f) cases. The Board decided to apply the following principles:

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

The Board also held at footnote 41: "[W]e will require the party asserting the existence of a 9(a) relationship to prove it." Because, as found by the judge in the instant case, the General Counsel failed to demonstrate a 9(a) relationship, we find that Section 8(f) applies and that *Deklewa* is controlling.

Applying *Deklewa* to the instant case, we reverse the judge and conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide certain information requested by the Union on 28 September 1982. The contractual history shows that in 1973 the Respondent signed an agreement binding it to certain provisions of a master agreement between the Union and an employers' association. In 1978 the Respondent signed another agreement, which likewise incorporated a master agreement and contained a provision binding the Respondent to future master agreements absent action by either party to terminate the agreement prior to its 15 June 1980 expiration. There was no evidence that either party took that action. A successor master agreement was in effect between 16 June 1980 and 15 June 1983 during which time the alleged unfair labor practice occurred.

Under the first *Deklewa* principle, the 1980–1983 collective-bargaining agreement is enforceable under Section 8(a)(5). Under the fourth principle, however, the Union enjoyed no presumption of majority status following the contract's expiration date, and at that point the Respondent was free to repudiate the 8(f) bargaining relationship. Because the Union's request for information occurred during the contract term, the issue before us is whether the Respondent had a duty to provide the requested information: specifically, an audit of certain of the Respondent's books and ledgers necessary to ascertain whether the Respondent was complying with its contractual obligation to make fringe benefit contributions on behalf of unit employees.

We briefly summarize the facts set forth by the judge. The 1980–1983 master agreement contained a provision obligating the Respondent to provide payroll and other records to the Union "in the event of a specific dispute regarding time, wages or fringe benefit payment of its Employees, regardless of classification, or a dispute regarding owner operators." During January through April 1982 the Respondent reported to the benefit trust that it employed no persons for whom reports should be filed or trust contributions made. However, in May 1982 the Union began to suspect that the Respondent was not honoring its contractual obligation to make fringe benefit payments. A union agent had visited a jobsite of the Respondent and learned from two employees that they had been employed by the Respondent for some time. The Respondent's owner later told the union agent that hours "should have been" reported for the two operators. In early July 1982, the Union informed the Respondent that it wished to audit its employment records with respect to possible contract violations.

On 28 September 1982 the Union specifically requested access to the Respondent's timecards for operating engineers, payroll records, ledgers on cash disbursements and accounts payable, and selected invoices for the period since June 1977. On 4 November 1982 the Respondent, without challenging the Union's contractual entitlement to the requested information, refused to allow the audit and stated that "we are not planning to cooperate or adhere to any of your contract agreements."

It is well settled that a labor organization, in its capacity as a collective-bargaining representative, is entitled, on appropriate request, to information from the employer that is needed for the proper performance of its duty to police compliance with a collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Certain data, such as wage and related information pertaining to employees in the bargaining unit, is presumptively relevant because such data "concerns the core of the employer-employee relationship." *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965). In addition, if requested information relates to an existing contract provision it thus is "information that is demonstrably necessary" to the union "if it is to perform its duty to enforce the agreement." *A. S. Abell Co.*, 230 NLRB 1112–1113 (1977).

In this case, the Union received information from two employees and from the Respondent itself that reasonably led it to believe that the Respondent was avoiding a contractual obligation to contribute to benefit funds. On that basis, the Union sought to examine the timecards of all employees who were either operating engineers or who were performing operating engineer work. Such an examination would enable the Union to determine whether individuals in that category were paid the contractual amounts as a basis for determining the proper contributions due the trust funds. Such information directly relating to unit personnel is presumptively relevant.

The Union also requested information pertaining to certain of the Respondent's ledgers as well as access to any invoices which may have generated payments recorded in those ledgers. An examination of the ledgers might reveal payments to individuals, including owner-operators, performing operating engineer work, and the requested invoices could reflect the hours worked by owner-operators generating such payments. In *L. M. Settles Construction Co.*, 259 NLRB 379, 382 (1981), such ledger information was found presumptively relevant.

As the Union had reasonable grounds to believe that the Respondent was not adhering to a contractual commitment, its 28 September 1982 request for an audit met the tests of necessity and relevance. Moreover, as noted above, the collective-bargaining agreement contains a specific provision requiring the Respondent to provide payroll and other records to the Union "in the event of a specific dispute regarding time, wages or fringe benefit payment of its Employees, regardless of classification, or a dispute regarding owner operators," a provision which the Respondent does not contest applies to the present dispute. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by breaching an obligation enforceable under *Deklewa* principles when it refused to supply requested information under either the independent statutory test of necessity and relevance for policing collective-bargaining agreements or under the specific terms of the contract.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing, during the term of its 1980–1983 collective-bargaining agreement with the Union, to supply the Union with relevant information which was required under the terms of the collective-bargaining agreement and necessary for it to administer the collective-bargaining agreement properly, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

4. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice, we shall order that it cease and desist and take certain affirmative action necessary to effectuate the policies of the Act. We shall order the Respondent to provide, on request, the information requested in the Union's letter of 28 September 1982.

ORDER

The National Labor Relations Board orders that the Respondent, W. B. Skinner, Inc., Pleasanton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing, during the term of a collective-bargaining agreement with Operating Engineers, Local Union No. 3, to supply the Union, on request, relevant information required under the

terms of the collective-bargaining agreement and necessary for the Union to administer the collective-bargaining agreement properly.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the Union with the information sought by the Union in its letter of 28 September 1982.

(b) Post at its Pleasanton, California office copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by Operating Engineers, Local Union No. 3, if willing, in conspicuous places where notices to employees and members are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse, during the term of a collective-bargaining agreement with Operating Engineers, Local Union No. 3, to supply the Union, on request, relevant information required under the terms of the collective-bargaining agreement and which is necessary for the Union to administer the collective-bargaining agreement properly.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Union with the information sought by it in its letter to us dated 28 September 1982.

W. B. SKINNER, INC.

Leslie Van Houten and *Patricia Milowicki, Esqs.*, for the General Counsel.
Jerrold C. Schaefer, Esq., of San Francisco, California, for the Respondent.
Lawrence Miller, Esq. and *Fred Morgan, Esq. (Bronson, Bronson & McKinnon)*, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this case in trial at Oakland, California, on February 13, 1984. It arose when Operating Engineers, Local Union No. 3 (Union) filed unfair labor practice charges against W. B. Skinner, Inc. (Respondent) on November 22, 1982.

After an administrative investigation, the Regional Director for Region 32 of the National Labor Relations Board (Board) issued a complaint against Respondent on February 8, 1983. That complaint alleged that Respondent violated Section 8(a)(5) and, derivatively, Section 8(a)(1) of the National Labor Relations Act (Act) by refusing to furnish information requested by the Union in July and September 1982 that was relevant and necessary to the Union's function as the exclusive bargaining representative in a certain unit of Respondent's employees.

Respondent duly answered the complaint, denying material allegations. On July 28, 1983, however, the Regional Director approved an informal settlement agreement with Respondent in which Respondent did not admit having committed any unfair labor practices but promised nevertheless, (a) to furnish the information at issue to the Union, and (b) not to "refuse to bargain collectively . . . by refusing to supply relevant information . . . which is necessary . . . to properly administer the collective bargaining agreement in effect between [Respondent] and the Union." In accordance with the terms of the settlement, the Regional Director withdrew the first complaint.

Subsequently, for reasons not explained or defended in this proceeding, Respondent reneged on the settlement commitment to furnish the disputed information. This caused the Regional Director to issue and "Order Withdrawing Approval of and Setting Aside Settlement Agreement and [new] Complaint and Notice of Hearing." The second complaint is materially the same as the first one.

Respondent's answer to the second complaint, like its initial answer, admits that its operations are properly sub-

ject to the jurisdiction of the Board, and that it refused to provide the information in question to the Union. Respondent has denied everything else of consequence, including that the Union ever occupied majority representative status under Section 9(a) of the Act in an appropriate unit of Respondent's employees, and that the information sought by the Union was relevant and necessary to its representative function.

The trial was brief, consisting of the General Counsel's introduction of mostly documentary and stipulative evidence, supplemented by the Union's introduction of some additional records and testimony. Respondent did not come forward with additional evidence after the General Counsel and the Union had rested.

All parties filed posttrial briefs which I have fully considered.

The Issues

There are two broad issues:

1. Did the General Counsel[1] introduce enough evidence to show, prima facie, that the Union occupied 9(a) majority representative status at any time before the alleged unfair practices? As narrowed by this litigation, this question subsumes at least two others:

(a) Does a presumption of the Union's 9(a) status derive simply from proof that Respondent, construction employer, signed "short-form" agreements with the Union in 1973 and/or in 1978?

(b) If not, is there independent evidence in the record that the Union achieved 9(a) majority status at some relevant point in its relationship with Respondent?

2. If the Union was the 9(a) representative of Respondent's employees at some relevant point, was Respondent statutorily obliged to turn over the specific information at issue?

I conclude below that the first question must be answered in the negative; accordingly, I do not reach the second question.

On the whole record, I make these

I. THRESHOLD FINDINGS OF FACT

A. *Introduction*

Respondent installs underground conduits in a northern California territory that is not more specifically defined in the record.[2] It operates from offices in the greater San Francisco Bay area city of Pleasanton. The business uses heavy excavation equipment, such as backhoes, but it is not clear whether Respondent owns any such pieces of equipment or, alternatively, whether it relies on owner/operators to furnish the same. The record sketchily reveals that some kind of employment relationship existed during certain periods between Respondent and certain named individuals, but it is not at all clear whether in any given case those individuals were owner/operators, or were, instead, merely operators. Similarly, to the extent that some or all of the individuals were owner/operators, the record will not permit a finding whether they were "employees" within the meaning of Section 2(3) of the Act or were, alternatively, "independent contractors" within the meaning of the same section.

I return to those—and other—unclear matters later after setting forth what the General Counsel views as the dispositive facts of the case relating to the threshold issue of the Union's 9(a) status.

B. *The Labor Agreements*

On April 19, 1973, Respondent's owner, W. B. Skinner, signed a "short-form" document captioned "Northern California Construction Agreement," which provided, inter alia, that Respondent would be bound to certain terms contained in a then-current "master Agreement" between the Union and Associated General Contractors of California, Inc. At that time, Skinner reported that he employed one "engineer." We do not know from the record whether, if at all, Respondent ever engaged additional workers in the contract unit during the 3-year term of that first short-form agreement or, if so, whether Respondent complied with the substantive terms of the agreement. We do not know any other circumstances surrounding the initial contracting on April 19, 1973.

On February 8, 1978, under similarly unclear circumstances, W. B. Skinner signed another such short-form agreement, this time indicating on that document that he employed three "engineers." That short-form agreement likewise incorporated by reference most terms in a then-current Master Agreement. It also contained an "evergreen" provision, in substance, that Respondent would be bound by "future Master Agreements" unless either party were to take steps to terminate the current agreement within 60 to 90 days of its scheduled expiration on June 15, 1980.

The record contains no indication that either party ever used contractually specified means to "terminate" the 1978 short-form contract before its scheduled expiration. There was a successor Master Agreement in effect between June 16, 1980, and June 15, 1983, the period during which the alleged unfair practices occurred.

The 1980–1983 Master Agreement contains no comprehensive description of the unit it covers. It purports, at section 1.00.00, et seq., to cover literally hundreds of construction and related offsite job classifications. It contains union-security provisions at section 4.02.00 and 4.02.01 which require covered employees doing jobsite construction work to join the Union "within 8 days" after they begin working. It has a separate provision, not applicable to the construction unit involved herein,[3] requiring offsite employees to join "within 31 days" after they begin working. It makes special reference to "Owner-Operators" in a variety of provisions within section 4.04.00, exempting them from some provisions (e.g., section 4.04.03), and stipulating at section 4.04.06 that

[1] References here and below to the General Counsel generally include the Charging Party Union; the exceptions are self-evident.

[2] In the 12 months before the complaint issued Respondent performed more than $50,000 worth of services for customers in California whose operations are within the "direct" jurisdictional guidelines promulgated by the Board.

[3] For reasons which are not evident, the General Counsel has vaguely put into issue whether or not Respondent is a construction industry employer. For reasons more fully explicated at fn. 10, I find that Respondent is such a construction employer.

they "shall be carried on the payroll of the Individual Employer as an Operating Engineer, and Employee, and, as such employee, all the terms and conditions of this Master Agreement . . . shall be applicable to him, except as provided elsewhere in this Section." Another provision in that section (4.04.17) provides, however:

> No Owner-Operator shall have any right to enforce this Agreement by grievance, arbitration, or otherwise until he has been placed on the payroll of an Individual Employer as an Employee.

The Master Agreement also contains a provision at section 3.02.00 for the furnishing by the Employer of payroll and other records to the Union "in the event of a specific dispute regarding time, wages or fringe benefit payment of its Employees, regardless of classification, or a dispute regarding owner-operators."

C. *The Alleged Unfair Labor Practices*

The Union began to suspect in late May 1982 that Respondent was not honoring the Master Agreement by failing to make accurate monthly reports to the fringe benefit trust about the number of unit personnel it employed and the hours they worked and by not making fringe trust contributions for persons who should have been reported on but were not. In the 4 months before May 1982, Respondent had sent regular report forms to the trust, but had indicated that it employed no persons for whom reports should be filed or trust contributions made.

The Union's suspicions were originally aroused after one of its agents, Datson, made two visits in late May to a construction project at Candlestick Park near San Francisco and was led to believe from conversations there with two operators (Norwood and Clifton) that they had been employed by Skinner at that job for some time (in the case of Norwood purportedly as an owner-operator). Subsequent conversations between Datson and W. B. Skinner, in which Skinner admitted that hours "should have been" reported for each of these individuals, were not enough to satisfy Datson that Respondent had merely made a good-faith error in earlier reports. As a result, Datson sought an "audit" of Respondent's books.

Another agent of the Union, Ivy, later sent a pair of letters to Respondent on July 22, 1982, each stating in substance that the Union wished to audit Respondent's employment records and would follow up with a specific appointment letter setting forth the nature of the information to be audited. One letter addressed itself to a possible contract violation with respect to "owner-operators"; the other simply expressed a desire to "ascertain" whether Respondent was in compliance with "stipulated wages and fringe benefits."

On September 28, 1982, the Union's agent, Hendricks, sent a letter to Respondent containing this material text:

> Please be advised we will be at your premises at 9:30 a.m. on October 19, 1982, to conduct an audit of your records in accordance with our previous notification.
>
> At the aforementioned time, we shall expect to have the following records available:
>
> 1. All time cards for employees who are Operating Engineers or who are performing operating engineer work.
> 2. All payroll records consistent with item #1 above.
> 3. Cash disbursements ledger.
> 4. Accounts payables ledger.
> 5. Selected invoices as primary documents in accordance with item #4 above.
> 6. These records should be available commencing with June 1977 through the present.
>
> Should you have any questions in this matter, please direct them to this writer.

The appointment was later rescheduled, but Respondent ultimately refused to allow the audit, formally stating in a letter to the Union dated November 4, 1982, inter alia: "[W]e are not planning to cooperate or adhere to any of your contract agreements."

As noted earlier, Respondent's refusal to furnish the information sought in the Union's letter of September 28, 1982, triggered the filing of charges with a Regional Office of the Board and the issuance of a complaint by the Regional Director that Respondent had thereby violated Section 8(a)(5) and (1) of the Act. This alleged violation was the subject of a settlement agreement that was later set aside when Respondent, after stalling and evasion, decided not to honor its settlement commitment to furnish the information at issue.[4]

There are more facts in this record, but discussion of them may be deferred until later, for the General Counsel rests her case on essentially the showing outlined above. As discussed in greater detail, infra, the General Counsel argues that the necessary threshold showing that a 9(a) relationship existed between Respondent and the Union was perfected by proof that Respondent signed a short-form agreement (either in 1973 or 1978; it does not matter) and that, by operation of law, that 9(a) relationship has continued to exist during the terms of the successive Master Agreements, including at the time in November 1982 when Respondent refused to submit to the Union's audit.

It is thus useful to digress from the almost complete narration of facts to analyze the potential validity of the General Counsel's threshold proposition about the adequacy of her showing that a 9(a) relationship existed. For, if she is correct, then the additional facts are of no significance. Accordingly, I now turn to such an analysis.

---

[4] Those circumstances are not further described herein because the General Counsel on brief has waived and disclaimed any contention that the settlement created a bargaining obligation under the Act independent of that which existed before it was entered into by Respondent, or that Respondent's breach of the settlement has independent character as an unfair labor practice. I return briefly to this subject in the "Analysis," infra.

II. ANALYSIS OF SECTION 9(A) ISSUE; FURTHER FINDINGS; CONCLUSIONS OF LAW

A. *General Legal Setting*

All parties acknowledge the existence of some legal principles of general application herein. It is thus admitted that facially lawful labor agreements reached in the nonconstruction sector carry with them a presumption that the contracting union enjoyed 9(a) majority status[5] at the time that recognition was initially extended by the contracting employer, and that such a presumption of majority status generally continues through the term of the union contract, including renewals. See generally *NLRB v. Iron Workers Local 103 (Higdon Contracting)*, 434 U.S. 335, 343 fn. 8 (1978). See also, e.g., *Pioneer Inn v. NLRB*, 578 F.2d 835, 837–838 (9th Cir. 1978); *Bartenders Assn. of Pocatello*, 213 NLRB 651, 652 (1974).[6]

But *Higdon*, supra, also teaches that, when a "pre-hire" labor agreement is entered into in the construction industry, the contracting union is not entitled to the ordinary presumptions that attend nonconstruction labor agreements. As the Court noted, nonconstruction labor agreements would be unlawful under Section 8(a)(2) of the Act if the contracting union did not occupy 9(a) status when first recognized.[7] But construction unions and employers enjoy a special statutory exemption from the stricture of Section 8(a)(2) in the form of Section 8(f) of the Act. Id. at 345. See also *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265 (1983).

Section 8(f) allows construction labor agreements to be reached without the union's majority status having first been established pursuant to Section 9. But "8(f) contracts," because they are not entered into on a majority showing by the union, suffer from certain well-established limitations not shared by "9(a)" labor agreements. *Higdon*, supra, 434 U.S. at 345. For our purposes, the most significant of these limitations is that 8(f) contracts carry with them no presumption that the contracting union enjoyed majority status at the inception of the bargaining relationship. Rather, the original 8(f) relationship must be shown to have "ripened" into a 9(a) relationship at some later point before the union's majority status will be presumed continuously to exist thereafter. *Higdon*, supra, 434 U.S. at 341, 344–345. See also *Ruttman Construction Co.*, 191 NLRB 701, 702 (1971); *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973); *Construction Erectors*, 265 NLRB 786 (1982). Another, corollary feature of 8(f) contracts is that they are voidable and may be repudiated at will until the Union has attained 9(a) status. *Higdon*, supra; *R. J. Smith Construction*, supra.

This discussion should help illuminate the central point at issue in this case; for the record is silent as to the circumstances underlying Respondent's signing of either the 1973 short-form labor agreement or the 1978 short-form. And the silence of the record on this point is seized on by each party's lawyer as a dispositive factor requiring vindication of her/his position.

Obviously, however, one litigant will normally suffer if his opponent is to benefit from the absence of evidence on a material point. And in this case whether the short-form contracts were "8(f)"—as opposed to "9(a)"—in character will be the dispositive question; for I can discern no independent basis for inferring from this spare record that the Union in fact occupied majority status in an appropriate unit of Respondent's employees at some relevant time before the alleged unfair labor practices.[8]

B. *The Question Restated; the Parties' Contentions*

The General Counsel characterizes this case as centrally raising a "burden-of-proof" question. This characterization carries a potential to mislead because there is no dispute over the rule that the General Counsel carries the ultimate burden of establishing each element of the Government's case by a preponderance of the credible evidence in the record as a whole. Neither is there any debate about the notion that in a prosecution like this one, alleging a refusal to bargain in violation of Section 8(a)(5) of the Act, it is the General Counsel who has the burden of establishing that the Union enjoyed 9(a) representative status at some relevant time before Respondent's alleged unfair practices took place.

The question may therefore be restated as follows: Is the General Counsel's mere proof of the existence of either of the short-form agreements enough, prima facie, to require Respondent to come forward to show that the Union was *not* the 9(a) representative when those agreements were entered into if Respondent wished to avoid a finding that the Union *was* such a majority representative then and during subsequent contract periods?

Arguing the affirmative, the General Counsel seeks to vindicate the as-yet-unsupported proposition that a labor agreement that is "lawful on its face,"[9] and is reached in the construction industry,[10] should carry with it the

---

[5] Sec. 9(a) of the Act refers to labor organizations which have been "designated or selected . . . by the majority of the employer's employees" in an appropriate bargaining unit as their exclusive representative. A union's "Section 9(a) status" thus triggers a duty on the employer's part under Sec. 8(a)(5) and 8(d) to accord exclusive recognition to it and to bargain in good faith with it about wages and other terms and conditions of employment.

[6] There are some exceptions not pertinent here. See generally *Hershey Chocolate Corp.*, 121 NLRB 901 (1958), enf. denied 297 F.2d 286 (3d Cir. 1961).

[7] 434 U.S. at 344–346, citing *Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961).

[8] The matter of independent proof bearing on the majority question is addressed infra.

[9] Elsewhere, the General Counsel uses the considerably less meaningful expression "fair and regular"; and sometimes she simply refers to contracts that are "fair on their face," a meaningless abstraction that the General Counsel cannot seriously contend would help decide whether a construction labor agreement ought to carry a presumption that the signatory union occupied 9(a) status.

[10] On brief, the General Counsel begins her argument on the 9(a) issue with this unsettling assertion:

> First, the record does not establish that Respondent is an employer in the construction industry within the meaning of Section 8(f).

This triggered a return to the pleadings, the transcript, and the exhibits to verify that, indeed (as alleged and admitted), Respondent has been engaged at all times material "in the installation of underground conduits"; indeed, that the labor agreements relied on by the General Counsel prominently feature the word "construction" in them and incorporate by reference the terms of a Master Agreement with an association of "Gen-

Continued

same presumptions that attend its nonconstruction industry contractual counterparts, i.e., that the contracting union occupied majority status when the contract was entered into, and continued in that majority status thereafter, through successive contractual periods.

In opposition, Respondent insists that the realities of the construction industry, especially those influencing the enactment of Section 8(f), demand instead that construction labor agreements be presumed to be no more than "pre-hire" contracts of the type authorized by that section.

C. *Conclusions Concerning the General Counsel's "Contract Presumption" of 9(a) Status*

The question as restated above is not a simple one; it implicates many legal areas; it affects construction practices; and it bears heavily on the ability of the Office of the General Counsel to investigate and process construction industry cases. It necessarily has impact also at the trial and decisional stages of the Board's processes. Clearly, if all it took is a signed "short-form" or other species of individual construction labor agreement to show, prima facie, that a construction union was the 9(a) representative of a unit of construction employees, then the Board's limited resources would not be expended to the degree they are now in efforts to reconstruct from equivocal data the arguably fictional point at which the 9(a) butterfly may have emerged from the 8(f) chrysalis.[11]

These considerations of private and public institutional stability and efficiency are not insubstantial, but they are not directly urged by the General Counsel. In any case, they would be more properly addressed in the first instance at the Board level of these proceedings should it come to that. But my rejections of the General Counsel's position as set forth below is not intended to suggest that brighter and more realistic lines are not needed in this legal area.

There is no direct legal authority—and nothing indirectly persuasive in the cases—for the proposition that a construction labor agreement may be presumed to have derived at its inception from a 9(a) labor relationship.

The General Counsel points to *Carmichael Construction Co.*, 258 NLRB 226 (1981), and *Redlands Construction Co.*, supra, as indirect support for her contention that the "burden of proof" is on the employer to show that his construction labor agreement was *not* entered into under 9(a) circumstances.

Carmichael contains dicta at fn. 1 on which I believe the General Counsel leans too hard; for the strict holding, expressed in the same footnote passage, derived from the Board's finding that the employer had "conceded the majority status of the Union at all times prior to . . . their . . . refusals to bargain." Thus, *Carmichael* did not decide our question. And *Carmichael* seems more striking for its clear "disavow[al of] the Administrative Law Judge's finding that '[t]he execution of succeeding contracts makes Section 8(f) irrelevant and, therefore, raises the presumption that the Union was the majority representative of the unit employees.'" Ibid.

Redlands provides even less nourishment for the General Counsel's theory. There, the Board also expressly refused to rely on the administrative law judge's discussion of *Carmichael* and found instead that "the record affirmatively establishes such a majority by direct evidence, contrary to the finding of the Administrative Law Judge." 265 NLRB at 586.

Notwithstanding the lack of any clear supporting precedent, the General Counsel came to trial with the belief that it was not her affirmative obligation to establish the Union's 9(a) status by means other than proof of the existence of the short-forms. She argued at trial that it was Respondent's duty to plead and prove that the Union had merely been recognized under Section 8(f) to "rebut" the "presumption" of the Union's 9(a) status, which was assertedly created by proof of the short-forms. Invited at trial to cite authority for her assertion that "8(f) is an affirmative defense" in such circumstances, the General Counsel failed to identify any such authority in her brief. Respondent called to my attention certain dicta to this effect in the administrative law judge's decision in *Bay Area Sealers*, 251 NLRB 89, 129 (1980). I agree with Respondent that *Bay Area Sealers* does not turn on the administrative law judge's "affirmative defense" dicta and that that case is merely another in which the Board has ultimately relied on independent proof that the union enjoyed majority status when the bargaining relationship was entered into. 251 NLRB at 89.

After the parties had lodged their posttrial briefs, the Board issued its decision in *Stine Scovil Construction Co.*, 269 NLRB 465 (1984), which seems even more clearly to have considered and rejected the notion that "8(f) is an

---

eral Contractors"; and, indeed, that the only persons claimed by the General Counsel to be legitimately part of the contract unit *whose jobs were specifically identified in the record* were jobsite backhoe operators (see findings, supra, and infra at sec. IV,D).

It is apparently the General Counsel's belief that, if this record did *not* show (as it does, over and over) that Respondent is in the construction industry, then the short-form contracts signed by Respondent would be more readily presumed to carry 9(a) trappings.

It is good that the General Counsel eventually concedes, albeit grudgingly, that Respondent "does appear" to be in the construction industry. This is not only because the record she made shows this to be the case without contradiction, but also because her case will collapse without a finding that Respondent is "primarily engaged in the building and construction industry" within the meaning of Sec. 8(f). For the agreements she relies on contain 8-day union-security clauses for jobsite employees that, she would not deny, are applicable to, e.g., the two backhoe operators on the May 1982 Candlestick Park job. And those otherwise impermissibly short union-security clauses are saved only by the 8(f)(2) exemption applicable only to construction industry employers and unions. Because the General Counsel stipulates that a labor agreement must be "lawful on its face" to enjoy her proposed 9(a) presumption, it is curious that she would in any way suggest that she has *not* proved that Respondent is in the construction business.

[11] I refer specifically to the drawn-out and frequently inconclusive searches of remote memories, payroll data, and other company and union and joint trust records that the Board and parties to Board proceedings often have been required to undertake in pursuit of the notion of a "ripened" bargaining relationship. See, e.g., *Construction Erectors*, 265 NLRB 786 (1982) (circuit court remand requiring second analysis of 1977 unit employee configurations as inferable from "myriad of exhibits," id. at 787); *Redlands Construction Co.*, 265 NLRB 586 (1982) (examination of 8 years of hiring records); *Carrothers Construction Co.*, 258 NLRB 175 (1981) (Board remand for more data about unit employment in *1966*); *Hageman Underground Construction*, 253 NLRB 60 (1980) (analysis of employment data on multiple jobsites between 1977 and 1978).

affirmative defense." There, the Board (Member Zimmerman dissenting) denied the General Counsel's Motion for Summary Judgment, saying (id. at 465–466):

> We note that the complaint fails to establish, by allegations or statements of fact, information necessary to determine that the Respondent has violated Section 8(a)(1) and (5) of the Act. Absent from the complaint are allegations or statements of fact that the Union is the lawful representative of the Company's employees under Section 9(a) of the Act; *that the agreement between the parties is or not an 8(f) contract*; that describe article 15 and its lawfulness under Section 8(e)'s proviso.
>
> Accordingly, we decline to grant the General Counsel's Motion for Summary Judgment and remand the proceeding to the Regional Director for appropriate action. [Emphasis added.]

If *Stine Scovil Construction*, supra, is not dispositive on the point, the remaining observations would cause me to reject the General Counsel's view in any case.

There is nothing in the Board's experience of empirical "realities" in the construction industry, nor in the legislative history underlying Section 8(f), to justify the presumption of fact that a construction labor agreement arose in a 9(a) context. Indeed, empirically, we know—and Congress presumed—that union contracts in the construction industry often are—and need to be—concluded before the employer has hired any workers.[12] And the mere fact that 8(f) agreements are common to the construction industry is enough to cause me to view warily any suggestion that a construction labor agreement ought to carry a presumption that the union signatory enjoyed 9(a) status from the outset.[13]

These doubts are not deflected by any coherent statement by the General Counsel of other possible countervailing considerations be they matters of law, policy, or equity. In the absence of any such arguments, I will not independently pursue such questions further. I would simply reject as not grounded in law or reality the presumption proposed by the General Counsel that a construction labor agreement arose in a 9(a)—as opposed to 8(f)—context.

Accordingly, I conclude that the General Counsel has not, by the mere introduction of either of the short-form labor agreements signed by Skinner in 1973 and 1978, established that Respondent owed the Union a statutory duty of recognition at either point. If that duty can be said to have arisen at all, it would have to derive from some independent circumstances, a possibility that I address briefly next.

D. *Is There Independent Evidence of the Union's 9(a) Status? Findings and Conclusions*

If we must look elsewhere for evidence that the Union achieved 9(a) majority status in an appropriate unit of Respondent's employees, then the main obstacles must be identified; for an attempt to reconstruct a union "majority" configuration at some historical point in Respondent's operations from the scant evidence on the subject requires the tools of archaeology, not those of legal science. There is, at the outset, the difficulty in defining precisely the unit jobs that are involved here. Relying on a presumption that a contractually covered unit is appropriate, the General Counsel describes the unit in the complaint as "All . . . employees performing work [for Respondent] covered by and within the job classifications set forth in the [1980–1983 Master Agreement]." But there are hundreds of such classifications, including scores that clearly are not applicable to Respondent's operation; and so the question of the scope of the unit of Respondent's employees is to some extent begged by such a characterization. All we know on this record is that Respondent used at least two persons on a backhoe on the May 1982 Candlestick Park job (whether using one or more owner/operators is not clear).[14] There is evidence that Respondent employed other persons—members of the Union—at various times. But that evidence does not disclose what their jobs were, whether they were owner/operators, nor whether they worked on any common days or, if so, at the same—or different—jobsites.[15]

---

[12] I do not here repeat the often-cited portions of the legislative history of Sec. 8(f) in which considerations of industry necessity are invoked as the basis for the exemption of prehire contracts from the more general proscriptions of Sec. 8(a)(2). See, e.g., *Higdon*, supra, 434 U.S. at 348–349.

[13] We are not truly presented here with the question of the weight to be accorded to a construction industry relationship involving "successively" applied labor agreements in determining whether a ripened 9(a) relationship has been achieved. There is no evidence that Respondent continuously applied to its unit personnel, if any, the terms of each of the succeeding Master Agreements following its signing of the initial 1973 short-form containing an evergreen clause (the initial point at which the General Counsel alleges in the complaint that the 9(a) relationship arose). Indeed, the absence of proof about the subsequent relationship (if any) between 1973 and 1978 and the paucity of evidence about the relationship between 1978 and 1982 suggest instead that Respondent and the Union were virtual strangers. Accordingly, this is not the record on which to revive the argument that a "successive" construction industry labor relationship may justify an inference that the necessary 9(a) transformation has occurred.

[14] There is evidence of a conversation between the Union's agent, Datson, and an operator of a "big-wheel trencher" on July 24, 1982, at another jobsite. There, the operator, self-identified as John Redfern, told Datson that he was employed by Respondent. But this evidence was offered by the General Counsel with the express reservation that it was only to explain Datson's subsequent conduct, and not for the truth of "Redfern's" remarks. A similar disclaimer of hearsay purpose was unmistakably made by the General Counsel with respect to Datson's testimony about what he was "told" by the Union's computer about Redfern's employment and union membership status. There is no independent evidence that Respondent employed Redfern in 1982 (cf. Skinner's admission in the case of the Candlestick Park operators, supra). Necessarily, because it has not been established, prima facie, that Respondent employed Redfern in July 1982, it has not been established, prima facie, that Respondent used a "big wheel trencher."

[15] The evidence in question consists of two types of computer-generated records, each created at the direction of Hendricks, by now an agent of the trusts. One set (C.P. Exhs. 2–4) recapitulates union membership data pertaining to the individuals whose names appear on the other record (C.P. Exh. 1). The latter is a recapitulation, generated on February 2, 1984, of all the persons for whom Respondent had reported "hours" to the trust for benefit contribution purposes during the periods April 1979 through July 1982. There are seven names on that recap, of whom six may be found (by cross-checking C.P. Exhs. 2–4) to have been members of the Union. Only one of them, Kosmach, was reported to have worked in 1982.

The General Counsel accurately distills a bit more from the record evidence pertaining to the persons who were shown to be members of the Union.[16] Thus, she notes:

> During the period April 1979 through July 1983, Skinner employed six operating engineers who were members of the Union. Respondent reported hours on John Redfern for April and May 1979 and February, March, April, May, and June 1981; on Dennis Covey for January 1980 and June, July and August, 1981; on John Kosmach for June, July, August, September and October, 1981 and June and July 1982; on Charles Clifton for June, July, August, September, October, and November, 1981; on James Brandon for August, 1981; and on Vernon East for September 1981.

This evidence, even when ground this fine, simply does not answer critical questions in the 9(a) majority analysis prescribed by the Board, specifically: Does Respondent employ a "permanent and stable work force"? If so, who are they and what is its size normally? See generally *Construction Erectors*, supra. And if Respondent's work force is not shown to be "permanent and stable," the task of establishing 9(a) status becomes even more difficult, i.e., "only upon a showing that the Union enjoyed majority support of Respondent's employees on a *site-by-site* basis."(Ibid., emphasis added.) See also *Dee-Cee Floor Covering*, 232 NLRB 421 (1977). Neither the General Counsel nor the Union makes any serious effort to match the data in this record to the necessary legal tests.[17]

Moreover, this kind of "reporting" data is even less reliable as a basis for attempting to divine the size and scope of the unit at whichever point might be appropriate because the "reporter," W. B. Skinner, Inc., is not elsewhere shown on this record to be reliable in its (minimal) relations with the Union.[18]

E. *The Applicability of the Poole Foundry Doctrine*

There is a question about the impact of the settlement agreement that Respondent signed in 1983 on Respondent's subsequent duty to recognize and bargain with the Union. The question arises in the light of *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952). The "doctrine" of that case is the one expressed by the Fourth Circuit, as follows, when it enforced the Board's Order against Poole (192 F.2d at 743–744):

> [T]he settlement agreement represents an agreement by Poole to undertake promptly the remedial action set out in the agreement rather than to be put to the trouble and expense of litigation . . . .
>
> . . . .
>
> While not an admission of past liability, a settlement agreement *does constitute a basis for future liability and the parties recognize a status thereby fixed* . . . . An entire structure or course of future labor relationships may well be bottomed upon the *binding effect of a status fixed by the terms of a settlement agreement*. If a settlement agreement is to have real force, it would seem that a reasonable time must be afforded in which a status fixed by the agreement is to operate . . . . Thus, *it follows that Poole, after having solemnly agreed to bargain with the Union, should not be permitted, within three and one-half months after the agreement, to refuse so to bargain, even if, as here, the Union clearly did not represent a majority of the employees.* [Emphasis added.]

The *Poole* doctrine as thus expressed has been adopted, inter alia, by the Ninth Circuit. *Mammoth of California v. NLRB*, 673 F.2d 1091, 1093 (1982).

I asked the parties to brief the question whether *Poole*, supra, might estop Respondent from denying the Union's presettlement 9(a) status. The General Counsel gave the matter this treatment in a footnote to her brief:

> The Judge, sua sponte, raised a potential alternative theory on which General Counsel might have proceeded. The Judge suggested that under *Poole Foundry*, the earlier settlement agreement between the Union and Respondent might have itself created a Section 9(a) relationship, even if the Union had not previously established majority support among Respondent's employees. While this theory is intriguing [sic], elaboration thereon would serve no useful purpose in this case, given the fact that the settlement agreement was, in fact, set aside [thus removing the factual predicate for the theory], and given the further fact that the alleged violation was neither plead [sic] nor litigated on such a theory. Accordingly, Counsel for the General Counsel's brief will not speculate on whether the Judge's proffered theory would independently support the Complaint's alleged violation. However, it should be noted that *Poole Foundry and Machine Co.*, 95 NLRB 34 (1951) enfd. 192 F.2d 740 (C.A. 4, 1951), cert. denied 342 U.S. 954 does not appear to stand for the proposition that the Judge cited. The holding in *Poole Foundry* was predicated upon the fact that the Union, at the time the settlement agreement was executed, was the Section 9(a) representative of Respondent's employees. Id. at 35, fn. 4. Whether *Poole Foundry* was meant to include situations where no such Section 9(a) status was present at the

[16] See fn. 15. Note, as well, that for reasons set forth at fn. 14 the Union's exhibits (R. Exhs. 2–4) are the only competent evidence of the membership status of any of the operators linked on this record to Respondent's operations.

[17] The Union's exposition also suffers from its erroneous inclusion of Redfern as an employee of Respondent in July 1982 (see fn. 14) and references to Norwood's alleged membership (status that may be found only by ignoring the hearsay character of the evidence, which was adduced on that point).

[18] As the General Counsel aptly observed about this very data during the trial: "[W]e have evidence to show that at certain periods of time the people that Mr. Skinner . . . was reporting to the trust fund, were all members of the Union. But we have no idea . . . if, indeed, he was hiring other people not through the Union and not reporting them." In fact, we do know from this record that Skinner was hiring persons other than those named on his own reports (e.g., Norwood) and that he was using others at times when he was not reporting them (e.g., Clifton and Norwood).

> time of the execution of the settlement agreement, *i.e.*, whether a settlement agreement containing a bargaining obligation can in effect establish, as opposed to merely reaffirm, a Section 9(a) relationship, is a question that need not be decided herein.

I think that the General Counsel is capable of waiving prosecutorial rights, and that in these peculiar circumstances her statements on brief amount to such a waiver. This renders moot any further discussion of *Poole's* potential impact herein. I do not, however, adopt any of the express or implied assumptions about *Poole's* reach as they appear in the General Counsel's footnote analysis.[19]

Based on the foregoing, I render these ultimate

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The record fails to establish that the Union was, at any relevant time, the exclusive collective-bargaining representative duly designated or selected by a majority of Respondent's employees in an appropriate unit within the meaning of Section 9(a) of the Act; accordingly, it has not been shown that Respondent was under any statutory obligation to recognize and bargain collectively with the Union.
4. In the foregoing circumstances, it did not violate the Act, as alleged, for Respondent to have refused to furnish certain information to the Union.

[Recommended Order for dismissal omitted from publication.]

---

[19] Among other things, I do not believe that the General Counsel has adequately considered subsequent holdings when she states that the "holding" in *Poole* was "predicated" on proof of the union's 9(a) status before the settlement was agreed to. The Fourth Circuit's statements quoted above that a settlement "constitute[s] a basis for future liability" and amounts to a recogni[tion of] a status thereby fixed does not accord with the General Counsel's analysis. See also, e.g., *W. B. Johnston Grain Co. v. NLRB*, 365 F.2d 582 (10th Cir. 1966) (cited in *Mammoth of California*, supra at 1093), wherein the circuit court stated (365 F.2d at 587, emphasis added): "It is true that the settlement agreement was not an admission that the Company had been guilty of an unfair labor practice by refusing to bargain, but a party who enters into a valid compromise agreement . . . *may not thereafter escape its obligation . . . on the ground that the claim asserted against it, which was settled by the agreement, was groundless.*" See also, e.g., *NLRB v. Pride Refining*, 555 F.2d 453 (5th Cir. 1977), denying enf. of 224 NLRB 1353 (1976), on grounds not material herein, in which the circuit court stated (555 F.2d at 458):

> It is not open to question that ordinarily in an 8(a)(5) settlement agreement *the employer acknowledges the majority status of the union* and agrees to bargain collectively for a reasonable time. [Emphasis added.]

Neither is it at all clear that the action of "setting aside" such a settlement affects the General Counsel's right to rely on the majority status that is "fixed" by the settlement itself. See, e.g., *Soule Glass & Glazing Co.*, 246 NLRB 792 (1979). There, the Regional Director had set aside three settlement agreements, two of which were to remedy 8(a)(5) violations (including one "information" violation, as herein). 246 NLRB at 793. The Board nevertheless adopted without comment the administrative law judge's settlement (246 NLRB at 802 citing *Poole*, emphasis added): "Furthermore, at the time recognition was withdrawn Respondent was obligated to bargain in good faith with the Union *by virtue of the settlement agreements in these cases.*" And see id. at fn. 23 (acknowledging as "proper exercise of his discretion" the Regional Director's "setting aside the settlement agreements").

Crest Mark Packing Co. *and* The Beef Boners & Sausage Makers Union Local 100–A of the United Food and Commercial Workers International Union, AFL–CIO, CLC. Case 13–CA–22541

18 May 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 6 August 1984 Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a cross-exception and a supporting brief and a brief in support of the judge's decision, and the Respondent filed a brief in answer to the General Counsel's cross-exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified, and to adopt the recommended Order.

The General Counsel excepts to the judge's finding that Patricia Gapik was a confidential employee. The judge found that Gapik was a confidential employee based on her having been told she was a "confidential" employee by the Respondent's vice president, Halper, and on her conduct in typing two contract proposals that the Respondent subsequently tendered to the Union during contract negotiations. For the following reasons, we agree with the General Counsel.

In *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981), the Supreme Court affirmed the Board's long-established "labor nexus" test. Under this test, only those employees who act in a confidential capacity to persons exercising managerial functions in labor relations matters are confidential employees. 454 U.S. at 188–189. In addition, the Court approved the Board's alternative test that employees who have "regular" access to confidential information concerning anticipated changes that may result from collective-bargaining negotiations are confidential employees. Id. The Court rejected a broader interpretation that would have found any employee with mere access to confidential business information to be a confidential employee. Thus, the question here is whether Gapik's duties had a "labor nexus" sufficient to render her a confidential employee.[2]

Gapik was hired in 1979 as the Respondent's bookkeeper, a position outside the bargaining unit. She is married to Ziggy Gapik, a union member. In 1981, when the Respondent learned of her impending marriage, Gapik was told by Vice President Halper that she would have to be "let go" because of her "confidential" status, but no such action was ever taken. Her duties included taking care of the Respondent's accounts receivable and payable and keeping employees' time and payroll records. She received deduction authorization forms from the Union and typed checks for union dues and for the pension and welfare funds. She typed notices to the Union regarding employee termination and hires and filed certain information such as disciplinary notices and insurance claims in employee personnel files. She once attended an unemployment compensation hearing on the Respondent's behalf and repeated what Plant Manager Kearney told her to say. Gapik prepared a seniority list for a layoff of employees in 1982, but had no input concerning which employees would be laid off. With respect to labor relations, the Respondent's affairs, including clerical functions, were handled by outside counsel. Halper, however, was responsible for the substance of the Respondent's proposals, and he represented the Respondent during negotiations. All related information was kept in Halper's office, and he specifically did not permit Gapik to see any "confidential" correspondence, including that concerning labor relations matters. Gapik did not open Halper's mail and never typed any notes, minutes, or correspondence dealing with labor relations. She did, however, type an initial proposal from Halper's notes so that he could show it to the Respondent's counsel and once typed a wage proposal for employees at the Chicago facility where she worked.[3]

It is well settled that the party asserting confidential status has the burden of providing evidence to support its assertion. *Intermountain Electric Assn.*, 277 NLRB 1 (1985). We find in this case that the Respondent has not met its burden. Although Halper was instrumental in formulating, determin-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, the exceptions, the cross-exception, and the briefs adequately present the issues and the positions of the parties.

[2] The Respondent does not contend, nor does the evidence establish, that Gapik had "regular" access to confidential labor relations information.

[3] Gapik also typed two proposals for the Respondent's Momence Packing facility in preparation for negotiations with the Union's sister local.

ing, and effectuating the Respondent's labor policies, the record reveals only two minor instances in which Gapik was involved in the Respondent's labor relations matters, i.e., her typing of a wage proposal and an initial proposal from Halper's notes prior to his showing it to counsel.[4] The Respondent introduced no evidence indicating that these incidents are likely to be repeated. Moreover, the record does establish that the Respondent generally relied on outside counsel to handle all labor relations matters, including related clerical functions. Gapik was not involved in typing correspondence or minutes of meetings that may have concerned labor relations, and she did not have access to Halper's files. In addition, Gapik's general bookkeeping duties, described above, do not in any other respect support a finding that she is a confidential employee. Given Gapik's lack of other indicia of confidential status, the two isolated occurrences of her typing labor-related documents are insufficient to constitute a "labor nexus." Accordingly, we find that Gapik is not a confidential employee.

In view of our finding that Gapik is not a confidential employee, we agree with the judge's conclusions that the Respondent's statements to her violated Section 8(a)(1) and that Gapik's discharge violated Section 8(a)(3) and (1) of the Act. We therefore find it unnecessary to pass on the judge's conclusion that confidential employees are entitled to the protection of the Act or on her alternative finding that, even if confidential employees are not so entitled, Gapik's discharge independently violated Section 8(a)(1) by analogy to *Parker-Robb Chevrolet*, 262 NLRB 402 (1982).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Crest Mark Packing Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[4] We find that the potential for conflict arising from Gapik's typing the Momence documents is not significant.

Ramon Martinez, Jr. Esq., for the General Counsel.
R. Peter Carey, Esq., of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Chicago, Illinois, on June 15 and 16, 1983, pursuant to a charge filed on September 10, 1982, and a complaint issued on October 28, 1982, and amended on June 7, 1983. The complaint as amended alleges that Respondent Crest Mark Packing Co. violated Section 8(a)(1) of the National Labor Relations Act, by directing an employee to speak to bargaining-unit employees against the bargaining proposals of the Beef Boners & Sausage Makers Union Local 100-A of the United Food and Commercial Workers International Union, AFL-CIO, CLC (the Union) and in support of Respondent's bargaining proposals; by threatening to lock out its employees and close its facility because of the employees' support for the Union; by threatening that Respondent's employees would never work again in the Chicago meat industry if they voted to engage in an economic strike; by threatening to oppose laid-off employees' unemployment compensation claims if they voted to strike in support of the Union; and by stating in an employee's presence that Respondent had solicited other businesses not to hire Respondent's employees if they decided to engage in an economic strike. Respondent denies having engaged in any of the foregoing conduct. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Patricia Gapik, and by failing to reinstate her because she supported the union activity of other employees and protested Respondent's efforts to solicit her support in Respondent's antiunion campaign. Respondent's posthearing brief contends that Gapik voluntarily quit, and that Respondent, for lawful reasons, accepted her resignation 3 days early.[1] Respondent further contends that Gapik was not protected by the Act because she was a confidential employee. The General Counsel contends that Gapik was not a confidential employee; that in any event, confidential employees are entitled to the protection of the Act; and that even if they are not, Gapik's alleged discharge violated Section 8(a)(1) because it was allegedly motivated by a refusal by her to commit unfair labor practices.

On the basis of the entire record,[2] including the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent,[3] I make the following

[1] At the outset of the hearing, Respondent's counsel stated, "most importantly, we contend she was not in fact discharged at all but voluntarily quit."

[2] Certain errors in the transcript have been noted and corrected.

Company witness Joseph Halper was properly present in the hearing room while Patricia Gapik testified as part of the General Counsel's case in chief. After the issuance of a sequestration order, Halper talked with company witness Patrick Kearney (who had not been so present) about Gapik's testimony regarding a telephone call to the state or Federal Department of Labor in the presence of Kearney but not Halper (see infra, part II,A). The General Counsel's posthearing brief requests me to reconsider my action at the hearing in denying his motion to strike all of Kearney's and Halper's testimony. I adhere to my denial of the motion. *U.S. v. Fike*, 538 F.2d 750, 757 (7th Cir. 1976), cert. denied 429 U.S. 1064 (1977); see also *U.S. v. Schaefer*, 299 F.2d 625, 631 (7th Cir. 1962), cert. denied 370 U.S. 917 (1962). As found infra fn. 30, this incident is immaterial to the results. Moreover, to the extent that Kearney's testimony differed from her testimony, I have credited her.

[3] Counsel's briefs state that the court reporter omitted certain exhibits, and misnumbered certain portions of the transcript, in copies of the record furnished to counsel. These errors do not appear in the copies furnished to me. Attached to Respondent's brief is a document that Re-

Continued

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business in Chicago, Illinois, where it is engaged in boning pork and in the wholesale sale of pork and related products. During the calendar and/or fiscal year preceding the issuance of the complaint, a representative period, Respondent purchased and received at this facility products, goods, and materials valued in excess of $50,000 directly from points outside Illinois. I find that, as Respondent admits, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In July 1977 Respondent voluntarily, and without an election, recognized the Union as the exclusive bargaining representative of Respondent's hourly paid production workers. Respondent recognized the Union continuously thereafter, and was still doing so at the time of the June 1983 hearing. During this period, Respondent never locked out its employees, and the only strike occurred in March 1983.

In January 1982 Respondent's executive vice president, Joseph Halper, set up a new corporation, Momence Packing Company, in Momence, Illinois, 50 or 60 miles from Respondent's facility in Chicago, to perform a pork belly skinning operation. A maintenance staff was hired about March 1982, and production operations began about June 1982. However, at least until the end of August 1982, no office employees worked at the Momence facility, and practically all of its books and records were prepared and maintained by Respondent's clerical workers.

Patricia Gapik became employed by Respondent in 1979 as a salaried employee outside the bargaining unit. In September 1981 she advised Executive Vice President Halper, Company President John Mazur, General Manager Edward Kramer, and Plant Manager Patrick Kearney that she was getting married to Zbigniew Gapik, a union member who was working for Respondent as a butcher in the bargaining unit. About 2 weeks later, Kearney told her that Kramer had said that either she or her husband would be let go because of their marriage. Kearney said that it would probably be she, because Zbigniew Gapik was in the Union and there might be some problem with terminating him. She asked why she was being singled out when Respondent employed many other employees who were related. She asked Kearney to tell Halper that she was not going to leave voluntarily. Later, she went into Halper's office and told him that Kearney had said that either she or her husband was going to be discharged because they were getting married. She told him that she would like to know why because Respondent had other personnel in the plant who were related. Halper told her that she was a "confidential" employee. He went on to say that he was concerned that she would tell her husband about matters "such as our finances, different things like that," and that such information would thereby become "common knowledge." She promised that she would not take any information out of the office and would not discuss the office business with her husband.[4]

She credibly testified that she never in fact did so. Halper testified that he "accepted her assurance . . . and just let it pass and she remained our employee and so did her husband. There was no problem."

The Union's collective-bargaining agreement for the production and maintenance employees at Respondent's facility was due to expire at the end of April 1982. Gapik's desk was located 5 or 6 feet from and outside Respondent's conference room. In late February or March 1982, as Halper and General Manager Edward Kramer were coming out of the conference room, Halper was in the course of saying that nobody was going to tell him how to run his business; that the men were making too much money; and that he was planning on locking them out. Then, he turned around and asked Gapik whether she was planning on buying "that new car." She said that she was. He said, "I don't advise you to, because your husband might be out of a job real soon." He did not mention interest rates. She did in fact buy the car.[5]

In March or April 1982 Plant Manager Kearney told Gapik that he had told his wife that Gapik was being "harassed," and that Kearney had told him that Gapik should call the "Department of Labor" and see whether anything could be done about this.[6] Gapik, who at that time was unaware that there was both an Illinois and a Federal "Department of Labor," asked the telephone operator for the "Department of Labor" telephone number, and called the number given to her. Gapik asked the woman who answered the telephone, whose identity is not shown by the record, whether there were any em-

spondent describes as "Administrative Law Judge's Exhibit 1" and as having been inadvertently omitted by the court reporter from the exhibit folders. At the hearing, a document was marked as ALJ Exh. 1, but was never offered.

[4] My findings about this conversation between Halper and Gapik are based almost entirely on his testimony. Her denial that the question of confidentiality and discussing business with her prospective husband came up is difficult to reconcile with her testimony that Halper said he had planned on letting her go because of her marriage, but had changed his mind, to which she replied that if he had let her go, he would have had to let go other company personnel who were kin to each other.

[5] My findings about this conversation between Halper and Gapik in Kramer's presence are based on her testimony. Halper and Kramer both testified that Halper advised her against buying a car because interest rates were high. However, Halper testified that this conversation took place in his private office and, when asked whether anyone else was present, said, "Not that I can recall." Kramer corroborated Gapik's testimony that this conversation occurred in his presence and in the main office area, and testified that clerical employee Annette McClory was probably present also. In view of these inconsistencies, and for demeanor reasons, I credit Gapik. McClory did not testify.

[6] This finding is based on Gapik's testimony. Inferentially, the alleged harassment consisted of alleged sexual and/or ethnic slurs. I need not determine whether Gapik's testimony is probative of the occurrence or contents of any conversation between the Kearneys.

ployee rights concerning "verbal harassment." The woman asked what type of harassment. Gapik told her a few things that had been said to Gapik. The woman said that she was sending Gapik a booklet concerning "all employee rights." Gapik then hung up the telephone, and related the conversation to Kearney. Kearney asked her to call the "Department of Labor" back and find out the rules or laws concerning lunch and coffeebreaks. Kearney explained that he had been told by General Manager Kramer not to permit her to leave the building for lunch any more, and to require Gapik (who was paid for her lunchbreak) to eat at her desk if she ate lunch at all. Kearney further explained that he was upset because he himself seldom got to go out to lunch, but had to watch the plant while Halper and Kramer went out; and that Kearney thought there should be a set rule concerning the hours and length of lunchbreaks. Gapik called the same woman again. She told Gapik that employees who worked 8 hours were entitled to a 20-minute lunch period, but other breaks were up to management. Gapik reported this conversation to Kearney.[7] No changes were thereafter made in Respondent's lunch practices with respect to Gapik or anyone else. Kearney and Halper denied that Kearney reported to Halper, Gapik's conversations with the "Department of Labor." Kearney testified that he never reported them to Kramer or anyone else in management.

B. *Alleged Unfair Labor Practices*

1. Alleged instructions to Gapik to speak in favor of Respondent's bargaining proposals and against union bargaining proposals

Before or during the initial bargaining session, which was held on April 23, 1982, the Union received from the Company a copy of the Company's initial bargaining proposals. Regarding the health, welfare, and pension funds the proposal as typed stated in its entirety:

> Section 19 - *DELETE (Insurance)*
> Will be provided by company through a private insurance company.
> Section 20 - DELETE
> Will be provided by company through a financial institution.

This first bargaining session with respect to a new contract was held at the union hall. The Union was represented by, inter alia, Union President Joseph Piotrowski, Union Secretary Walter Piotrowski, Union Business agent Walter Dzieronski, and employees John Kopinski and Stanley Lubinski. Respondent was represented by Halper. The Union proposed, inter alia, inclusion in the new agreement of the union health, welfare, and pension programs set forth in the expiring agreement. Halper said that these union programs "would no longer be in the negotiations." Halper said that he would like to get something in the nature of Blue Cross and Blue Shield, and mentioned that "that they did have Banker's Life." Walter Piotrowski said that if the private insurer's program was as good or better than the Union's, he would like to listen to it.

A later negotiating session on June 4, 1982, was held in Respondent's conference room. The Union was represented by, inter alia, Joseph Piotrowski, Walter Piotrowski, Dzieronski, and Kopinski. Respondent was represented by, inter alia, Halper and Kramer. The Union described improved health, welfare, and pension benefits in a recently ratified bargaining agreement between the Union and the American Meat Association. Respondent said that it would come up with a proposal that would be commensurate or better.

After the union officials had left, Halper came into the main office. In the presence of Kramer and Gapik, he remarked, "how difficult it was to get anything across to these stupid Polacks." Halper said that during the meeting he had been trying to explain his proposal regarding the health and welfare insurance and the pension fund, and that he "just didn't seem to get anything through John Kopinski's head." Halper said that Kopinski was so stupid that Halper could not understand why Kopinski was a union steward. Gapik said that she knew Kopinski was not stupid, that she knew he spoke English very well, that he had studied at the University of Polar[illegible] and that he was far from stupid. Halper said that if Kopinski was not stupid, then he must be afraid to go against the Union. Halper went on to say that under the union pension plan, the men were "vested for 10 years," and that "For 10 years, the Union takes the money and puts it in their pockets." He went on to say that the Union did not care about the men, that they were so stupid they did not realize this, and that he "just didn't seem to be able to get anything across."

Halper asked Gapik how she knew so much about Kopinski. She said that the Gapiks were friends of his, that they visited each other's houses, and that she felt she knew him very well. Halper said, "[W]hy don't you talk to [your husband and] explain all these proposals as far as the health and welfare and the insurance . . . and have him talk to Kopinski about it?" She asked Halper why he did not call Kopinski to his office and explain all this to him. Halper, who has a background in labor relations, said that he could not do this because it would violate the labor laws. However, he said, nobody could do anything to her for talking to Kopinski about this. Gapik said that she would talk to her husband.

On an undisclosed later date, inferentially a day or two later, Gapik told her husband that Halper wanted one of the Gapiks to explain the insurance, health, and welfare to Kopinski. Zbigniew Gapik told his wife not to get involved with it. On June 19, while the Gapiks and Kopinski were together in a restaurant, Gapik said to Kopinski that Halper was an intelligent man who thought that the Respondent's pension and insurance plan could be good for the workers, and asked whether Kopinski understood the proposals. He said yes, in a manner which suggested to Gapik that he felt the question insulted his intelligence. Zbigniew Gapik became "mad" at his wife for bringing the matter up, and she never brought it

[7] My findings about these calls are based on a composite of Gapik's testimony and credible parts of Kearney's testimony. For demeanor reasons, I do not credit Kearney's testimony that the expressed concern about lunch periods proceeded entirely from her and not him.

up again. During this conversation, Gapik did not tell Kopinski why she had chosen to speak to him about these items. Kopinski testified that he had no idea whether, in making these remarks, Gapik was speaking her own mind.

My findings concerning the conversation between Gapik and Halper are based on her testimony, which is indirectly corroborated by Respondent's continuous insistence, to the point of eventually taking a losing strike (see infra, part II,B,4,a,(5)) on its own proposals about pensions and insurance. Although the June 4 negotiating session likely broke up about 15 minutes after her normal quitting hour, during that week she worked several hours of overtime after her regular working hours. For demeanor reasons, I do not accept Kramer's denial that he was present during such a conversation. Also for demeanor reasons, and because Halper's testimony was impeached in other respects (see infra, part II,B,4,b), I do not accept Halper's denial that he told Gapik to tell her husband about the Company's proposals. Respondent's brief contends (Br. 17–18) that her testimony about this conversation is unworthy of belief because the health, welfare, and pension plan proposals as of that date were not very specific. However, Gapik attributed to Halper the remark during this conversation that the employees did not realize that the existing pension plan benefited union officials at the employees' expense. Moreover, Halper may well have been persuaded that the "Polacks" did not understand that Respondent was intending to offer plans commensurate with the Union's plans. Indeed, Halper testified that in June 1982, Gapik told Kramer and he regarding the pension plans and health insurance that her husband had said, "the people didn't really understand what [Respondent's representatives] were talking about," and asked Halper and Kramer to clarify the matter. Although for demeanor reasons I credit her denial of this conversation, Halper's testimony does evince his belief that "the people" could have been confused about Respondent's then position as to these bargaining issues.

2. Extension agreement; alleged lockout threat

The Union and the Company had another negotiating session on June 23 at the union hall. Respondent was represented by, inter alia, Halper, Kramer, and an insurance broker whom Respondent brought to the meeting. The broker said that he could plan both the health and welfare fund and the pension fund to yield better benefits than the union plans. That day, the parties entered into an agreement to extend (for employees on the payroll before May 1) the existing agreement until a new agreement was executed or, if the parties were unable to reach such an agreement, until either party had given to the other a 5-day written notice of its desire to terminate the provisions of the current agreement. Further, "The Union shall not strike and the Company shall not lock out its employees unless either party has provided the other with the five-day written notice previously set forth."

During the first week in June 1982, Zbigniew Gapik went on medical leave because he had broken his hand at work. On July 5, 6, 7, or 8, Halper came up to Gapik's desk and asked when she thought her husband would be released from the doctor. She said that she was very sure that he would be released the following Friday, July 9. Halper said that if her husband was released, to tell him not to bother to come back to work. She asked why. Halper said, "Because I'm locking the men out Friday." She asked if he was "kidding." He said, "No, I'm not. I'm going to lock them out and I'll run this operation out of Momence . . . I'm going to see how long those men can go without getting a paycheck." Halper went on to say that he and other company officers could get along for a long time, or indefinitely, without getting a paycheck, and asked her how long she could go without one. She said that if her husband was released that Friday, he would report to work Monday; and that if he was locked out, somebody from the Company would have to tell him that he was locked out. She repeated Halper's remarks to her husband before he returned to work on July 12.

My findings concerning this conversation between Halper and Gapik are based on her testimony. She testified that Kramer and (probably) Kearney were present, but they were not asked about the matter. Halper testified that during a conversation when nobody else (so far as he knew) was present, she asked him why her husband had not received his workmen's compensation checks and why his doctors had not been paid. Gapik credibly testified without contradiction that her husband's workmen's compensation checks were duly received at Respondent's office. She further credibly testified without contradiction that his medical claims were sent to the insurance company, that her husband never received at his home any bills for medical treatment for his injury, and that regarding such injuries at Respondent's plant, the procedure was for the insurance company to pay the providers directly. Halper testified that any problems with Zbigniew Gapik's workmen's compensation claim should have been noted in his personnel file; but no such notations were produced. I infer that the medical bills were paid in the usual course. Moreover, Halper sought to improve his denial that he mentioned a lockout by testifying that Gapik knew there would be a layoff, because she had been asked to prepare a seniority list. However, she dated that seniority list July 9, 1982; and Plant Manager Kearney testified that the decision to effect a layoff was not made until about 11 a.m., on July 9, several days after the July 5 date that Halper attached to his conversation with Gapik. For the foregoing and demeanor reasons, and because Halper's testimony was impeached in other respects (see infra, part II,B,4,b), as to this conversation I credit her over Halper. The fact that Respondent was still bound by a no-lockout agreement terminable on 5 days' notice is not inconsistent with testimony that Halper threatened a lockout in 4 to 7 days for the purpose of frightening his subordinates.

3. July 12 layoff; August 5 strike-vote and contract termination notices

On Thursday, July 8, the parties conducted another bargaining session. The Union was represented by Walter and Joseph Piotrowski, Dzieronski, and Kopinski.

Respondent was represented by Halper and Kramer. Health, welfare, and pension issues were discussed. The Union asked Respondent to show a "formula" that would show its proposed plans were as good as or better than the union plans. Halper said that if the administrator of the union plans could show Respondent a better "evaluation" of those plans, Respondent could formulate something more definite.

After the decision about 11 a.m., on Friday, July 9, to effect a layoff, and after Gapik had finished preparing the seniority list bearing that date, Halper conferred with the foremen about whom to lay off in view of the employees' jobs and seniority and the Company's production needs. After 4 hours' work on Monday, July 12, about half of Respondent's 40-unit employees were laid off. Among those laid off was Zbigniew Gapik. Ordinarily, after deciding to effect a layoff, Respondent would direct Gapik to prepare a typewritten list of who was to be laid off, and would post it immediately after it was prepared. The record fails specifically to show whether this was done in connection with the July 12 layoff. I infer that if such a typewritten list was prepared and posted at all, this was not done until the morning of that day.

On Thursday, August 5, the parties conducted another negotiating session in Respondent's conference room. The Union was represented by Walter and Joseph Piotrowski, Dzieronski, and Kopinski. Respondent was represented by Halper and Kramer. Respondent presented its proposal as to the health, welfare, and pension funds. The Union stated that it would not agree to these proposed plans because it was not sure whether they were at least as good as those called for in its recently executed contract with the American Meat Association. The insurance broker brought to the meeting by Respondent said that if the Union would just explain the current status of its health, welfare, and pension plan, she could use an experience factor in it and could get a formula for such plans. Union Secretary Walter Piotrowski told Respondent that at the next union meeting, he would report the status of negotiations to the membership and take a strike vote. That same day, Halper gave the Union a written notice of termination of the collective-bargaining agreement, "effective at the end of the shift, at approximately 2:30 p.m. on Friday, August 13, 1982.

4. Alleged August 9–10, 1982 threats of reprisal for strike; alleged August 10, 1982 discharge of Patricia Gapik; the March-April 1983 strike and bargaining agreement

a. *Credited evidence about those events*

(1) Events on August 9–11, 1982

After a 1-week vacation during the first week in August, Gapik returned to work on Monday, August 9. About 8 or 8:30 that morning, Halper called her into his office. In Kramer's presence, Halper asked her if her husband had started to receive his unemployment checks. She said that he had not, but should be getting them shortly. Halper told her not to count on it. She asked why. He said that there was going to be a strike vote, and that if any of the active employees struck, Halper was going to see to it that the employees on layoff status would stop receiving unemployment compensation. Gapik said that she did not think he could do that to the employees who had been laid off, "They didn't go on strike, you laid them off." Halper said that he could do it, that he would do it, that they were all union members whether they were on strike or laid off, and that that was the price that they were going to have to pay for being union members. Halper went on to say that if she cared anything about her husband's receiving his checks, she should tell him to contact the men that were on layoff and the ones who were still working and tell them to vote not to strike. Halper said that if they did strike, he would see to it that "none of those [obscenity] Polacks ever work in the Chicago meat industry again." Halper said that he could do this by merely making a few phone calls. She said, "I know you can." I have seen you do it before.[8] She said that she would not tell her husband anything, and that if there was a union meeting, the Union or the union steward would contact him. However, she did tell her husband about this conversation with Halper.

During Gapik's August 2–6 vacation, her job had been performed by Pat Dale (also referred to in the record as Pat Gail), who had been Respondent's first bookkeeper and who came in to help out when extra bookkeeping help was needed. About 8 a.m., on August 10, the morning after Gapik's conversation with Halper about her husband's unemployment compensation, Plant Manager Kearney told Gapik that Dale had taken home more money for the week than Kearney had, and said that he was going to talk to Halper about the matter.[9] Gapik said that she had had her own problems with Halper. Kearney asked what the matter was. She went through her whole August 9 conversation with Halper. In addition, according to her credible testimony, she told Kearney of "other things that had been said" to her and how she "had been asked to relay certain things about the Union to the men." I infer from this testimony that she described her conversation with Halper about March 1982 when he advised her not to buy a new car because her husband might be locked out of his job "real soon";

---

[8] Regarding the incident she was referring to, a composite of credible parts of the testimony of Gapik, Halper, and Joseph Piotrowski shows as follows: In late August 1981 (the 1982 date testified to by Piotrowski was obviously in error), employee Stanislaw Golan walked off the production line and was discharged. At his behest, the Union filed an unsuccessful grievance alleging that his departure was due to illness caused by a new production line system. The Union also filed a charge about his discharge with the NLRB, which dismissed the charge. When he filed an unemployment compensation claim, he was found disqualified for 6 weeks. During a November 1981 telephone conversation in Gapik's presence, Halper told Ed O'Hilski, a representative of another meat company whose employees were also represented by the Union, not to accept Golan's application for employment. Halper said that Golan had been discharged for walking off the production lines and refusing to work, that Respondent had had problems with him in the past, that O'Hilski had potential for future problems with Golan, and that if O'Hilski had such problems, "he would have the Union on his back."

[9] The parties stipulated that during that week Kearney's gross pay exceeded $500, his take-home pay was about $385, and Dale's take-home pay was $400. No deductions were made from her pay because she was a part-time employee.

bout her June 4 conversation with Halper regarding ex-lanations to Kopinski of Respondent's bargaining pro-osals; and about Halper's early July comments regard-ng alleged lockout plans that included her husband. She aid to Kearney that she was disgusted about the whole ituation, that she felt she was being put in the middle of he problems between the Union and Respondent, that hese problems were none of her business, that she was ired of being harassed verbally and of being insulted and legraded, that she could no longer concentrate on her work, that she was constantly being pulled away from ier work and being told different things, and that "it was going to have to stop." She said that if it did not stop, the following Friday was going to be her last day. Kear-ney asked if she wanted him to talk to Halper for her. She said, "no," that she would talk to Halper herself.

About 3 p.m. that afternoon, Gapik's normal quitting time, Kramer received a telephone call from Timothy G. Lowry, a meat broker with whom Respondent regularly does business. In Gapik's presence, Kramer told Lowry that there was a pending union meeting for a strike vote and that he had spoken to a couple of other meat compa-nies regarding not hiring these men if they went out on strike. Kramer said that he had talked to Thomas Smith from R and S Meats, to O'Hilski from Illinois Meat, and to someone from Ampack. Kramer said that he was pretty sure that Ampack would not hire strikers against Respondent, and that all of these firms seemed to be in sympathy with Respondent. Kramer asked Lowry, who acts as meat broker for a number of meat packers in ad-dition to Respondent, if he would ask other meat compa-nies not to hire any of these men. Kramer spoke in a loud, angry, boisterous, and theatrical tone.

At this point, Gapik approached Kearney and told him about Kramer's conversation with Lowry. She said that she had decided not to wait around for Halper and that she was going home. She asked Kearney to talk to Halper for her. Kearney said that he would see what he could do, that she should go home, and that he would see her in the morning. Halper's daughter Kim (who did not testify) was present at the beginning of this conversa-tion, but Kearney and Gapik concluded it in the shipping dock because Kearney told Gapik that he did not want their conversation to be overheard by Halper.

About 5:15 that evening, Kearney telephoned Gapik at her home. He told her that he had spoken with Joseph Halper and that Halper had told him to tell her that her services were no longer needed. She said that he was "kidding." He said, "[No], really, I spoke with Mr. Halper and he said to tell you that your services are no longer needed." She said, "That is it? Just get rid of me? That is it?" He said, "That is it." She said that she would be in on Friday to get her paycheck.

On Wednesday, August 11, Gapik telephoned Kearney and told him that on August 13, the next payday, her husband would pick up her final paycheck and some per-sonal effects that she had kept at the office. On Friday, August 13, Kearney gave these items to Zbigniew Gapik in the plant parking lot. Kearney told him in English that Gapik had been fired, and said in English "Everybody in this company is crazy."

My findings about the conversation between Kearney and Zbigniew Gapik are based on Gapik's testimony. Kearney testified that the conversation occurred in the office downstairs, and that all he said to Gapik was, "Ziggy, I'm sorry, [Mrs. Gapik's] not working here no more." Gapik impressed me as an honest witness, where-as Kearney was impeached in several respects (see infra, part II,B,4,b). Although Gapik's native language is Polish and his ability to understand English is very limit-ed, Kearney's version of what he said includes nothing that would be capable of being misunderstood as an as-sertion that everyone in the Company was crazy. More-over, although Kearney testified that Halper's daughter, Kim, was present during this conversation, she was not called as a witness. Accordingly, and after considering the witnesses' demeanor and respective interests, I credit Gapik.

On August 11, 1982, Respondent's employees voted to give the Union authority to strike. On or before August 18, the Union notified Respondent of this strike authori-zation. However, the union negotiators had not really wanted to strike at this time, and no strike was called.

(2) Gapik's unemployment compensation claim

On an undisclosed date before August 18, 1982, Gapik filed an application for unemployment compensation. Thereafter, the Gibbens Company, which represents Re-spondent in contested unemployment compensation claims, requested Respondent to fill out a blank form, printed up by Gibbens, headed "Notice of Termination of Employment." The form as filled out by Kearney on August 18 states that she quit and that Respondent would not rehire her. In a portion of the form stating "Reason in detail required," he inserted the following entry:

> When she returned to work after vacation and found out her replacement was paid more than she was, she said she was insulted by this and had no other recourse than to quit. In the past she has men-tioned that she would like to collect compensa-tion.[10]

On August 24, a claims adjudicator of the State of Illi-nois Department of Labor, Bureau Employment Securi-ty, Division of Unemployment Insurance, denied her claim on the ground that she had left work because of "Job dissatisfaction." Pursuant to her appeal dated August 27, 1982, a hearing on her claim was held on Oc-tober 21, 1982, by a hearings referee. Regarding the cir-cumstances of her separation, she gave the same testimo-ny to the referee that she gave before me and that is summarized above. At the conclusion of her testimony, the referee asked her, "Do you mean that you were fired for union activities?" She replied, "I guess that is what you can call it." Kearney testified before the referee that Gapik quit because Dale made more money than Gapik did. The referee's decision, dated October 29, 1982, states in part:

[10] The General Counsel's objection to the receipt of this document into evidence is discussed infra, part II,B,4,b.

FINDING OF FACTS:

The claimant was a bookkeeper. She left work because of dissatisfaction with employment. Her husband had been previously laid off for lack of work by the employer. Thereafter, a strike vote was to be taken. She objected to being asked to speak to her husband about the matter. The claimant felt as though she was in the middle of something that was of no concern to her. Thereafter, the claimant advised the employer she was leaving work the following Friday. Her resignation was immediately accepted. The claimant denied that she was going to stay at home and "draw compensation."

CONCLUSION:

The evidence established the claimant voluntarily left work without good cause attributable to the employing unit. It was not established the claimant's work was unsuitable per se. The claimant is disqualified under the provisions of Section 601A of the Act.[11]

DECISION:

The determination of the Claims Adjudicator is affirmed. The Claimant is disqualified for benefits under Section 601 of the Illinois Unemployment Insurance Act from August 08, 1982, and for each week thereafter until the Claimant had had employment in at least four calendar weeks and has had earnings in each of the weeks that equal or exceed $148, which is the Claimant's current weekly benefit amount.

On April 29, 1983, the board of review of the State of Illinois Department of Labor issued a decision finding that "the Referee's findings of fact and conclusions are fully supported by the record, and no errors of fact or law appear to have been made. Accordingly, the decision of the referee is affirmed."

(3) Gapik's knowledge of the instant charge

The charge that gave rise to the instant proceeding was executed by the Union on September 9, 1982. In the blank space after "Basis of the charge (be specific as to facts, names, addresses, plants involved, dates, places, etc.)," the charge states, "On or about August 10, 1982, the Company terminated Pat Gapic [sic] because of her activities on behalf of the Union." The charge does not specify her address or telephone number. The evidence that Gapik gave a statement to a Board agent on September 17, 1982, shows that at least by that date, Gapik had learned about the Union's charge.

(4) Gapik's EEOC charges

Meanwhile, on September 13, 1982, Gapik went down to the office of the Equal Employment Opportunity Commission and spoke to an EEOC agent. Gapik told the EEOC agent that she had been subjected to "verbal" "sexual harassment" and insults of a sexual nature, and that she had been paid less than a male bookkeeper (who left in May 1982, more than 2 months before Gapik's termination), who performed the same duties and whom she had been required to train. Gapik did not mention her union complaints, because the EEOC agent said that she was only concerned with the sexual harassment and the pay differential. The EEOC "Charge of Discrimination" that Gapik signed on that day states that she had been discharged on August 11, 1982, and further states:

> I was subjected to harassment by the male bookkeeper and even though management was aware of the harassment, no action was taken.
>
> . . . In August 1981, I married an employee who was a member of the union. . . . My husband is Polish and I was continually subjected to ethnic slurs by Joseph Halper.
>
> . . . On August 11, 1982 I informed Patrick Kearney, that if the harassment did not cease, I would be quitting by August 14, 1982 [which was a Saturday]. I was called by Kearney and told not to return to work because my services were no longer needed.

Thereafter, another EEOC agent, Wagner, telephoned Gapik and asked her to come down to the EEOC office again to give further information. On January 6, 1983, she met with him in his office. On that date, she signed an amended charge. The first page of the amended charge consists of a photocopy of the September 13 charge with certain changes made by her. In material part, these consisted of a change in her alleged discharge date to August 10, 1982; and a change in the penultimate sentence so as to assert that on August 10 she told Kearney that if the harassment did not cease, she "would be quitting by following Friday."[12] As signed by her on January 6, 1983, the amended EEOC charge also contains two newly typed pages. These pages allege that Halper told her that he could not "get these [obscenity] polacks" to understand his contract proposals; that he had told her on August 9, 1982, that "If these [obscenity] polacks strike I'll make sure they never work in the Chicago meat industry again"; and that on August 10, 1982, Kramer had asked Lowry to pass the word not to hire any of the "[obscenity] polacks" that Respondent was locking out. The charge alleges that Halper, Kramer, and Kearney made additional anti-Polish remarks and that "these constant ethnic slurs made my work environment unbearable." The charge goes on to allege that Halper, Kramer, and Respondent's bookkeeper had made sexually offensive remarks; that she had been paid less than the male bookkeeper for equal work; and that Halper had at-

[11] "An individual shall be ineligible for benefits for the week in which he left work voluntarily without good cause attributable to the employing unit and thereafter, until he has become reemployed and has had earnings equal to or in excess of his current weekly benefit amount in each of four calendar weeks . . . ." 48 Smith Hurd Illinois Annot. Statutes Para. 431.

[12] The date of her marriage was also changed. The January 1983 charge, like the September 1982 charge, alleges that the most recent act of discrimination occurred on August 11, 1982.

tributed the salary differential to the fact that the other bookkeeper "was a man and would not work for any less money." The charge as amended concludes:

> On August 10, 1982, I told Patrick Kearney that I was tired of being insulted and degraded and that I wanted the harassment to stop. I said that if the harassment did not stop by the following Friday I would be forced to quit. Patrick Kearney said that he would talk to Halper about it. At 5:15 PM on August 10, 1982 Pat Kearney called me and told me that I was fired. I have been retaliated against.

At the time of the June 1983 hearing before me, this EEOC charge was still pending.

(5) Events surrounding the strike in March and April 1983

Until March 28, 1983, the health, welfare, and pension plans were continuous subjects of negotiations, but the Union and Respondent had still failed to reach an agreement. On Friday, March 25, Respondent's employees voted to go out on strike on Monday, March 28. The evening of March 25 or early in the morning of March 26, Respondent received unofficial word of the strike vote. On the morning of March 26, Respondent called a meeting of its employees, most of whom were Polish-speaking and some of whom were Spanish-speaking. In rather poor Polish, Company President Mazur tried to explain to the employees Respondent's stand in the negotiations. He told the employees that they should not go on strike, that anybody who did strike should not go back to work, that the shop would be open on Monday, and that those who came in to work on Monday would get a company insurance and pension plan and the wages would be the same. He said that he could not give the employees any guarantee, but that they should believe his word. He said that he did not want the Union to represent the employees, and did not want them to pay union dues.[13] Then, Halper told the employees, in English, that the Union had not officially notified Respondent of the strike, that the shop would be open on Monday if anyone chose to come to work, and that wages would be the same as before. An employee asked in English what would happen if the Union took their insurance away if they came to work. Halper said in English that he would give the employees "the private insurance and the pension plan and that negotiations are not over, so we can still discuss some things." Kearney, who understands practically no Polish, testified without objection that Mazur also answered the question in Polish. Halper instructed employee George Negrete, who could speak both Spanish and English, to translate Halper's remarks for the benefit of employees who spoke only Spanish. Inferentially, Negrete told them something in Spanish. No witness who can understand Spanish testified about this meeting.

[13] My findings as to Mazur's remarks are based on the uncontradicted testimony of Kopinski, the only witness regarding this meeting who is able to understand Polish. Mazur did not testify.

The Union began to strike and picket the plant on March 28, 1983. The strike continued until April 8, 1983. On the following day, the employees ratified a new contract that included Respondent's health, welfare, and pension proposals.

b. *Reasons for credibility findings*

My findings in the preceding part II,B,4,a about management's remarks on August 9 and 10 are based almost entirely on Gapik's testimony, which I credit for demeanor reasons and the following considerations:

1. Regarding Gapik's testimony that about 8 a.m., on August 9, she and Halper conversed about unemployment insurance in Kramer's presence, both Kramer and Halper denied that Halper had any conversation whatever with her on the date and at the hour she gave. Kramer testified on direct examination that "I think" Halper was in Momence on August 9. On cross-examination, Kramer initially responded, "Right" to the inquiry, "So, Mr. Halper wasn't at the [Chicago] plant all day, right?" Then, when asked how Halper's daughter Kim (Respondent's receptionist) got to work that day, Kramer testified that he "would imagine" that Halper dropped her off at the plant on August 9, and that he would "not necessarily" stop to talk to Kramer before leaving for Momence. Company witnesses Kearney and Halper were evasive and untruthful about where Halper was on August 9 and 10. Kearney initially testified that Halper was at Respondent's plant, in Chicago, on August 9. Then, Kearney testified that Halper was not at Respondent's plant that day, that he was at the Momence plant on that day, and (in effect) that Kearney did not see Halper at all on August 9. After that, Kearney testified that Halper dropped off his daughter at Respondent's Chicago plant on both August 9 and 10; that Halper was not otherwise at Respondent's Chicago plant on either day, but was at the Momence Packing plant; and that Kearney drove Miss Halper home on the evening of both August 9 and 10. Halper testified that she and Kearney were still at the Chicago plant when Halper returned there late in the afternoon of August 10. He also testified that he came to the Chicago plant about 7:45 a.m. on August 9 to drop off his daughter, and that at this time he had a brief conversation with Kearney (who, as noted, in effect denied that this conversation occurred). Halper further testified that he then drove to the Momence Packing plant, which is 50 or 60 miles from Respondent's Chicago plant. In an effort to procure corroboration for his testimony about these events, he testified that he was the person who made two August 9 telephone calls that are listed on the Momence Packing telephone bill with Respondent's Chicago facility telephone number listed as the recipient, and that both these calls were made to Kearney; the bill shows that these calls were made at 9:52 a.m. and 12:52 p.m. However, Halper further testified that the August 10 telephone calls that are listed on the Momence Packing telephone bill, all nine of which were allegedly made by him, included a call made from the Momence Packing facility at 3:59 p.m.; and that he was in his car, driving from the Momence to the Chicago plant, when he made telephone

calls on his mobile telephone that (as shown by his telephone bill) were made at 3:46, 3:57, and 4 p.m. on August 10. Moreover, he admitted that Momence Production Supervisor Dick Backhard had occasion to call the Chicago facility. Gapik credibly testified that she received a telephone call from Momence Packing every morning, usually placed by Backhard, about the previous day's receipts and shipments so that she could do the billing; and that she believed the August 9 morning call about this matter was made by him. I conclude that he, not Halper, made the 9:52 a.m. telephone call to Respondent's Chicago facility from the Momence Packing facility on the morning of August 9. Further, I conclude that Halper's misrepresentations about the August 10 telephone calls cast doubt on his credibility generally, including his veracity in denying the August 9 remarks that Gapik attributed to him. For this reason, and because of deficiencies, discussed infra, in Kramer's testimony about another matter, I do not credit their denials of Halper's August 9 remarks to Gapik in Kramer's presence. Further, I find that the above-described inconsistencies in Kearney's testimony about the foregoing August 9–10 events reflect on his credibility generally.

2. Kramer and Lowry both denied engaging in any conversation, as described by Gapik in her testimony about the August 10 events, about the possibility of a strike among Respondent's employees. However, it is undenied that on August 5 the Union, in Kramer's presence, said that it was planning to take a strike vote. Moreover, Kramer and Lowry admittedly have frequent occasion to engage in telephone conversations with each other. Furthermore, although on direct examination both of them testified that a possible strike among Respondent's employees was of no concern to Lowry, on cross-examination Lowry testified that reports regarding work stoppages involving his customers were of substantial concern to his meat-brokerage business because, "when the contracts are up . . . you don't buy or sell meat for them"; and that "Oh, sure," he talks with his customers about strikes as long as 1 month in advance. Moreover, Kearney did not deny Gapik's testimony that she described such a Kramer-Lowry conversation a few minutes after the time that she testimonially attached thereto.

3. Among the remarks to Lowry that Gapik attributed to Kramer during this conversation was the assertion that R & S General Manager Smith was sympathetic to Kramer's requests not to hire employees who struck Respondent. Although denying that Kramer made any such requests to him, Smith testified that when Respondent's employees struck in March and April 1983, he personally drove a truck across the picket line at Respondent's facility to pick up or deliver goods, even though the Union, which also represents R & S employees, had asked him in advance not to do so.[14] Moreover, Kramer's use of loud and boisterous tones during this converation indicates that much of his message was not really intended for Lowry's benefit, but rather was really directed at Gapik and (through her) her husband in the bargaining unit. For this purpose, the effectiveness of these remarks about Smith would have little or no relationship to their accuracy.

4. The undisputed evidence establishes that during the period when Gapik acted as Respondent's regular bookkeeper, Dale had worked for Respondent as a bookkeeper for 1 week in April 1982 while Gapik was on vacation, for an undisclosed period in May 1982 after the male bookkeeper quit, and in July 1982 during a state audit. Because Gapik maintained the payroll records, she was at all times well aware that on each of these occasions Dale was receiving higher direct wages than Gapik. Moreover, Gapik received various fringe benefits not enjoyed by Dale, and received a pay increase about early June 1982. Such evidence renders unlikely Kearney's discredited testimony that on Tuesday, August 10, Gapik said that she was quitting at the close of business on Friday, August 13, because, when substituting for Gapik the preceding week, Dale had been paid more than she. Moreover, the stipulation that Dale's take-home pay for that week had also been higher than Kearney's, his testimony that he had not learned this until August 10, and the absence of evidence or claim that he had known Dale's pay rate during her previous sporadic employment with Respondent, tend to corroborate Gapik's credited testimony that it was he who on August 10 expressed resentment at Dale's pay in comparison to his.[15]

Although I have discredited Kearney's testimony about this August 10 conversation with Gapik, I adhere to my action at the hearing in receiving, over the General Counsel's objection, the Gibbens-provided form that Kearney filled out and sent to Gibbens about the circumstances of Gapik's separation. The document is not hearsay to the extent that it shows Respondent's representations to Gibbens, which opposed, on Respondent's behalf, Gapik's unemployment compensation claim. In contending that the document is not receivable under rule 803(6) of the Federal Rules of Evidence to show the truth of the contents, the General Counsel's posthearing brief seems to rely solely on the contention that the source of information indicates "lack of trustworthiness." Particularly because Kearney himself testified about the events that the document purports to describe, the circumstances on which the General Counsel bases his "lack of trustworthiness" claim go to the weight of the document and not to its admissibility. See *American International Pictures v. Price Enterprises*, 636 F.2d 933, 935 (4th Cir. 1980), cert. denied 451 U.S. 1010 (1981); *Crompton-Richmond Co. v. Briggs*, 560 F.2d 1195, 1201–1202 fn. 12 (5th Cir. 1977). Because I do not read Kear-

[14] There is no evidence that R & S ever hired any of Respondent's employees during the March-April 1983 strike. In contending that Kramer did not ask R & S Representative Smith about August 1982 not to hire Respondent's employees if they went on strike, Respondent's brief (Br. 27) refers to R & S' conduct in hiring several of Respondent's ex-employees in 1982, beginning in early 1982 and up to 14 months before the strike.

[15] I do not credit Gapik's testimony that when stating on Tuesday, August 10, that the following Friday would be her last day if management's harassment did not stop, she meant Friday, August 20, and not Friday, August 13. Her testimony in this respect is inconsistent with her initial EEOC charge and with the natural reading of her amended EEOC charge. In any event, management had no reason to suppose that she meant August 20.

ney's testimony as representing that Respondent fills out such a form only after the applicant's unemployment compensation claim is initially denied, I do not regard as reflecting on the document's trustworthiness the fact that it is dated before Gapik's claim was initially denied. However, I attach no evidentiary weight to the representations in this document, for the reasons set forth in connection with Kearney's testimony and because the document was prepared in anticipation of the litigation of Gapik's unemployment compensation claim. I note, moreover, that the document, unlike Kearney's testimony, does not allege that Gapik said that she was not quitting until the end of the week, or that Halper thereupon told him to accept her resignation immediately.

5. Kearney and Halper both testified that on Tuesday, August 10, Kearney told Halper that Gapik had said that Friday was her last day, and that she was quitting because she felt insulted by reason of Dale's pay while Gapik was on vacation. Halper, but not Kearney, further testified that Kearney said that Gapik did not want to talk about a raise; and that Halper replied,". . . if she is that unhappy to the point she doesn't want to talk about a raise or anything else, and she is quitting Friday, we better accept her resignation immediately, because if we don't, we have the potential of her goofing up our accounts receivable and accounts payables, because her attitude is so bad." Kearney's testimony nowhere refers to any unwillingness by Gapik to talk about a raise, or to any explanation by Halper for telling Kearney to accept her resignation immediately. I do not credit either Halper's or Kearney's testimony about this conversation between them. Rather, and because I see no reason why Kearney would have given Halper an inaccurate report of what Gapik had told Kearney, I infer that Halper received an accurate report from Kearney and that Halper told him (as Kearney promptly did) to tell her immediately that her services were no longer required. Further, in the absence of corroboration from Kearney, I do not credit Halper's testimony about the reasons Halper gave for his instructions to Kearney.

6. Kearney testified that after this conversation with Halper, Kearney telephoned Gapik and told her that Respondent was accepting her resignation. Kearney went on to testify that she said, "Oh, as of Friday," and he said, "No, as of today." Kearney further testified that about August 18, Gapik telephoned him and told him that if Respondent opposed her claim for unemployment compensation, she was going to file "all kinds of charges." As previously shown, Kearney's testimony in other respects is unreliable. Moreover, although Respondent's counsel stipulated that a document drawn up by Gapik on the Friday before a Monday layoff was in fact a seniority list of all the employees working in the plant that Friday, Kearney testified (in connection with Respondent's efforts to show that she was a confidential employee) that the document listed only those employees who were to be laid off. Accordingly, and for demeanor reasons, I credit Gapik's version of the discharge conversation, and her denial of the August 18 conversation. In connection with the alleged August 18 conversation, I note that she later filed a total of one charge (with EEOC), and that she filed this charge almost a month after this alleged conversation and while her unemployment compensation claim was pending before the referee. I further note that when testifying before the unemployment compensation referee, Kearney admittedly did not refer to this alleged conversation. Although he was not asked during that hearing about an event that happened after Gapik's discharge, I think it likely that he would have volunteered testimony about this conversation if it had really occurred.

C. *Analysis and Conclusions*

1. Whether Gapik was a confidential employee

a. *Facts*

Most of Respondent's eight-floor building is occupied by production operations. The fourth floor of the building contains the private office of Executive Vice President Halper and an undivided office area. During 1982 and until Gapik's separation in mid-August 1982, the undivided office area contained desks occupied by General Manager Kramer, Gapik, and McClory. Until May 1982, when the male bookkeeper quit, he also had a desk in that area. Dale also worked in that office from time to time between April 1982 and the end of the first week in August 1982. So far as the record shows, during the first 8 months of 1982 Respondent's only clerical personnel were Gapik, McClory, Dale, the male bookkeeper, and receptionist Kim Halper, whose office was on the first floor and who, inferentially, was a student who intended to return to school at the end of the summer.[16] During part of this period, Dale was acting as a fill-in for the male bookkeeper after he quit. Gapik and McClory each had a typewriter at their desk; Dale also had access to a typewriter. At the time of Gapik's separation, she was keeping the books for both Respondent and Momence Packing, and was training McClory to do the payroll. Halper testified that McClory was supposed to be learning to take over Momence Packing's "paper work," was performing general office work, and performed duties for Respondent "Just to give her whatever extra time to fill out her eight hours." The duties of the clerical employees in the undivided office area included answering the telephone and connecting the caller with the person called.

As of early July 1982, Respondent's active work force numbered about 40 people. Gapik's job title was bookkeeper. She took care of accounts receivable and accounts payable. She never saw Respondent's profit and loss statements. She kept a record of each employee's hours of work, figured out the gross and take-home pay of each, and made the data entry sheets for the payroll. After the payroll readout and the checks had been printed, she balanced them against her own records. She received checkoff and welfare deduction authorization slips from the Union, made appropriate data entries, typed up the checks to the Union for checked-off union dues, typed up the checks for the pension and for the

[16] Halper was then 16 years old and was just learning to type. Her father, Executive Vice President Joseph Halper, usually drove her to and from work.

health and welfare funds, and typed notices to the Union that employees had been added to or removed (by termination or otherwise) from the deductions lists. She maintained individual personnel files, and she put into or took out of these files such information as injuries or changes in deductions. She inserted into the files of office personnel certain information regarding vacation, sick, and off days. When Plant Manager Kearney wrote up a disciplinary action, she would insert a copy into the employee's file and send a copy to the Union. When Respondent was presented with an employee's health insurance claim (on a form prepared by the Union), she would determine from the employee's personnel file (or, perhaps, from the payroll records) whether he had been working for Respondent on the critical dates, sign the form, and (without keeping a copy) return it to the employee, who sent it to the Union.

When an employee was injured on the job, Gapik would fill out and mail to the insurance companies claims made by employees or by the clinic Respondent was associated with, and put a copy of the clinic's report in the employee's personnel file. About June 1982, the Occupational Safety and Health Administration asked Respondent for a record of how many injuries there had been in the plant. The testimony suggests that a file of records of such injuries was supposed to be, but had not been, kept. Gapik asked Respondent's workmen's compensation insurance company for a printout of how many claims it had paid, and sent the printout to OSHA.[17]

When Respondent received an unemployment compensation claim, whether to contest it was usually discussed between Halper, Kramer, and Kearney. On occasion, Respondent would merely forward the claim notice to the Gibbens Company, a professional organization hired by Respondent to handle unemployment compensation claims, and leave the matter up to it. Halper would either tell Gapik to put a particular unemployment compensation claim notice into the personnel file, or (if Respondent was responding to the notice) tell her how to respond. On an undisclosed date after November 1981, after both Kearney and Kramer refused to attend a hearing on a particular employee's unemployment compensation claim, Halper said to Gapik, "You are the bookkeeper, take care of this." Kearney told her how the employee had been terminated and what to say. At the hearing, Gapik appeared as Respondent's representative and repeated what Kearney had told her—namely, that the employee had been fired for refusing to work on some new equipment. His claim was denied for 6 weeks. This was the only occasion on which Gapik ever performed such an unemployment compensation function.

In June 1982 an auditor from the wage and hour division of the United States Department of Labor came to Respondent's plant. After going through the payroll records, he asked her whether anyone was being paid cash and how hourly paid employees were paid for Saturday work. No other clerical personnel were involved in this audit. Her participation took about 20 minutes. This audit did not result in any charges against Respondent.

On an undisclosed 1982 date before Gapik's separation in mid-August, Respondent underwent a sales-tax audit by the Illinois Department of Revenue. At the request of Respondent's accountant, Gapik pulled from Respondent's files some invoices for a 3-year period. When the state auditor came in, Respondent's accountant worked with him, inferentially with the assistance of the retrieved invoices.

As previously noted, after 11 a.m. on Friday, July 9, 1982, Gapik was asked to prepare a seniority list to be used in determining which employees were to be included in a layoff announced about noon on Monday, July 12. This was the only occasion on which a seniority list was ever prepared for this purpose. When layoffs were effected, she typed up, "whenever she could get to it," a list of employees to be laid off. The layoff list was posted immediately after she typed it. She had nothing to do with choosing which employees would be selected for layoff.

Gapik occasionally picked up mail from Respondent's post office box. Halper credibly testified that she gave the mail to him unopened, and that he returned it to her after he had removed "confidential" letters, which he did not show her. He went on to testify that by "confidential" letters, he meant "Correspondence between our corporate attorneys and myself that were of a private nature, concerning labor negotiations, things like that that [Kramer] was working on immediately or financial statements due to the commodities and trade, I would keep that all myself."

Halper testified that current labor relations files that he was working on "right away," were kept in his desk, and that files that he did not need immediately or on "something which is done" are kept in the "general file" in the main office. He went on to testify that when a new file was to be set up, he asked, "The bookkeeper, whoever was in charge" to set it up. His testimony is somewhat vague about who inserted material into the labor relations files, but he testified, in effect, that he did not do this himself because he did not know exactly where in the main office these files were kept. Gapik testified that Halper maintained the labor relations files and kept them in his office, that she had nothing to do with them, and that she never saw the correspondence file concerning negotiations. In view of her uncontradicted testimony that when Halper sent materials to Respondent's labor counsel, Halper inserted the material into the envelopes that she addressed; in view of Halper's testimony that he did not permit her to see "confidential" incoming correspondence; and for demeanor reasons, I credit Gapik.

Halper decided on the substance of Respondent's bargaining proposals and represented Respondent during bargaining negotiations. Gapik never sat in on negotiations. Laying to one side Halper's comments when leaving the conference room in February or March 1982 and his June 1982 remarks about the Union's allegedly stupid representatives, she was never (so far as the record shows) in hearing distance of intramanagement discussions about negotiating strategy. The record suggests

[17] Halper testified that OSHA had made such reviews a total of twice between about 1977 and 1983. Gapik began to work for Respondent in 1979.

that most of the typing in connection with Respondent's 1982 negotiations was performed by secretaries employed by Respondent's counsel. Gapik never typed any notes, minutes, or correspondence in connection with bargaining negotiations. However, Halper testified that in February 1982, Gapik typed Respondent's initial proposal to the Union (headed "Crest Mark Packing Co.") from his handwritten notes so that he could show the proposal to Respondent's counsel before giving it to the Union. Halper further testified that Gapik typed a wage proposal (R. Exh. 8) that Respondent submitted to the Union in July 1982; but that she typed no other proposals that Respondent used during the negotiations. So far as relevant here, Respondent's initial proposal consists of Respondent's Exhibit 2 and Respondent's Exhibit 4.[18] On rebuttal, when the General Counsel showed her these three exhibits and asked her whether she had typed "any" of them, she said yes. I accept Halper's testimony that she typed these two proposals by Respondent notwithstanding her testimony elsewhere that she typed only Momence Packing bargaining proposals. An exhibit-folder copy of Respondent's initial proposal consists of material typed by Gapik plus various notations written by Halper during negotiations. At least two of these notations might suggest, to someone acquainted with prior negotiations, what positions Respondent planned to take during future negotiations.[19] Halper testified that it was his practice to take to each bargaining session a xerox of such an annotated copy of Respondent's proposal, and that the xerox was made either by him or by "the bookkeeper or the other secretary."

As previously noted, while Gapik was in Respondent's employ, no clerical personnel were working in Momence Packing Company's office in Momence, and she was training McClory to perform these functions. Gapik set up and maintained the books, and did the billing, for Momence Packing. She typed up two proposals made by Momence Packing to the labor organizations (the Union and a sister local) which represented the Momence Packing employees. The record suggests that Momence Packing did not reach a final agreement until about January 1983, after Gapik's separation. Gapik did not maintain the labor negotiation files from Momence Packing; they were kept by Halper in his office.[20] Halper asked her to keep Momence Packing business confidential. There is no evidence or claim that she failed to do so.

b. *Analysis*

I agree with Respondent that Gapik was a confidential employee. In so finding, I solely rely (1) on the fact that on learning of her betrothal to a unit employee, Halper told her that she was "confidential" (although without any reference or, at least, specific reference, to the duties that afforded her that status under the Act),[21] and (2) on her conduct in typing contract proposals, which Respondent thereafter tendered to the Union during collective-bargaining negotiations. *Reymond Baking Co.*, 249 NLRB 1100 (1980); see also *Associated Day Care Services*, 269 NLRB 178 (1984). No different result is suggested by *Postal Service*, 232 NLRB 556, 558 (1977), cited by the General Counsel; that case does not indicate that the "merit evaluations and other personnel documents" typed by the employees in question were in other than their final form. See *Associated Day Care Services*, supra. Although there is no evidence that Gapik typed up any contract proposals for Respondent at any other time, neither is there any evidence that Respondent engaged in contract negotiations at any other time while she was working for it.[22]

I need not and do not determine whether Gapik's conduct in typing employer contract proposals with respect to the Momence facility, which is owned and operated by a corporation other than Respondent, is relevant to determining whether she was a confidential employee with respect to Respondent, her own employer. Cf. *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450, 457 (1980). In this connection, I note that she was performing this function merely until Momence Packing acquired a trained clerical force of its own. Cf. *Swift & Co.*, 129 NLRB 1391, 1393 (1961); *NLRB v. Allied Products Corp.*, 545 F.2d 644, 650 (6th Cir. 1977).

2. Whether Gapik was an employee within the meaning of Section 2(3) of the Act

Respondent contends that confidential employees are not employees within the meaning of Section 2(3) of the Act for any purpose. Respondent cites *Peerless of America v. NLRB.*, 484 F.2d 1108, 1112 (7th Cir. 1973);[23] *NLRB v. Wheeling Electric Co.*, 444 F.2d 783, 788 (4th Cir. 1971); and the dissenting opinion in *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 197–198 (1981). However, the *Hendricks County* majority declined to rule on this issue (454 U.S. at 186–187 fn. 19). Nor has the Board abandoned its position that confidential employees are employees within the meaning of Section 2(3). See, e.g., *Intermountain Rural Electric Assn.*, 253 NLRB 1153, 1165–1166 fn. 20 (1981), remanded 732 F.2d 754 (10th Cir. 1984); see also *NLRB v. Greyhound Lines*, 426 F.2d 1299, 1301 (5th Cir. 1970); *NLRB v. Poultrymen's Service Corp.*, 138 F.2d 204, 210 (3d Cir. 1943); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). Accordingly, I am bound by the Board's view of the law. *Ford Motor Co.*, 230 NLRB 716, 717–718 (1977), enfd. 571 F.2d 993, 996–997 (7th Cir. 1978), affd. 441 U.S. 488 (1979).

[18] The typewritten portions of G.C. Exh. 4 and of the first page of R. Exh. 2 are identical.

[19] "O.T. over 40 hours only!!" and "4 yr. K."

[20] This finding is based on her testimony. For the reasons set forth in connection with the labor negotiation files for Respondent, I do not accept Halper's testimony otherwise.

[21] Cf. *Ohio State Legal Services Assn.*, 239 NLRB 594, 599 (1978). Indeed, all the duties on which I rely in finding that she occupied that status were not performed until several months later, and about 3 years after her hire.

[22] The bargaining agreement which expired in 1982 became effective in April 1979. She started working for Respondent in October 1979.

[23] Although the instant case will probably be presented to that court of appeals if the case goes beyond the Board level, this is by no means certain. See *J. P. Stevens & Co. v. NLRB*, 388 F.2d 892 (4th Cir. 1967); *NLRB v. General Electric Corp.*, 418 F.2d 736, 739 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970); *NLRB v. B.V.D. Co.*, 225 F.2d 923 (D.C. Cir. 1955).

I find that although Gapik was a confidential employee, she was an employee within the meaning of Section 2(3) of the Act. In this connection, it might be appropriate to point out that the General Counsel contends in substance that Gapik's discharge stemmed from her desire to remain neutral in the labor dispute between Respondent and the Union. This case does not present the question of whether she could have been lawfully discharged for making common cause with the Union (cf. *Wheeling*, supra) or with an admitted employee (cf. *Hendricks County*, supra). Further, because the allegedly unlawful remarks shown by the credible evidence constituted deliberate efforts by Respondent to enlist her aid in its dispute with the Union, this case does not present the question of whether her ability to overhear intramanagement discussions about the Union rendered them unlawful (cf. *Peerless*, supra). Nor, of course, does this case present the question of whether she could properly have been included in a bargaining unit (cf. *Hendricks County*, supra; *Kleinberg*, supra, 253 NLRB at 450–451).

3. Whether Respondent's statements to or through Gapik violated Section 8(a)(1)

I disagree with the General Counsel's contention that Respondent violated the Act when Executive Vice President Halper told Gapik that he was locking the men out the following Monday, and when she told this to her husband, pursuant to Halper's instructions. I so find because the record fails to show that such a lockout, if effected, would have violated the Act. See *Darling & Co.*, 171 NLRB 801 (1968), affd. 418 F.2d 1208 (D.C. Cir. 1969).[24]

However, and in view of my finding that Gapik was an employee within the meaning of Section 2(3) of the Act, I conclude that Respondent violated Section 8(a)(1) of the Act when (1) Halper told her that if any of the active employees struck, he would see to it that the employees on layoff status (who included her husband) would stop receiving unemployment compensation;[25] (2) he told her that if the employees struck, he would see to it that none of the employees (or, at least, none of the Polish employees, who included her husband) ever worked in the meat industry again; and (3) General Manager Kramer said to Meat Broker Lowry, under circumstances when Kramer must have known that Gapik could overhear him and likely intended her to do so, that Respondent had solicited other businesses not to hire Respondent's employees if they went on strike. While it is true that the laid-off employees were receiving unemployment compensation from the State of Illinois rather than from Respondent, Respondent has made no showing that a genuine material issue of fact or law would be presented by a claim that employees on layoff status lost their right to continued unemployment compensation payments by virtue of a strike subsequent to their layoff. Cf. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). Moreover, because Halper instructed Gapik to tell her husband (admittedly an employee) about Halper's remarks, Respondent violated Section 8(a)(1) when she complied with these instructions, whether or not she was herself an employee. *Indian Head Lubricants*, 261 NLRB 12, 18 (1982).[26]

In addition, and regardless of whether Gapik was a statutory employee, I find that Respondent violated Section 8(a)(1) when, pursuant to instructions issued by Halper for the purpose of procuring unit employees' receptivity to Respondent's proposals, she told employee Kopinski that Halper was an intelligent man who thought that Respondent's pension and insurance plan could be good for the workers, and asked whether Kopinski understood the proposals. From the fact that Respondent and the Union had at all relevant times been either parties to or negotiating for a bargaining agreement, I conclude that the Union was the employees' statutory bargaining representative. The Union's status as such exacted from Respondent the negative duty to refrain from dealing with unit employees. *Medo Photo Corp. v. NLRB*, 321 U.S. 678, 683–695 (1944); *General Electric*, supra, 418 F.2d at 755; *Ross Crane Rental Corp.*, 267 NLRB 415 (1983). Although Union Steward Kopinski was one of the Union's employee bargaining representatives, Halper's comment that Kopinski must be afraid to go against the Union shows that Mrs. Gapik was being directed to (as she did) address him as a unit employee and a friend, rather than in his official capacity; and in the absence of the Union's professional and other employee negotiators. Although Kopinski testified that he had no idea whether she was then speaking her own mind, Respondent's conduct was unlawful even assuming that Kopinski believed Gapik had approached him entirely of her own volition, and that he had no suspicion she was acting on the instructions of Halper, who was her immediate supervisor and one of Respondent's bargaining representatives. Whether employee Kopinski knew it or not, Respondent was in fact trying to undermine employee support for the Union's present bargaining position about pensions and insurance. Such employer efforts might even be more successful if they seemingly proceeded solely from another employee's friendship and from a wife's natural concern about her husband's fringe benefits. Moreover, in view of my finding that Gapik was a statutory employee, I find that Respondent violated the Act when Halper told her to make such statements to her husband (a unit employee) and Kopinski. *Enterprise Products*, supra, 265 NLRB at 548; *Texaco*, supra, 700 F.2d at 1043.[27]

[24] The complaint does not allege that Respondent violated the Act by instructing Mrs. Gapik to convey this message to her husband. Cf. *Texaco Oil Co. v. NLRB*, 700 F.2d 1039, 1043 (5th Cir. 1983).

[25] See *Texaco Oil Co.*, 259 NLRB 408 (1981), enfd. 700 F.2d 1039 (5th Cir. 1983). The complaint does not allege that Respondent violated the Act by telling her, expressly or impliedly, to tell employees, directly or indirectly, about part or all of what Halper told her on this occasion. Cf. *Texaco*, supra, 700 F.2d at 1043; *Enterprise Products Co.*, 265 NLRB 544, 548 (1982).

[26] The General Counsel stated at the outset of the hearing that he was proceeding on the theory that the Respondent was answerable for Gapik's remarks because it had directed her to convey these messages to admitted statutory employees.

[27] The complaint alleges that Respondent "acting through Joseph Halper, directed an employee to speak to bargaining unit employees against the Union's bargaining proposals and in support of Respondent's bargaining proposals," in violation of Sec. 8(a)(1) (pars. V,(a),VII). Both

Continued

4. Whether Gapik's discharge violated the Act

During Gapik's last day of active employment, she told Plant Manager Kearney about Halper's unlawful June 4 instructions to talk to unit personnel about Respondent's insurance and pension proposals; about Halper's early July instructions to her to tell her husband about Halper's alleged lockout plans; about Halper's unlawful August 9 statements that if the active employees struck, he would see to it that the employees on layoff status would stop receiving unemployment compensation and that none of the employees (or, at least, none of the Polish employees) would ever work in the meat industry again; and about Halper's concomitant efforts to induce her to get her husband to campaign against a strike. She went on to tell Kearney that she had been asked to relay to the men certain things about the Union, that she was disgusted about the whole situation, that she was being put in the middle of the problems between the Union and Respondent, that these problems were none of her business, that she was tired of being harassed verbally, that she had been insulted and degraded, that she could no longer concentrate on her work, that she was constantly being pulled away from her work and told "different things," and that if this conduct did not stop, the following Friday was going to be her last day. At this time, she said that she would wait for Halper's return in order to talk to him about the matter. However, later that day, General Manager Kramer told Meat Broker Lowry, in a conversation that was unlawful because Kramer knew Gapik could overhear him, that Respondent was trying to induce other employers not to hire Respondent's employees if they went out on strike. Inferentially, she concluded from Kramer's loud and boisterous tones that he intended her to overhear this conversation and to relay it to her employee husband, at least, and perhaps to other employees as well. At this point, Mrs. Gapik told Kearney about Kramer's remarks, said that she was going home, and asked Kearney to speak to Halper about the matter. Later that day, Kearney reported Gapik's statements to Halper, who instructed Kearney to tell her immediately that her services were no longer needed. Kearney promptly conveyed this message to Gapik. Three days later, he told her husband that she had been fired.

I agree with the General Counsel that Gapik's termination violated Section 8(a)(1) and (3) of the Act. Her Section 7 rights as an employee included the right to remain neutral in the dispute between Respondent and the Union over the terms to be included in the bargaining agreement under negotiation and, a fortiori, to refrain from unfair labor practices in connection with that dispute.[28] The foregoing sequence of events shows that Halper discharged her because he had learned from Kearney that she intended to exercise these rights.

Moreover, I agree with the General Counsel that Gapik's termination violated Section 8(a)(1) of the Act even assuming that her status as a confidential employee wholly removed her from the protection of the Act. Although supervisors are specifically excluded from the protection of the statute (see Secs. 2(3) and 14(a)), the statute nonetheless forbids their discharge for refusing to commit unfair labor practices. Such a prohibition stems from the need to vindicate the employees' exercise of their Section 7 rights. *Parker-Robb Chevrolet*, 262 NLRB 402, 402–403 (1982), affd. sub nom. *Food & Commercial Workers Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983), and cases cited. I perceive no reason why excluding confidential employees from the protection of the statute would call for a different rule with respect to them. I infer that the reasons for Gapik's discharge were known to her employee husband, at the very least.[29] In any event, under the circumstances of this case, I conclude that such employee knowledge would not be an essential element of the offense. The principle that an employer may not lawfully discharge a supervisor for refusing to commit unfair labor practices protects rank-and-file employees by permitting their supervisors to respect the employees' statutory rights without fear of reprisal. *Frenchy's K & T*, 263 NLRB 45, 47 (1982). If employers are allowed to force supervisors to engage in unfair labor practices, this necessarily results in direct interference with the affected rank-and-file employees in the exercise of their Section 7 rights. *Howard Johnson Co. v. NLRB*, 702 F.2d 1, 4 (1st Cir. 1983), and cases cited; *Gerry's I.G.A.*, 238 NLRB 1141, 1151 (1978), enfd. 602 F.2d 1021, 1023 (1st Cir. 1979). I perceive no reason for a different rule with respect to persons held unprotected by the Act on the ground that they are confidential employees. Employee ignorance of the reason for Gapik's discharge could not affect either Respondent's ability to resume unfair labor practices through a more tractable replacement, the willingness of that replacement (lest she suffer Gapik's fate) to engage in the unlawful conduct that Gapik had eventually abjured, or the likely impact of her successor's unlawful conduct on employees. A requirement that rank-and-file employees know the reasons for such an unlawful discharge would be particularly inappropriate where, as here, the employer's unfair labor practices sought to be committed through the confidential employee may have been rendered more effective by concealment from admitted rank-and-file employees of the fact that such conduct had proceeded from the employer's instructions. See *Belcher Towing Co. v. NLRB*, 614 F.2d 88, 91–92 fn. 4 (5th Cir. 1980); *Elder-Beerman Stores Corp.*, 173 NLRB 566 (1968), enfd. 415 F.2d 1375 (6th Cir. 1969), cert. denied 397 U.S. 1009 (1970); *GTE Automatic Electric*, 204 NLRB 716, 722, 738–739 (1973). Contra: *Florida Steel Corp. v. NLRB*, 551 F.2d 306 (4th Cir. 1977), relied on by Respondent.

I am aware that Gapik's complaints to Kearney, who (inferentially) relayed them to Halper, included complaints that likely did not constitute Section 7 activity, about alleged employer conduct that likely would not have constituted violations of the National Labor Rela-

briefs treat this allegation as including an allegation that Gapik's comments to Kopinski constituted an 8(a)(1) violation by Respondent (G.C. Br. 33, R. Br. 24).

[28] *Texaco*, supra, 700 F.2d at 1043; *Longshoremen ILA Local 31 (U.S. Borax)*, 223 NLRB 1257, 1261 (1976), enfd. 549 F.2d 698 (9th Cir. 1977).

[29] She credibly testified that she would talk to him about "something bothering me with my job," and that she discussed with him "the problems that I was having as far as being put in the middle of the union negotiations between Crest Mark and the Union."

tions Act.[30] However, Respondent has failed to show that its treatment of Gapik would have been the same if her statements to Kearney had been limited to such matters. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

I find without merit Respondent's contention that even assuming (as I have found) that Gapik's August 10 discharge was an unfair labor practice, she should not be afforded a reinstatement remedy, or any backpay after Friday, August 13, because she told Kearney on the morning of August 10 that the following Friday would be her last day if Respondent did not stop its unfair labor practices. In the first place, by discharging her immediately, Respondent deprived her of the opportunity to change her mind. Because her immediate discharge was unlawful, doubts about whether she would have adhered to her decision should be resolved against Respondent. *Transportation Management*, supra.[31] Moreover, if she had changed her mind before actually quitting, Respondent could not lawfully have refused to let her rescind, because of her refusal to continue enduring or engaging in unfair labor practices, any quit notice which she may have given. See *Sycor, Inc.*, 223 NLRB 1091, 1092 (1976); *DeQueen General Hospital*, 264 NLRB 480, 490–491 (1981). Furthermore, because Gapik told Kearney on August 10 that she would not quit at all if Respondent stopped its unlawful conduct, Respondent is in a singularly poor position to contend that on August 11–13 it would have continued its unlawful conduct and, therefore, that it is now entitled to the financial benefits of a determination that she would have quit on August 13. See *Remodeling by Oltmanns*, 263 NLRB 1152, 1161–1162 (1982), enfd. 719 F.2d 1420 (8th Cir. 1983).

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Patricia Gapik was a confidential employee at all relevant times.

4. Patricia Gapik was at all relevant times an employee within the meaning of Section 2(3) of the Act.

5. Respondent violated Section 8(a)(1) of the Act:

a. When Supervisor Joseph Halper told employee Patricia Gapik that if any of the active employees struck, he would see to it that the employees on layoff status (who included her husband, employee Zbigniew Gapik) would stop receiving unemployment compensation.

b. When Patricia Gapik so advised employee Zbigniew Gapik, pursuant to Supervisor Halper's instructions.

c. When Supervisor Halper told employee Patricia Gapik that if the employees struck, he would see to it that none of the employees (or, at least, none of the Polish employees, who included her husband, employee Zbigniew Gapik) ever worked in the meat industry again.

d. When Patricia Gapik so advised employee Zbigniew Gapik, pursuant to Supervisor Halper's instructions.

e. When Supervisor Edward Kramer told Meat Broker Timothy Lowry, under circumstances when Kramer knew that employee Patricia Gapik could overhear him, that Respondent had solicited other businesses not to hire Respondent's employees if they went on strike.

f. When Patricia Gapik, pursuant to instructions issued by Supervisor Halper for the purpose of procuring unit employees' receptivity to Respondent's bargaining position, told employee John Kopinski that Halper was an intelligent man who thought that Respondent's pension and insurance proposals would be good for the workers, and asked whether Kopinski understood these proposals.

g. When Supervisor Halper instructed employee Patricia Gapik to make such statements to employees John Kopinski and Zbigniew Gapik.

6. Respondent violated Section 8(a)(1) of the Act by discharging Patricia Gapik.

7. Respondent violated Section 8(a)(3) of the Act by discharging employee Patricia Gapik.

8. The unfair labor practices set forth in Conclusions of Law 5–7 affect commerce within the meaning of the Act.

9. Respondent has not violated the Act by threatening to lock out employees.

The Remedy

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom and from like or related conduct, and to take certain affirmative action to effectuate the policies of the Act.

Affirmatively, Respondent will be required to offer Patricia Gapik immediate reinstatement to the job of which she was unlawfully deprived or, if such a job no longer exists, a substantially equivalent job, and make her whole for any loss of earnings she may have suffered by reason of her discharge, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1959), with interest as prescribed in *Florida Steel Corp.*, 231

[30] Gapik testified without contradiction that Halper had rejected her prior complaints about the male bookkeeper's remarks to her of a sexual nature, and (with some corroboration from Halper) about a salary differential between her and the male bookkeeper allegedly based on sex. In addition, her EEOC charges contain certain allegations, regarding management's ethnic and sexual slurs, as to which there is no other evidence in the instant record.

Notwithstanding Halper's and Kearney's denials that Kearney reported to Halper Gapik's March or April 1982 contacts with a Government "labor department" about breaks and "verbal harassment," and Halper's credible testimony that it was he alone who decided on Gapik's discharge, Respondent's brief states (Br. 29) that "Crest Mark knew of Mrs. Gapik's inquiries to the Department of Labor." Cf. *Jackson Sportswear Corp.*, 211 NLRB 891, 902 and cases cited in fn. 47 (1974). Because I see no reason to suppose that such inquiries had anything to do with her discharge, I need not and do not determine whether they were protected by Section 7. Citing, inter alia, *Meyers Industries*, 268 NLRB 493 (1984), Respondent alleges that they were not. Respondent has not addressed the question of whether her inquiries about breaks were afforded statutory protection, even though Kearney was not an employee within the meaning of Sec. 2(3), because he asked her to make such inquiries in order to obtain a lunchbreak for himself as well as her.

[31] Indeed, her testimony suggests that because she was the only full-time employee who knew how to close the July books for Respondent and Momence Packing, she would have remained on the job until she completed that task, which would have taken her until at least August 20.

NLRB 651 (1977).[32] I find that such relief would be appropriate if her discharge violated only Section 8(a)(1) of the Act. See the cases cited in *Parker-Robb*, supra, 262 NLRB at 403 fn. 7. Also, Respondent will be required to remove from its files any reference to Patricia Gapik's discharge, and notify her in writing that this has been done and that evidence of her unlawful discharge will not be used as a basis for future personnel action against her. *Sterling Sugars*, 261 NLRB 472 (1982).

In addition, Respondent will be required to post appropriate notices. Because some of Respondent's employees speak Spanish or Polish as a native language and understand little or no English, notices will be required in all three languages.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

The Respondent, Crest Mark Packing Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that if any of the active employees struck, Respondent would see to it that the employees on layoff status would stop receiving unemployment compensation.

(b) Telling employees that if the employees struck, Respondent would see to it that none of them ever worked in the meat industry again.

(c) Telling employees that Respondent has solicited other businesses not to hire Respondent's employees if they went on strike.

(d) Seeking to bargain directly with employees, at a time when Respondent is under a duty to bargain with a labor organization as the exclusive bargaining representative of such employees.

(e) Telling employees to engage, on Respondent's behalf, in the kind of conduct described in paragraph 1(d).

(f) Discharging personnel for refusing to commit unfair labor practices against employees.

(g) Discharging any employee, or otherwise discriminating against any employee with regard to his hire or tenure of employment or any other term or condition of employment, to discourage membership in the Beef & Sausage Makers Union Local 100-A of the United Food and Commercial Workers International Union, AFL-CIO, CLC, or any other labor organization.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Patricia Gapik reinstatement to the job that she was unlawfully deprived or, if such a job no longer exists, a substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of pay she may have suffered by reason of her unlawful discharge, in conformity with the remedy section of this decision.

(b) Remove from its files any reference to Patricia Gapik's unlawful discharge, and notify her in writing that this has been done and that evidence of that discharge will not be used as a basis for future personnel actions against her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Chicago, Illinois facility copies in English, Polish, and Spanish of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that paragraph V(b) of the complaint be dismissed.

[32] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT seek to bargain directly with employees, at a time when we are under a duty to bargain with a union as the exclusive bargaining representative of such employees.

WE WILL NOT tell employees to engage in such conduct on our behalf.

We will not tell employees that if any of the active employees strike, we will see to it that the employees on layoff status will stop receiving unemployment compensation.

WE WILL NOT tell employees that if the employees strike, we will see to it that none of them ever work in the meat industry again.

WE WILL NOT tell employees that we have solicited other businesses not to hire our employees if they go on strike.

WE WILL NOT discharge personnel for refusing to commit unfair labor practices against employees.

WE WILL NOT discharge any employee, or otherwise discriminate against any employee with regard to his hire or tenure of employment or any other term or condition of employment, to discourage membership in the Beef Boners & Sausage Makers Union Local 100–A of the United Food and Commercial Workers International Union, AFL–CIO, CLC, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Patricia Gapik reinstatement to the job of which she was unlawfully deprived or, if such a job no longer exists, a substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed; and make her whole, with interest, for any loss of pay she may have suffered by reason of her unlawful discharge.

WE WILL remove from our files any reference to her unlawful discharge, and notify her that this has been done and that evidence of that discharge will not be made a basis for future personnel actions against her.

CREST MARK PACKING CO.

A.M.A. Leasing, Ltd. *and* Beef Boners & Sausage Makers Union Local 100–A, United Food & Commercial Workers International Union, AFL–CIO, CLC *and* Production Workers Union of Chicago and Vicinity, Local 707, Party to the Contract

Production Workers Union of Chicago and Vicinity, Local 707 *and* Beef Boners & Sausage Makers Union Local 100–A, United Food & Commercial Workers International Union, AFL–CIO,CLC *and* A.M.A. Leasing Ltd., Party to the Contract. Cases 13–CA–24614, 13–CA–24734, 13–CB–10794, and 13–CB–10840

18 May 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 8 August 1986 Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent Union filed exceptions and a supporting brief, and the General Counsel filed limited exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

[1] The Respondent Union's request that the Board reverse the judge and grant the Respondent Employer's motion that the General Counsel submit exculpatory evidence to the judge is denied. See *Nueva Engineering*, 269 NLRB 999, 1005 (1984), enfd. 761 F.2d 961, 969 (4th Cir. 1985).

[2] The Respondent Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In par. 4 of his Conclusions of Law, the judge inadvertently stated that the Respondent Union violated Sec. 8(a)(2) of the Act, rather than Sec. 8(b)(2). We correct the error.

[4] In par. B,1(a) of his recommended Order, the judge recommended that the Respondent Union be ordered to cease accepting recognition from and executing a collective-bargaining agreement with the Respondent Employer when the Respondent Employer does not employ a representative number of its ultimate complement of unit employees and before it is engaged in normal business operations. In her exceptions, the General Counsel contends that the Respondent Union should be directed to cease and desist from accepting recognition as the exclusive collective-bargaining representative of any employees of the Respondent Employer unless and until it has been so certified by the Board. We agree and shall modify the Order accordingly.

The General Counsel also contends that the judge erred in failing to order the Respondent Union to disclaim recognition as the exclusive collective-bargaining representative of any employees of the Respondent Employer unless and until it has been so certified by the Board. We shall modify the judge's recommended Order to include such affirmative relief and shall issue a new notice to members.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Employer, A.M.A. Leasing Ltd., Bensenville and Chicago, Illinois, its officers, agents, successors, and assigns, and the Respondent Union, Production Workers Union of Chicago and Vicinity, Local 707, Chicago, Illinois, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph B,1(a).

"(a) Accepting recognition as the exclusive collective-bargaining representative of any employees of the Respondent Employer unless and until it has been so certified by the National Labor Relations Board."

2. Insert the following as paragraph B,2(b) and reletter the subsequent paragraphs.

"(b) Disclaim recognition as the exclusive collective-bargaining representative of any employees of the Respondent Employer unless and until it has been so certified by the National Labor Relations Board."3. Substitute the attached Appendix B for that of the administrative law judge.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT accept recognition as the exclusive collective-bargaining representative of any employees of A.M.A. Leasing, Ltd. unless and until we have been so certified by the National Labor Relations Board.

WE WILL NOT give effect to the 15 August 1984 collective-bargaining agreement between A.M.A. Leasing, Ltd. and us or to any extension, renewal, or modification thereof.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act except to the extent that such rights may be affected by an agreement, as authorized in Section 8(a)(3) of the Act.

WE WILL, jointly and severally with A.M.A. Leasing, Ltd., reimburse with interest all present and former employees of A.M.A. for all initiation fees and dues paid by them or withheld from them pursuant to the union-security clause and the dues-

checkoff clause of the 15 August 1984 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 707 before 15 August 1984.

WE WILL disclaim recognition as the exclusive collective-bargaining representative of any employees of A.M.A. Leasing, Ltd. unless and until we have been so certified by the National Labor Relations Board.

PRODUCTION WORKERS UNION OF CHICAGO AND VICINITY, LOCAL 707

Felicitas Berlanga and *Robert Bloch, Esqs.*, for the General Counsel.
Ramon Martinez, Esq. (Naphim, Barta & Cox), of Chicago, Illinois, for the Respondent Employer.
Cora Vaughn, Esq., of Gary, Indiana, for the Respondent Union.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried for 5 days in December 1985 and January 1986 in Chicago, Illinois. The complaint alleges that the Respondent Employer A.M.A. Leasing, Ltd. (AMA) and Respondent Union Production Workers Union of Chicago and Vicinity, Local 707 (Local 707, collectively the Respondents) violated the National Labor Relations Act. More specifically, the complaint alleges that AMA violated Section 8(a)(1) by preventing employees from engaging in union activities on behalf of Charging Party Union Beef Boners & Sausage Makers Union Local 100-A, United Food & Commercial Workers International Union, AFL-CIO-CLC (Local 100) and Section 8(b)(2) and (1) by rendering aid, assistance, and support to Local 707, by soliciting and distributing Local 707 authorization cards to employees, by permitting Local 707 agents to use its facility to solicit authorizations, and by deducting dues from employee wages and remitting them to Local 707 in the absence of employee authorizations. The complaint also alleges that AMA violated Section 8(a)(2) and (1) and Local 707 violated Section 8(b)(1)(A) when they agreed that AMA would recognize Local 707 and when they entered into a collective-bargaining agreement because, at those times, Local 707 did not have the support of an uncoerced majority of AMA employees and, alternatively, because AMA was not engaged in normal business operations and had not yet employed a substantial and representative complement of employees. Because the parties' collective-bargaining agreement contained a union-security clause requiring union membership after a certain date, the complaint also alleges that the Respondents violated Section 8(a)(3) and Section 8(b)(2) of the Act. The Respondents deny the substantive allegations of the complaint. I have received briefs from all the parties and a reply brief from the General Counsel. I have read and considered all the briefs.

On the entire record, including the testimony of the witnesses and my observation of their demeanor while testifying, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

AMA, an Illinois corporation with offices in Bensenville, Illinois, is engaged in the meat processing business at the so-called Donna Packing facility or plant at 225 North Green Street, Chicago, Illinois. During a representative 1-year period, AMA has, in the course of its business operations, performed services valued in excess of $50,000 for enterprises located outside the State of Illinois and performed services valued in excess of $50,000 for enterprises located within the State of Illinois, which are directly engaged in interstate commerce. Accordingly, I find that Respondent AMA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS

Respondent Local 707 and Charging Party Local 100 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

On 9 July 1984 AMA entered into an agreement with a wholly owned subsidiary of Dominick's Finer Foods, Inc. to provide an employee work force to break, cut, and process meat at a facility on 225 North Green Street, Chicago, Illinois, known as Donna's plant. Dominick's agreed to pay AMA an amount to cover employee wages, taxes, and fringe benefits, as well as a management fee and a service charge. The contract states that effective 1 August 1984, AMA is to be paid a service charge of $10 per week per employee. For any workweek in which 26 to 40 employees are actively at work, the service charge is set at $9 per employee and when more than 40 employees are working the service charge becomes $8 per employee. The contract, which specifically states that Dominick's is not to be considered the employer of these employees, continues in effect until 31 July 1987.

The facility manned by AMA is located in an area—the Fulton Street area of Chicago—which houses many meatpacking plants. Both Local 707 and Local 100 represent employees in these plants. It appears that these two unions actively compete for the representation of employees in the packing industry in this particular area. Donna's plant is located next door to a meatpacking house operated by a company called Nationwide. Until sometime in 1983 Nationwide also operated Donna's plant as a meat packing facility. Nationwide's employees were and are presently represented by Local 100.

One of Nationwide's employees and a Local 100 member, Tirbucio "Butch" Trevino, was hired by AMA in a supervisory position. His initial responsibilities included supervising the cleaning, painting, and refurbish-

ing of Donna's plant—which had been unused for about a year—in order to pass a United States Department of Agriculture (USDA) inspection and obtain a certificate to process meat. Trevino, who obtained a withdrawal card from Local 100, began hiring employees in late July 1984. According to Trevino, word of the reopening of Donna's plant was well known in the packinghouse area and he was able to hire applicants basically off the street.

By 30 July, Trevino had hired between 12 and 15 employees essentially to clean up the facility. The employees, most of whom had no meatcutting experience, were told they would have jobs after the plant became operational, that is, when meat arrived, but most were not told what particular job they would have. The employees continued to do essentially cleanup work until mid-September. On 14 September 1984 the USDA finally approved the facility for meat processing with an inauguration of service date of 17 September 1984.

On 30 July 1984 Local 707 Business Agent Al Polk approached Isaac Sanchez, who had been hired that day by AMA. Polk and Sanchez, who had formerly been a Local 707 steward at another packing plant,[1] met on the street outside Donna's plant. Polk asked Sanchez to sign a union authorization card and to help organize the AMA employees. Sanchez signed a card and agreed to help organize the employees. Polk signed up seven other employees at this time. Polk also gave some blank cards to Sanchez and another employee, Vince Gaglione. Sanchez testified that he "helped" several employees fill out their cards and returned them to Polk. Gaglione also solicited several employees who thereafter signed Local 707 authorization cards.

The record shows that for the pay period ending 4 August 1984, AMA employed 13 people, and for the pay period ending 11 August 1984, AMA employed 15 people. The record shows that 8 out of the 13 employees as of 4 August had signed union authorization cards and 10 of the 15 employees as of 11 August had signed cards.

However, out of the eight employees who signed cards as of 4 August, two, Depcik and Renteria, testified to circumstances which the General Counsel alleges call into question their authorizations. They both signed authorization cards on 30 July—their first day of work. They are still employed at AMA and they testified that Supervisor Butch Trevino told them to sign authorization cards for Local 707 and sent them to another portion of the plant where Al Polk was having employees sign cards. Although I believe Depcik and Renteria were honest witnesses striving to tell the truth, their testimony on this issue is not reliable. I believe they confused the signing of their authorization cards on 30 July with the subsequent signing of insurance cards, which contained a union membership and authorization statement. It is uncontested that many employees signed such insurance cards at the plant on 25 September 1984 and that Al Polk supervised the signing of cards at this time. Renteria testified that the Trevino instructions were given 2 or 3 weeks after he began working; obviously this could not have referred to his authorization card signing, which took place on his first day of work. Depcik testified that Polk, Sanchez, and another Spanish-speaking person from Local 707 had insurance cards spread on a table inside the facility. Clearly Depcik was likewise referring to the 25 September meeting when Local 707 officials were getting employees to sign insurance cards. In these circumstances, I cannot accept the testimony of Depcik and Renteria that Trevino directed them to sign union authorization cards on 30 July.

Two other employees—Gross and Vanisi—testified that, at various times in August 1984, Trevino actually distributed Local 707 authorization cards to employees and directed that they be signed. Gross testified that shortly after he began working at Donna's plant, Trevino gave him a Local 707 authorization card and asked him to sign it and return it to him. Trevino also said that Local 707 was going to be the union and that he should not talk to the people from Local 100. Gross also testified that he saw Trevino hand out cards to other employees. Vanisi testified that some time in August he asked Trevino for a Local 707 union authorization card because he thought an earlier one he had signed had been lost. Trevino gave him a blank card; Vanisi signed it and gave it back to Trevino. Two weeks later, Vanisi asked if he were in the Union because he noticed that no dues were being deducted from his pay. Trevino gave him another card and told him to give it back to him. Trevino denied having any conversation about unions with these employees or distributing union authorization cards.

Although the Respondents have strenuously attacked the credibility of Vanisi and Gross, I found these two witnesses believable in the essentials of their testimony. Their testimony was corroborative and survived vigorous cross-examination. Contrary to AMA's contention, there was no evidence elicited that they bore a grudge against AMA despite the fact that they were discharged before the hearing. Nor are their interests any more aligned with a party to this proceeding than is Trevino's interest. I have considered AMA's contention that Gross' pretrial affidavit did not contain certain of Trevino's remarks that Gross mentioned in his testimony. However, there was no material inconsistency shown between Gross' testimony and his pretrial affidavit. Gross candidly testified that he was not asked particular questions about Trevino's remarks by the Board investigators who took his affidavit. Vanisi also was questioned about his pretrial affidavit, but there was no showing of a material inconsistency between his testimony and his affidavit. Vanisi's authorization card, dated 6 August 1984, was received in evidence, but there was no evidence whether this was the card he first signed and believed was lost or a later one obtained from Trevino. Thus, his testimony about Trevino's activity is perfectly compatible with the rest of his testimony. AMA's suggestion that Vanisi and Gross may have been talking about dues-checkoff cards is unsupported by the evidence. Trevino was tightlipped about any union conversations that he may have had. He denied he had any union-related conversations with Vanisi and Gross. This not only undercuts AMA's sug-

[1] Actually, Sanchez had been a steward for Local 100, but the employees thereafter ousted Local 100 and replaced it with Local 707. Sanchez simply shifted union affiliation and retained his job as union steward.

gestion, but it also raises questions in my mind about Trevino's candor. I found Trevino a less impressive witness than Vanisi and Gross who clearly and firmly referred to union authorization cards in their testimony. In evaluating the testimony of all three witnesses—particularly their demeanor—I find that Trevino did indeed pass out Local 707 authorization cards. I also find that Trevino told Gross that Local 707 was the incumbent union and that Gross should not talk to representatives of other unions.

On some indeterminate date in August 1984, Local 100 Business Agent David Speciale, who serviced employees represented by Local 100 in the Fulton Street area, became aware that Donna's plant was gearing up for meatpacking. He had occasion to talk to employee David O'Keefe who was working outside the plant cleaning rails leading into the plant. Speciale was trying to interest O'Keefe in Local 100. Trevino approached them and told O'Keefe not to sign anything "unless I tell you to." O'Keefe continued working and did not speak to Speciale any further. The testimony of Speciale and O'Keefe was mutually corroborative, except that O'Keefe testified that Trevino also said that "everything was taken care of," a remark similar to that Trevino made to Gross. Trevino denied making the statements attributed to him. I credit Speciale and O'Keefe. Neither one's testimony was shaken on cross-examination and they both appeared to me to be honest and reliable witnesses.

On 31 July Local 707 sent a telegram to AMA requesting recognition. The telegram stated that if Local 707 did not receive a response by 3 August it would "exert economic pressure." On 1 August AMA responded by telegram denying the request unless Local 707 demonstrated majority status through "a card check by an independent third party." An undated agreement signed by a Local 707 representative and AMA Vice President Anthony Apa was received into evidence. It authorized the Illinois Department of Labor to conduct a card check of AMA employees as of 7 August 1984 in a specifically defined unit. The agreement provides that should the Department of Labor certify that Local 707 represented a majority of the employees, "AMA shall recognize the Union at once." The agreement continues as follows: "Both parties agree to be bound by the results of this card check, and it is agreed that this shall be the sole method utilized for resolving all questions concerning representation of the employees." The agreement contains an attached list that purports to be that of "AMA/Donna Authorization Cards." The list contains 12 names.[2]

On 7 August 1984 the Illinois State Department of Labor sent a letter to Local 707 and AMA stating that it had made a cross check of Local 707 authorization cards against AMA's current payroll and certifying Local 707 as the bargaining representative of the AMA employees. The letter stated that, of 16 eligible employees on the payroll as of 7 August, 12 had signed authorization cards for Local 707.[3]

Thereafter, Local 707 and AMA entered into negotiations and signed a collective-bargaining agreement, a copy of which was entered into evidence. Also, thereafter, Local 707 representatives met with employees at the plant, on one occasion to ratify the agreement, and on another to have them sign insurance cards and dues-checkoff authorizations. The General Counsel asserts that recognition was accorded on 7 August 1984 and the agreement was signed on 15 August 1984. The Respondents suggest that recognition was really accorded on 24 September 1984 and the agreement was signed on 8 October 1984. The General Counsel asserts that the ratification meeting was held the week before meat arrived at the plant and that both that meeting and the insurance and dues checkoff card meeting occurred after the contract was signed. The Respondents' theory is that there were two ratification meetings after meat arrived at the plant and that the insurance and dues-checkoff card meeting occurred 1 day after recognition and 2 weeks before the contract was signed. Based on my assessment of the documentary evidence, the plausibility of each position, and the reliability and demeanor of the witnesses on these issues, I agree with the General Counsel.

It is fairly clear that on 25 September 1984 representatives of Local 707 came to the plant to sign up employees for Local 707's insurance program. At this point, according to the Respondents' witnesses, the parties had agreed orally at least to the insurance provisions of a collective-bargaining agreement. Documentary evidence reveals that many employees signed such insurance cards on 25 September and that those cards also contained a provision for membership in Local 707, and authorization of Local 707 as bargaining representative. According to Polk, he also had some employees sign dues-checkoff authorization cards at this time, implying that a union-security and dues-checkoff agreement had also been concluded.

A number of employees testified credibly and in a way that was mutually corroborative that the week before meat arrived at the plant—which all parties agreed was 17 September 1984, Al Polk came to the plant to talk to employees to explain the contract he had negotiated with AMA. He asked for a show of hands to reflect acceptance of the contract and the employees in effect ratified the contract. The employees testified that Trevino asked them to attend the meeting, which was on worktime, and he was present during the entire meeting. One employee even testified that he was scheduled to begin work on Monday when the meat was to arrive, but he was called at home by Trevino and asked to attend this meeting. The employees had no prior knowledge of or imput in any negotiations and had no role in selecting Sanchez as their steward, a selection which was apparently made by Polk and announced to Trevino. Although these employees understandably were not consistent in all details,

[2] This apparently constituted the entire work force as of 7 August. Employees Gross, Lucente, and O'Keefe were placed on the payroll as of the week ending 11 August, but it is unclear when exactly they started work. The record reveals that Gross and Lucente signed authorization cards on 25 September. The record is unclear when O'Keefe signed an authorization card.

[3] The Department of Labor apparently counted Butch Trevino as one of the employees in the unit.

their testimony about the meeting was essentially credible and reliable.

In contrast, Polk and Sanchez testified that there were two ratification meetings at the plant, one in which the employees rejected a proposed contract and another in which the employees accepted the contract. Both Polk and Sanchez were vague both as to the [illegible] of these meetings and their contents, although presumably they meant to place the meetings after the 25 September meeting at which insurance cards and dues-checkoff authorizations were signed. Trevino testified to only one ratification meeting, which he placed in "around October." I reject the testimony of Trevino, Polk, and Sanchez to the extent that it conflicts with that of the employee witnesses. Significantly, the Respondents failed to call as witnesses on this point any employees other than Sanchez—who was, after all, a Local 707 steward. Not only was the testimony of Polk and Sanchez inconsistent with that of Trevino about the number of ratification meetings, but Sanchez was confused about whether the first ratification meeting was when "we were just starting" or, as he stated in response to a leading question, after the meat arrived. Thus, the Respondents' witnesses were not only vague but inconsistent. I do not accept their testimony on this point and I credit instead the mutually corroborative testimony of employee witnesses.

The testimony of Apa and Polk that recognition was not accorded to Local 707 until 24 September 1984 and that the collective-bargaining agreement was not signed until 8 October 1984 is not persuasive. Their testimony is basically that on 24 September—after an 11 September letter from Polk—Polk was forced to and did demonstrate a new majority as of that date, which Apa accepted. Polk then testified that the next day he went to the plant and had employees sign insurance cards, after obtaining Apa's permission to do so "to expedite our negotiations." Polk also had employees sign dues-checkoff authorization cards on that day. It is implausible that, after having agreed to recognize Local 707 if it demonstrated a card majority to the satisfaction of the Illinois Department of Labor, both Local 707 and AMA would have waited from 7 August to 24 September to effectuate recognition and to 8 October to sign an agreement. In early August, Local 707 had threatened economic action if AMA did not grant immediate recognition and AMA quickly agreed to abide by the card check. The Department of Labor quickly certified Local 707 and, in accordance, with the agreement of the parties recognition followed. The parties demonstrated such ardor when they became engaged and celebrated a wedding in early August that it is hard to believe that their relationship was unconsummated until late September or early October. Apa claims that the hiatus was occasioned by the fact that AMA's work force was expanding at this time and, as a result, he required a new majority showing. However, Apa's testimony in this respect is refuted by documentary evidence that shows no appreciable increase in employees during this period. The 20 September payroll records show the same 15 employees that appeared on the 16 August payroll.

My view is supported by other documentary evidence. Although the signature page of the collective-bargaining agreement entered into evidence was undated, the text states quite clearly that the agreement was "made and entered into this 15th day of August, 1984." In addition, another document entitled "Memorandum of Agreement," which was signed by representatives of Local 707 and AMA on 15 October 1984, states that the parties had "previously entered into a Collective Bargaining Agreement, dated August 15, 1984, covering the employees at the Donna Packing Facility." The purpose of the memorandum was to "reexecute the Collective Bargaining Agreement, because of the expansion of the unit, effective with the signature of the undersigned on this Agreement." Documentary evidence shows that the expansion of the unit occurred in late September and early October. This is consistent with the 15 October memorandum but inconsistent with Apa's testimony that such expansion occurred earlier and was the reason he did not abide by the 7 August certification. Indeed, Apa's denial that he accorded recognition to Local 707 on 7 August not only flies in the face of AMA's agreement with Local 707 and the Illinois Department of Labor but is refuted by Apa's own reliance on such recognition to fend off a subsequent demand for recognition by Local 100. Thus, as I discuss later in this decision, in a 21 November letter, Apa rejected Local 100's request for recognition by stating that Local 707 had been certified by the Illinois Department of Labor on 7 August 1984. A further example of Apa's unreliability as a witness was his reluctance to acknowledge the 21 November letter.

Polk's testimony is, of course, consistent with Apa's and fails for the same reason. In addition, I found quite significant an apparent slip of the tongue by Polk during his testimony. When he was asked by his counsel when the contract was signed, Polk responded, "About the 8 of August." When his counsel then asked, "August or October?", Polk obligingly responded, "I am sorry, October." I believe Polk was right the first time—the parties entered into the contract in early August. Polk's testimony is also difficult to reconcile with the uncontested fact that he went to the plant on 25 September 1985 to obtain insurance cards and dues-checkoff authorizations from employees. If recognition had been accorded the day before, as he testified, it seems highly unlikely that agreement on insurance and dues-checkoff would have been reached so quickly, particularly since, according to Polk, the contract itself was signed on 8 October. Indeed, it is much more likely that the insurance and dues-checkoff cards were signed, *after* a contract was entered into and *after* the ratification meeting. I also find it difficult to accept Polk's testimony that when he and Apa bargained on 24 and 25 September they exchanged written proposals. No written proposals were offered in evidence. If such written proposals existed, they undoubtedly would have been offered as they would have shed light on important contested issues in this case. Finally, in view of my rejection of the testimony of Apa and Polk, I place no reliance on two self-serving letters written by Polk—one to AMA dated 11 September and another to the Board's investigator—which allegedly support his position concerning the signing of the contract and granting of recognition.

The Respondents argue that the signed agreement simply was made effective or retroactive to 15 August to protect the employees' seniority. I disagree. If so, the contract would have specifically stated these facts and would have contained a date on the signature page, as the 15 October memorandum clearly does. Indeed, the only reference I could find in the bargaining agreement to retroactive pay was the following statement in the "wage scale" appendix that provided for wage rates as of 15 August for the years 1984, 1985, and 1986: "wages in all classifications shall be retroactive to August 7, 1984 for allemployees employed by AMA Leasing on that date."[4]

Local 707 also alleges that other facts support the Respondents' position: (1) AMA did not commence withholding dues from the wages of its employees until October; (2) a retroactive wage increase was put into effect in October; (3) employees were not enrolled in the insurance plan until 25 September; and (4) the contract was not ratified until September. Although some of these facts may tend to support the Respondents' position, they do not overcome the substantial evidence in support of the General Counsel's position. It is fairly clear that the Respondents did not have any need to implement their contract until the plant opened as a meatpacking facility. Since, at that point, the work force began to expand, it was natural that union representatives would wait until then to enter the plant to explain the contract and implement its terms. The Respondents could not, of course, have implemented the dues-checkoff provision until they obtained authorizations from employees; this took place on 25 September. In view of the contract provision for retroactive wage payments and the sketchy evidence about them in the record, it is difficult to see how the fact that these payments were made in October sheds any light on when the contract was signed. Moreover, the Respondents have not clearly or persuasively shown what kind of retroactive payments were made. Both the testimony and the payroll figures are confusing in this respect. Finally, the facts cited by Local 707 are in no way inconsistent with my findings and, indeed, do nothing to support or rehabilitate Apa and Polk whose testimony refutes the Respondents' position.

In accordance with my credibility determinations and the clear and objective documentary evidence, I find that AMA agreed to recognize Local 707 on 7 August 1984 and entered into a collective-bargaining agreement with Local 707 on 15 August 1984. I also find that Local 707 representatives had only one contract ratification meeting—shortly *before* the meat arrived at the plant, and that a second meeting between employees and union officials took place on 25 September 1984—*after* the meat arrived and *after* a contract was entered into, at which time insurance and dues-checkoff authorization cards were signed by employees.

The bargaining agreement between the parties contains the following union-security clause:

> Section 2—*Recognition of Union; Union Shop; Probation*
>
> (b) It shall be a condition of employment that all employees of Employer covered by this agreement who are members of the Union in good standing on the date on which this Agreement is signed shall remain members in good standing, and those who are not members on the date on which this Agreement is signed shall, on the thirtieth (30th) day following the date on which this agreement is signed, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after the date on which this Agreement is signed shall, on the thirty-first (31) day following the beginning of such employment, become and remain members in good standing in the Union.

The agreement also provides for the checkoff of union dues:

> Section 3—*Check-off*
>
> Whenever any employee covered by this Agreement has executed and delivered to his employer a written assignment for the deduction of Union dues and initiation fees by the Employer from that employee's wages, the Employer agrees to make such deduction and to send the Employer's check for the amount so deducted . . . .

On 25 October 1984, a number of employees met with Local 100 Business Agent Speciale across the street from Donna's plant where he was on a service call. The next day, employee James Anhock went to the Local 100 union hall and obtained a number of blank Local 100 authorization cards. There is no evidence concerning the solicitation of these cards, but it appears that some employees signed cards and gave their support to Local 100.

On 6 November 1984 Local 100, the Charging Party Union, requested recognition as bargaining agent of Respondent AMA's Donna's plant employees. On 21 November 1984 AMA responded, through its president, Michael P. Apa, stating that it was unable to recognize the Charging Party Union because Local 707 was "certified by the Illinois State Department of Labor as the bargaining agent for those employees on August 7, 1984."

B. *Discussion and Analysis*

1. Incidents of unlawful interference and assistance

I have found that AMA Supervisor "Butch" Trevino distributed authorization cards to employees and solicited them to sign such cards. This conduct constitutes unlawful interference with protected activities of employees and unlawful assistance to Local 707 in violation of Section 8(a)(2) and (1) of the Act. See *Mason City Dressed Beef*, 231 NLRB 735, 741, 749 (1977); *Hillside Bus Corp.*, 262 NLRB 1254, 1270 (1982). In addition, I have found that Trevino told two employees—Gross and O'Keefe—that Local 707 was the incumbent union and that they should not speak with representatives of Local 100. In

[4] The contract also provides that classification rates will be 50 cents below the contract rate for the first 30 days of employment and 25 cents below the contract rate from the 31st through the 90th day of employment.

one instance, Trevino interrupted a conversation between O'Keefe and a representative of the disfavored union. Such conduct constitutes both coercion and unlawful assistance. See *Southland Knitwear, Inc.*, 260 NLRB 642, 655–656 (1982).[5]

2. The alleged unlawful recognition and bargaining agreement

In accordance with my credibility determinations, I find that AMA accorded, and Local 707 accepted, recognition on 7 August 1984. The parties agreed that recognition would follow if the Illinois Department of Labor certified Local 707 as the majority representative as of that date. The Department of Labor did certify Local 707. There is no credible evidence—indeed no documentary evidence at all—that this agreement for recognition upon certification was rescinded or revoked. The parole evidence rule precludes any attempt to alter the plain and unambiguous agreement of the parties. See *Precision Anodizing & Plating*, 244 NLRB 846, 857 (1979). Indeed, AMA specifically relied on the 7 August certification by the Illinois State Department when it refused to recognize Local 100, a competing labor organization.

In addition, again having resolved conflicting evidence, I find that AMA and Local 707 entered into a collective-bargaining agreement on 15 August 1984. That agreement contained union-security and dues-checkoff provisions.

The remaining question to be resolved is whether, when recognition was granted and when agreement was reached, Local 707 had a valid majority. The General Counsel's rationale in support of the complaint allegation of unlawful recognition is twofold: First, the General Counsel contends that, on 7 August, Local 707's majority was invalid because it was coerced by AMA's unlawful conduct. Alternatively, the General Counsel asserts that recognition was improper because, at that time, AMA was not engaged in normal operations and did not employ a substantial and representative complement of employees.

Regarding the first theory, the General Counsel contends that Trevino's misconduct tainted Local 707's majority showing. I reject this contention. The evidence shows that Local 707 had signed authorizations from 8 of 13 employees as of 4 August and 10 of 15 employees as of 11 August. The Illinois Department of Labor found a clear majority as of 7 August 1984. The General Counsel's evidence identified only two employees as having received cards from Trevino. One, Vanisi, had previously signed a card distributed to him by a fellow employee which he feared had been lost. Union Business Agent Polk and two other employees had distributed cards. Thus, Trevino's card distribution was not shown to have affected Local 707's majority. Moreover, the General Counsel has failed to show that Trevino's statements to Gross and O'Keefe that there already was a union at the plant and that they should not talk to representatives of other unions took place before the 7 August 1984 certification by the Illinois Department of Labor or otherwise affected Local 707's majority as of that date. None of the General Counsel's other evidence, including use of the employer's facility and deduction of dues without authorizations, relates to Local 707's majority status as of 7 August. In these circumstances, I cannot find that Local 707's acknowledged majority status as of 7 August 1984 was coerced or tainted by unlawful employer assistance.[6]

The General Counsel, however, advances an alternative theory, namely, that on 7 August—when AMA recognized Local 707—and on 15 August—when it signed a contract with Local 707, it did so prematurely at a time when it was not engaged in normal operations and had not employed a substantial and representative complement of employees. I agree with the General Counsel's position and, on this theory, I find that there was no lawful authority for the parties to agree to recognition on 7 August 1984 and enter into a collective-bargaining agreement on 15 August 1984.

Hilton Inn Albany, 270 NLRB 1364, 1365 (1984), citing *Herman Bros.*, 264 NLRB 439 (1982) (emphasis added), the Board's test for determining whether allegedly premature recognition has been lawfully extended is

> . . . twofold. At the time of recognition (1) an employer must employ a substantial and representative complement of its projected work force, that is, the jobs or job classifications designated for the operation must be substantially filled *and* (2) the employer must be engaged in normal business operations.

The evidence here is overwhelming that until mid-September at the very earliest AMA was not engaged in normal business operations at Donna's facility. Many employees testified, in a mutually corroborative way, that they did cleanup, painting, and refurbishing work from late July until mid-September. The purpose of this cleanup work was to get the plant operational and ready to pass the USDA inspection. Most employees were not told what their jobs would be once the meat arrived. The meat arrived on 17 September—the date the USDA gave on its certificate as the inauguration date for meat processing. Several employees were specifically hired to report for work when the meat arrived. After the meat arrived, employees wore uniforms, including frocks, gloves, and hats, which they had not worn before. And

[5] The General Counsel's two other independent allegations of unlawful assistance—permitting Local 707 agents to use its facility and deducting dues from employee wages without proper authorization—turn essentially on whether the recognition and the bargaining agreement were proper. Because I find the recognition and the bargaining agreement improper, this conduct is likewise unlawful. However, I believe it is unnecessary to make specific findings or provide a specific remedy for this conduct because it is adequately encompassed by the findings and remedy relating to the unlawful recognition and the unlawful bargaining agreement.

[6] The General Counsel asserts, in her brief, that she "need not prove with mathematical certainty that the union lacked majority support at the time of recognition where there is evidence that the employer unlawfully assisted a union's organizational campaign," quoting from *Siro Security Service*, 247 NLRB 1266, 1271 (1960). However, the General Counsel failed to fully explicate the legal principle involved. In such cases, the trier of fact must assess the "totality of the circumstances" to determine "whether the employer's conduct was sufficiently pervasive to taint the union's majority status." And although the General Counsel's evidence may establish "a prima facie case of non-majority status," that evidence may be rebutted. Id. at 1272.

they no longer performed the kind of cleanup work they did before, although, of course, some did perform normal maintenance duties. Their jobs changed substantially to reflect the meat processing character of the plant. And there is no evidence that prior to 17 September the employees were specifically being trained for meat processing work. Indeed, they were paid substantially less in August than they were in October when the plant was fully operational. Thus, it is clear that until 17 September 1984 AMA was not engaged in normal business operations at Donna's plant.

Although the above finding that AMA was not engaged in normal business operations in August 1984 would alone establish a violation, the evidence also shows that the employee complement at Donna's facility in August 1984 fell far short of a substantial and representative complement. Thus, as of the payroll period ending 11 August, AMA had 15 employees in one job classification. By the payroll period ending 29 September 1984, AMA had 46 employees in three job classifications and by the payroll period ending 15 December 1984, AMA had 47 employees in four classifications. This is, of course, understandable because after the plant began operating as a meat processing facility, AMA began hiring more employees, as the record shows. Indeed, AMA's agreement with Dominick's contemplated that the work force would increase substantially since it provided for different forms of compensation when the work force reached employee levels of over 40. In these circumstances—as well as for other reasons based on the unreliability of his testimony, I reject Michael Apa's rather rambling, self-serving, and uncorroborated testimony that initially he only expected to employ 20, 25, or 30 people at Donna's facility. I find instead that the work force in early August was not a substantial and representative complement of employees.

The Respondents allege that AMA's early August work force would have satisfied the Board's *General Extrusion* rule, which is utilized in representation cases. I disagree. As the Board stated in *Ten Eyck*, supra, the Board looks for guidance in these types of cases to the standard in *General Extrusion Co.*, 121 NLRB 1165 (1958), which provides that an existing contract bars an election, if, compared to the hearing date, an employer employs 30-percent of its employees in 50 percent of the job classifications at the time the contract was signed. Here, AMA may have barely met the 30 percent figure on employees, but it did not meet the 50-percent job classification figure. In any event, as the Board indicated in *Ten Eyck*, the application of a mathematical formula on this issue is not conclusive. 270 NLRB at 1366. Here, the employees working in early August were classified as shipping and receiving personnel; yet, in fact, they were cleaning the plant to prepare it for meat processing. Thus, when the plant was fully operating, all four of the relevant job classifications, shipping and receiving, driving, breaking and wrapping, were ones that had not been in existence in early August.[7]

Accordingly, I find that by agreeing to recognize Local 707 on 7 August 1984, at a time when AMA was not engaged in normal business operations and did not employ a substantial and representative complement of employees, AMA violated Section 8(a)(2) and (1) of the Act. By demanding and accepting recognition under these circumstances, Local 707 violated Section 8(b)(1)(A) of the Act. In addition, by thereafter entering into a collective-bargaining agreement, AMA further violated Section 8(a)(2) and (1) of the Act and Local 707 further violated Section 8(b)(1)(A) of the Act. See *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961). Although I found that the parties entered into the agreement on 15 August 1984, this violation flows from the earlier unlawful recognition and would stand even if the Respondents had signed the agreement on 8 October 1984.[8] Finally, as the agreement contains union-security and dues checkoff provisions, AMA also violated Section 8(a)(3) and (1) of the Act and Local 707 violated Section 8(b)(2). See *Ten Eyck Hotel*, supra.

CONCLUSIONS OF LAW

1. By distributing union authorization cards to employees, soliciting them to sign union authorization cards, and by preventing employees from speaking with representatives of particular unions, Respondent AMA violated Section 8(a)(2) and (1) of the Act.

2. By recognizing Respondent Local 707 on 7 August 1984 as the exclusive bargaining representative of its employees and by executing and maintaining a collective-bargaining agreement with Local 707 on and after 15 August 1984, Respondent AMA has unlawfully assisted and supported Local 707 and has thereby violated Section 8(a)(2) and (1) of the Act.

---

[7] The Respondents also assert that their contrary position is supported by *Klein's Golden Manor*, 214 NLRB 807 (1974), and *California Labor Industries*, 249 NLRB 600 (1980). I disagree. Unlike here, in *Klein's*, the employer's original work force constituted more than 50 percent of its ultimate complement and its job categories "covered substantially all of the job classification at the [facility] when it was in full operation." Id. at 815–816. Likewise, in *California Labor Industries* supra, a representation case, the evidence showed, unlike here, that over half of the job classifications were filled at the time the contract was signed. Moreover, although in *Klein's* there is little discussion of the employer having engaged in normal business operations at the time of recognition, it is clear that the Board viewed the work in preparation for the opening of the nursing home involved in that case as essentially the same as the work after it opened its doors to patients. 214 NLRB at 809. The same cannot be said for the work of the employees in this case. In any event, it is clear, under *Ten Eyck*, that both the tests for lawful recognition must be met. Here neither were met.

[8] To the extent that the Respondents assert that—even if recognition on 7 and 15 August was premature, a subsequently obtained majority justified a subsequently reaffirmed contract, I reject this assertion. The violation flowing from premature recognition is not cured unless it is fully remedied. See *Ladies Garment Workers v. NLRB*, supra, 366 U.S. at 736, in which the Supreme Court stated:

> [W]e reject as without relevance . . . that, as of the execution date of the formal agreement . . . [the union] represented a majority of the employees. As the Court of Appeals indicated, the recognition of the minority union . . . was "a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative." . . . It is, therefore, of no consequence that [the union] may have acquired by [the formal date of the agreement] the necessary majority if, during the interim, it was acting unlawfully. Indeed, such acquisition of majority status itself might indicate that the recognition secured by the . . . agreement afforded [the union] a deceptive cloak of authority with which to persuasively elicit additional employee support.

3. By accepting recognition as the exclusive bargaining representative of Respondent AMA's employees and by executing and maintaining the 15 August 1984 collective-bargaining agreement between it and AMA, Respondent Local 707 has restrained and coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act.

4. By maintaining and enforcing the union-security and dues-checkoff provisions of the 15 August 1984 collective-bargaining agreement, Respondent AMA has violated Section 8(a)(3) of the Act and Respondent Local 707 has violated Section 8(a)(2) of the Act.

5. The violations set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondents have not otherwise violated the Act.

THE REMEDY

Having found that AMA has violated Section 8(a)(1), (2), and (3) of the Act and that Local 707 has violated Section 8(b)(1)(A) and (2), I shall order each to cease and desist from the unlawful conduct and to take certain affirmative actions to effectuate the policies of the Act.

AMA will be ordered to withdraw recognition from Local 707 and the latter will be ordered to cease accepting recognition from the former unless certified by the Board. Both the Respondents will be ordered to cease giving effect to their 15 August 1984 collective-bargaining agreement, including all renewals, extensions, and modifications, and to cancel it entirely. AMA and Local 707 will also be ordered to jointly and severally reimburse, with interest, all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the union-security and dues-checkoff provisions of the 15 August 1984 collective-bargaining agreement. However, reimbursement shall not extend to those employees who voluntarily joined and became members of Local 707 prior to 15 August 1984.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

A. The Respondent, A.M.A. Leasing, Ltd., Bensenville and Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Distributing union authorization cards to employees, soliciting them to sign union authorization cards, and preventing employees from speaking with representatives of particular unions.

(b) Recognizing Local 707 as the exclusive representative of its employees for the purpose of collective bargaining unless and until it is certified by the Board as the collective-bargaining representative of such employees pursuant to Section 9(c) of the Act.

(c) Maintaining or giving any effect to the collective-bargaining agreement between AMA and Local 707 entered into 15 August 1984, or any renewal, extension, or modification thereof unless and until Local 707 is certified by the Board as the collective-bargaining representative of such employees; provided, however, that nothing in this Order shall authorize or require any changes in wages or other terms and conditions of employment that may have been established pursuant to the collective-bargaining agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 707 as the exclusive collective-bargaining representative of its employees unless and until it has been duly certified by the Board as the exclusive representative of such employees.

(b) Jointly and severally with Local 707 reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues-checkoff and union-security clauses of the 15 August 1984 collective-bargaining agreement. However, reimbursement does not extend to those employees who voluntarily joined and became members of Local 707 prior to 15 August 1984.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of reimbursement due under the terms of this Order.

(d) Post at its Donna facility copies of the attached notice marked "Appendix A."[10] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the authorized representative of AMA, shall be posted by AMA immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by AMA to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondent, Production Workers union of Chicago and Vicinity, Local 707, Chicago, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting recognition from and executing a collective-bargaining agreement with it when AMA does not

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employ a representative number of its ultimate complement of unit employees and before it is engaged in normal business operations.

(b) Giving effect to the 15 August 1984 collective-bargaining agreement between the Respondent AMA and Respondent Local 707 or to any extension, renewal, or modification thereof.

(c) In any like or related manner restraining with or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with AMA reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues-checkoff and union-security clauses of the 15 August 1984 collective-bargaining agreement. However, reimbursement does not extend to those employees who voluntarily joined and became members of Local 707 prior to 15 August 1984.

(b) Post at its business office and other places where notices to its members are customarily posted copies of the attached notice marked "Appendix B."[11] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative of Local 707, shall be posted by Local 707 the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Furnish the Regional Director with signed copies of the notice for posting by AMA at its Donna plant where notices to all employees are customarily posted. Copies of the notice, to be furnished by the Regional Director, shall be signed and forthwith returned to the Regional Director.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT distribute union authorization cards to employees, solicit them to sign union authorization cards, or tell them that they cannot speak to representatives of particular unions.

WE WILL NOT recognize or contract with Production Workers Union of Chicago and Vicinity, Local 707 as the bargaining representative of our employees until it has been certified as such representative by the National Labor Relations Board.

WE WILL NOT maintain or give effect to our 15 August 1984 contract with Local 707 or to any renewal, extension, or modification thereof but we are not authorized or required to withdraw or eliminate any wage rates or other benefits, terms, and conditions of employment that we have given to our employees under the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Local 707 as the collective-bargaining representative of our employees.

WE WILL, jointly and severally with Local 707, reimburse with interest all our present and former employees for all initiation fes and dues paid by them or withheld from them pursuant to the union-security clause and the dues-checkoff clause of the 15 August 1984 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 707 before 15 August 1984.

A.M.A. LEASING, LTD.

[11] See fn. 10, supra.

Mission Industries *and* Ralph Barbosa, Petitioner *and* International Union of Operating Engineers, Local 501, AFL–CIO. Case 31–RD–1032

18 May 1987

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 24 October 1986 and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the Regional Director's findings and recommendations only to the extent that they are consistent with this decision.[1]

Pursuant to a Stipulation for Certification Upon Consent Election, a secret mail ballot election was conducted on 24 October 1986. A ballot was mailed to each of 31 eligible voters, whose names and addresses were provided by the Employer. Twenty-eight ballots were returned. The tally of ballots shows 14 for and 13 against the Union, with 1 ballot declared void and none challenged. The Employer alleged in its Objections 1 and 2 that the voided ballot should be opened and counted (Objection 1) or, in the alternative, that the Board, through its agents, should have challenged the ballot rather than consider it void (Objection 2). The Union has excepted to the Regional Director's recommendation that the Employer's Objections 1 and 2 be sustained. We find merit in the Union's exceptions.

The mail ballot in question arrived at the Regional Office enclosed in the appropriate official envelope. The identification stub of the mail ballot envelope, however, was missing. This identification stub would have exhibited both the signature of the voter and a "key number" matching the particular ballot to that voter on the eligibility list. Although the main portion of the disputed mail ballot envelope was postmarked in Santa Barbara, California, the Board agent was unable to identify its source as an eligible voter and thus voided the ballot.

After the election, the Employer interviewed the only four eligible voters whose names were not checked on the eligibility list as having voted. Each of these individuals signed statements, which the Employer submitted to the Regional Director in support of its objections. Only one of the four eligible voters interviewed attested to having mailed his ballot, with the identification stub attached and signed, from Santa Barbara.[2]

The Regional Director determined that these affidavits and the Santa Barbara postmark were sufficient to establish positively that the eligible voter who claimed to have mailed his ballot from Santa Barbara was the source of the ballot in question. Therefore, the Regional Director recommended that the ballot previously declared void be opened and counted and that a revised tally be issued.

The Union has excepted to the Regional Director's recommendation with respect to the Employer's Objections 1 and 2. The Union contends, inter alia, that the envelope identification stubs are necessary to ensure that only eligible voters participate in the election. We agree with this contention. As noted in *Brink's Armored Car*, 278 NLRB 141 (1986), mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections, due to the absence of direct Board supervision over the employees' voting. Accordingly, the Board has adopted mail ballot election procedures, including the use of an identification stub, designed to preserve the integrity of the election process and to ensure that no reasonable doubt is raised about the fairness or validity of that process. The absence of an identification stub, in itself, raises a reasonable doubt concerning whether only eligible voters participated in the election and whether each of those eligible voters cast only one ballot. See *Northwest Packing Co.*, 65 NLRB 890 (1946). We further find that permitting inquiry into the source of a mail ballot without an identification stub would greatly increase the potential for confusion and coercion and that such inquiries are not likely to dispel the reasonable doubt concerning the validity of such ballots.[3] Accordingly, we con-

[1] In the absence of exceptions, we adopt, pro forma, the Regional Director's recommendation that the Employer's Objections 3, 4, and 5 be overruled.

[2] The ballot declared void by the Board agent conducting the election has been retained in an official Board envelope and secured at the Regional Office. The Regional Director designated the four eligible voters whose names had not been checked off on the eligibility list as having voted as Employees A through D. Employee A indicated that he signed the identification stub of his mail ballot envelope and watched his wife deposit it in a Santa Barbara mailbox. Employee A's wife also provided a statement corroborating Employee A's account. Employees B and C claimed that they mailed their ballots from locations other than Santa Barbara. These ballots were not received by the Regional Office. Employee D, who resides in Santa Barbara, maintained that he never recieved a ballot from the Regional Office and, therefore, he did not vote. No party has excepted to the Regional Director's findings that the apparent failure of the Regional Office to receive the ballots of Employees B and C, as well as Employee D's apparent nonreceipt of a ballot, did not warrant setting aside the election.

[3] Moreover, even assuming inquiry into the source of the presently disputed ballot would be appropriate, which we decline to do for the policy reasons set forth above, we would find that the Santa Barbara postmark on the mail ballot envelope and the employee affidavits would not be sufficient evidence to establish positively the identity of the voter.

clude, contrary to the Regional Director, that the mail ballot in issue should remain void. We therefore overrule the Employer's Objections 1 and 2 and find that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Union of Operating Engineers, Local 501, AFL–CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All engineers and automotive repairmen employed by Mission Industries at its facilities located in Bakersfield, Eureka, Fresno, Lancaster, Morro Bay, Oceanside, Oxnard, Pacific Grove, Sacramento, Salinas, Santa Barbara, Santa Cruz, Santa Maria, Turlock, Ventura and Victorville, California.

Excluded: Office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

The Dickinson-Iron Community Action Agency; Dickinson-Iron Alternative Fuel Energy Corporation; Eagle Fiber Fuels Manufacturing, Inc. *and* Thomas Barnhart. Case 30–CA–9222

18 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 12 February 1987 Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions and a supporting brief and a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dickinson-Iron Community Action Agency; Dickinson-Iron Alternative Fuel Energy Corporation; Eagle Fiber Fuels Manufacturing Inc., Iron River, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN DOTSON, dissenting.

In accordance with the policy set forth in *Ming Quong Children's Center*, 210 NLRB 899 (1974), I would decline to assert jurisdiction in this case and would dismiss the complaint.[1] The Respondent is a nonprofit institution engaged in providing social services such as the weatherization of homes of low income and elderly individuals pursuant to grants from Federal, state, and regional governments. Thus, in the absence of evidence that this Company has a substantial impact on interstate commerce, I would decline to exercise jurisdiction over any labor dispute involving this Employer.

Benjamin Madelman, Esq., for the General Counsel.
Vincent R. Petrucelli, Esq. (Petrucelli & Hopkins, P.C.), of Iron River and Hopkins, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard on 15, 16, and 17 October 1986 in Iron Mountain, Michigan, based on an unfair labor practice charge filed by Thomas Barnhart, an individual, on 20 May 1986, and a complaint issued by the Regional Director for Region 30 of the National Labor Relations Board (the Board), on 29 July 1986, as amended on 5 August 1986.[1] The complaint alleges that The Dickinson-Iron Community Action Agency; Dickinson-Iron Alternative Fuel Energy Corporation; and Eagle Fiber Fuels Manufacturing, Inc. (Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act), by discharging employees who had engaged in a concerted work stoppage. Respondent's timely filed answer denies the commission of any unfair labor practices.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

The Dickinson-Iron Community Action Agency (DICAA) is a Michigan not-for-profit corporation with an office and place of business in Iron River, Michigan, where it is engaged in providing social services, including the weatherization of homes of low income and elderly individuals, pursuant to grants from state, Federal, and regional governments. During 1985, its funding from these sources approximated $1,250,000 of which about $250,000 was expended by its weatherization program. During the same time period, DICAA received funds in excess of $50,000 directly from sources outside the State of Michigan and purchased goods and materials valued in excess of $50,000 directly from sources similarly located outside the State of Michigan.

Respondent denied that DICAA (and the business allegedly affiliated with it as a single employer) was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent contended first that the dollar volume of business engaged in by DICAA was insufficient for the assertion of the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel excepts to the judge's recommended Order to the extent that it does not include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

[1] See my dissenting opinions in *Alan Short Center*, 267 NLRB 886 (1983); and *Salvation Army of Massachusetts*, 271 NLRB 195 (1984).

[1] All dates hereinafter are in 1986 unless otherwise specified.

Board's jurisdiction; it subsequently asserted that jurisdiction should not be taken because of DICAA's nonprofit governmental status. Respondent's contentions with respect to jurisdiction are without merit. In *St. Aloysius Home*, 224 NLRB 1344 (1976), the Board (Chairman Murphy and Member Penello dissenting) abandoned its earlier rule in which it had declined to assert jurisdiction over charitable nonprofit institutions (see *Ming Quong Children's Center*, 210 NLRB 899 (1974)) and asserted jurisdiction, applying the jurisdictional standards that would be applied to commercial enterprises of the same nature. For nonretail enterprises such as DICAA, the Board's jurisdictional standard requires only $50,000 in direct and indirect outflow or inflow of goods or materials. *Siemons Mailing Service*, 122 NLRB 81 (1958). Respondent clearly meets this dollar volume standard.

With respect to Respondent's second jurisdictional contention, the Board, in *Rustman Bus Co.*, 282 NLRB 152 (1986), recently reaffirmed its assertion of jurisdiction over entities providing service to exempt governmental entitles. The basic test for determining whether the assertion of jurisdiction over such an employer is waranted is whether the employer retains broad discretion and control over its day-to-day labor ralations policies and practices and is capable of effective bargaining with a representative of its employees. See *National Transportation Service*, 240 NLRB 565 (1979). The Board also examines the scope and degree of control, if any, exercised by the exempt entity over the employer's labor ralations. See *Res-Care, Inc.*, 280 NLRB 670 (1986) (Member Stephens concurring and dissenting). The Board has rejected the "intimate connection" standard under which jurisdiction was withheld if the private employer performed functions that were intimately related to traditional government functions of the exempt entity. See, e.g., *Rural Fire Protection Co.*, 216 NLRB 584 (1975). In the instant case, the board of DICAA and its executive director hire the employees, determine the wages and benefits to be paid, and set all labor relations policies. There is no record evidence concerning any control over "essential terms and conditions of employment" by any of the governmental agencies that fund DICAA's operations.

I find that DICAA retains broad, indeed complete, discretion and control over the day-to-day labor relations policies and practices applicable to its employees. It is, therefore, completely capable of effective bargaining with any representative the employees might select. I further find that DICAA meets the jurisdictional standards that would be applied to a commercial enterprise of a similar nature. Accordingly, I find that DICAA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Dickinson-Iron alternative Fuel Energy Corporation (AFE) is a Michigan for-profit corporation with an office and place of business in Iron River, Michigan, where it is engaged in the sale and distribution of fuel and the installation of wood burning furnaces. The record reflects that Eagle Fiber Fuels Manufacturing, Inc. (Eagle) is a Michigan for-profit corporation with its office and place of business in Iron River, Michigan, where it is, or had been, engaged in the manufacture and sale of wool burning furnaces. DICAA wholly owns AFE and is the majority stockholder in Eagle. AFE and Eagle were created, in part, to bring money into DICAA. All three are located at the same address and DICAA's executive director, Daniel Bonetti, is the incorporator of both AFE and Eagle; he is currently president of Eagle. AFE and Eagle operate out of the Angeli-Jacobetti Center (the A-J Center) which is owned by DICAA and operated as an industrial incubator center, providing low-rent facilities and other services to new business ventures. Bonetti acknowledged that he endeavored to make AFE a successful business operation on behalf of its owner, but denied that he oversaw its operations.[2] Bonetti hired AFE's general manager, Thomas Barnhart[3] and, after Barnhart's discharge, hired his replacement. Bonetti also negotiated Barnhart's wage rate with him. AFE leases space from DICAA in the A-J Center at a nominal rent and similarly rents some equipment from DICAA. DICAA maintains AFE's books and all of AFE's checks are signed by Bonetti and the DICAA treasurer.

Eagle built burning furnaces, identical to those manufactured by AFE, at the A-J Center, and when Eagle sold furnaces, installation was performed either by the purchaser or by AFE. Eagle, it appears, has not been a functioning business entity since approximately December 1985.

The complaint alleges that DICAA, AFE, and Eagle are affiliated businesses to the extent that they comprise a single-integrated enterprise and a single employer within the meaning of the Act. Respondent denied that allegation, but I find that the facts, as set forth above, fully support it. In *Truck & Dock Services*, 272 NLRB 592 fn. 2 (1984), the Board concisely summarized Board and court law with respect to single-employer status, as follows:

> To determine weather two entities are sufficiently integrated so that they may fairly be treated as a single employer, the Board and the courts examine four principal factors: (1) common management; (2) centralized control of labor relations; (3) interrelation of operations; and (4) common ownership. *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982); *Shellmaker, Inc.*, 265 NLRB 749, 754 (1982). While none of these factors, viewed separately, has been held controlling, the Board has stressed the first three factors, particularly centralized control of labor relations. *Parklane Hosiery Co.*, 203 NLRB 597, 612 (1973). Single-employer status depends on all of the circumstances and has been characterized as an absence of an "arms length relationship . . . among unintegrated companies." *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980).

---

[2] In his affidavit, he had acknowledged "informally" overseeing those operations in order "to protect DICAA as shareholder."

[3] The Charging Party herein.

All the foregoing factors are satisfied here. DICAA owns all or nearly all the stock in both corporations, Bonetti and the DICAA board exercise substantial managerial control over both, the operations of AFE and Eagle were closely interwined regarding functions and location, and both fit into the operations of the DICAA weatherization program. Employees are interchanged regularly between all three entities. AFE and Eagle are, to all intents and purposes, mere operating arms of DICAA, established, at least in part, to bring revenue into the programs of DICAA. Accordingly, I find that DICAA, AFE, and (to the extent that it is still a functioning enterprise) Eagle constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

The employees of DICAA and AFE are not represented by any labor organization and there is no labor organization involvement in any of the following facts.

II. SUPERVISORY STATUS

A. *General Discussion—Bonetti's Role*

The complaint alleges that Respondent discharged eight individuals, Edwin Yackel, Francis Arvidson, Duane Juneau, Robert Kenny, Richard Makela, Martin Sheffer, Danny Thurston, and William Weier because of their concerted protected activities.[4] Respondent contends that Yackel, Juneau, Arvidson, Sheffer, Kenny, and Thurston were staturoty supervisors, not entitled to the protections of the Act. At various points, Respondent's executive director, Bonetti, also referred to Makela and Weier as independent contractors, at least implicitly asserting that they were not employees covered by the statute.[5]

Respondent DICAA is organized, pursuant to the Economic Opportunities Act of 1964, with a board of governors appointed by elected officials, representatives of the poor, and other interest groups. That board determines the rates of pay, fringe benefits, personnel policies, and other terms and conditions of employment of the Agency's employees. DICAA is managed on a day-to-day basis by Bonetti and his assistant, Judy Tefft. DICAA's personnel policies give Bonetti final say in hiring and firing, subject to review by the personnel board. According to those policies, he appoints all staff members and makes all promotions. Bonetti, however, testified that potiential employees, responding to advertisements, would be interviewed by the immediate job supervisors, crew chiefs, or foremen, and he would only review their recommendations in a manner he characterized as "perfunctory." He would "normally" accept the recommendations, but sometimes reject them if there was sufficient cause or reason. He denied that he interviewed employees for the weatherization program. Similarly, he sometimes transferred employees between the DICAA weatherization program and AFE but, he testified, such transfers were more often made by Barnhart, Yackel, or Juneau.[6] Bonetti clearly had, and exercised, the authority to discharge employees. He personally made the decision to terminate the individuals involved in this proceeding. His role, in both hiring and firing, was more than perfunctory, even according to his own testimony.

According to Respondent's table of organization, immediately below the assistant director were the weatherization department coordinator and automotive shop foreman. The former position was allegedly filed on a part-time basis by Ed Yackel. The person designated as auto shop foreman was Robert Kenny. Below Yackel was Duane Juneau, Iron County foreman for weatherization, and he allegedly had Crew Chiefs Francis Arvidson and Martin Sheffer reporting to him. Reporting to Auto Shop Foreman Kenny, according to the table of organization, was Dan Thurston, alleged to be an assistant foreman. The specific evidence with respect to the supervisory status of each of these employees will be discussed hereafter. According to Respondent, the only nonsupervisory persons on its payroll in the weatherization department were Makela and Weier, both of whom it referred to as independent contractors.

In addition to the foregoing individuals, Respondent's work was accomplished through the use of general assistance workers or GAs furnished by the Michigan Department of Welfare and, on occasion, individuals referred to Respondent by the courts under offender programs, by CETA (Comprehensive Employment Training Act) and by Youth Experience Programs. According to Bonetti, Respondent had a contract with the Michigan Department of Welfare to provide a worksite, supervision, materials, tools, equipment, and timekeeping for the GAs. They did not fill out employment applications or other paperwork for Respondent and, other than possibly being covered by Respondent's unemployment compensation insurance, they received no benefits or wages for the time spent working on Respondent's projects. They were generally untrained and unskilled labor and were assigned to work under the crew chiefs, in weatherization, the automotive shop or other DICAA projects. On the average, according to Bonetti, there were between 7 and 20 GAs assigned to Respondent's weatherization program at any one time; approximately 300 GAs have put in time working for DICAA over the last 3 years.

[4] The unfair labor practice charge was filed by Thomas Barnhart and similarly alleged his discharge. The investagation revealed that he was a statutory supervisor and, accordingly, the complaint did not allege his discharge was violative.

[5] The General Counsel contends that Respondent has taken shifting and inconsistent positions with respect to the status of these individuals. Thus, in Respondent's counsel position letter to the Board of 10 June, it was asserted that Yackel as Energy coordinator was a statutory supervisor, while Juneau, Kenney, Sheffer, Arvidson, and Thurston "were classified as Energy program workers . . . general laborers." Weier and Makela, it was contended, were independent contractors, not employees. On 3 July, Bonetti gave an affidavit to the Board in which he asserted that Juneau, Sheffer, Arvidson, and Kenny had supervisory authority as crew chiefs. Thereafter, however, in a meeting of Respondent's board on 21 August, Bonetti presented in update on the Board proceedings, reasserting Respondent's contentions that Yackel and Juneau were supervisors, but not claiming that Sheffer, Arvidson, Kenny, or Thurston were or that makela and Weier were independent contractors. It is clear from the differences in positions stated that Bonetti was not merely reading that attorney's position letter to the Board. Respondent's prior statements are properly considered here as admissions against interest. See *Liberty Cleaners*, 227 NLRB 1296 (1977).

[6] As will be seen, infra, the individuals alleged to be supervisors contradicted Bonetti's testimony concerning their authority.

According to Bonetti, because Respondent could not promote or grant raises to the GAs, it could "fire" them or give them written warnings with copies sent to the Department of Welfare. No such warnings were proffered as evidence in this proceeding. Nor was there any evidence of instances where GAs were "fired." The giving of such warnings, he claimed, might affect whether Respondent would subsequently hire these individuals as its own employees if and when job opportunities arose. Respondent could not independently deny these individuals their welfare payments, but, according to Bonetti, the crew chiefs could send them home if they refused to work and that might cause them to lose their welfare. Arvidson testified that although he did not have GAs working under him on a daily basis, they were assigned to him regularly, and he told them what to do. He directed their work and, if they failed to do as directed, he repeated his directions. He said generally they came and put in their 8 hours. Kenny also had GAs working under him; he testified that he was never told what he could do if they failed to do their work. Frequently, he stated, they did not show up for work and nothing adverse happened to them. Kenny said that if they failed to do their work, he could report them to Foreman Juneau.

Bonetti met and gave directions to all the employees virtually every morning. On a daily basis, employees and general assistance workers were assigned to weatherization or AFE by Bonetti and it was generally Bonetti who told the crews what projects they would be working on. If employees and general assistance workers were not assigned by Bonetti to special projects, Iron County Foreman Juneau would assign them to the crew leaders for weatherization work.

B. *Evidence Regarding Specific Individuals*

1. Edwin Yackel—weatherization coordinator

Yackel was employed by Respondent for approximately 9 years. For the period that ended in 1983, he was the Iron County foreman for DICAA's weatherization department. In 1983, Yackel was transferred to AFE where he delivered fuel and installed furnaces. In early 1986, AFE ran out of funds and Bonetti laid AFE's employees off. Yackel and some others continued working although they drew no wages. About 1 February, Bonetti asked Yackel whether he would serve as weatherization coordinator on a part-time basis, explaining that this would provide a means in which Yackel's hourly wage could be paid. Yackel agreed and from that time forward he received half of his weekly earnings from DICAA and the other half from AFE. His wage, $6.30 per hour, was unchanged from that which had been paid him both as Iron County foreman and AFE employee.

The position of weatherization department coordinator had been unfilled between 6 and 8 months prior to Yackel's designation. After his designation, Yackel's duties changed very little. He continued to spend upwards of 90 percent of his time delivering fuel and installing furnances for AFE. His duties with respect to the weatherzation department consisted of passing on material requests from Juneau to Bonetti and Tefft and signing such forms as timesheets and leave requests. His signature, it appeared, carried little weight; overtime payments that he "approved" were disallowed by Tefft or Bonetti even though the employees had worked the overtime hours. Although he signed leave requests, he never denied an employee time off and did not believe that he had the authority to do so. The employees did not report to him if they were going to be absent. Yackel credibly denied that he was told what his authority, duties, and responsibilities would be when he was given the title of weatherization coordinator. He specifically denied being told that he had the authority to hire, fire, promote, grant wage increases to, discipline, or transfer employees and, between his appointment and his discharge, Yackel never exercised any of these functions. He did not interview employees for hire or make recommendations concerning anyone's hiring. Bonetti never asked him for recommendations on personnel actions concerning weatherization department employees. Employee William Weier was hired during this period; Weier was interviewed by Bonetti.

Although Yackel was allegedly the weatherization coordinator for both counties, he never talked with the Dickinson County foreman. He denied that he directed the flow of work or inspected the work done by employees in the weatherization department. According to Martin Sheffer, it was not Yackel who would inspect the homes and determine what work had to be done, but Juneau. Yackel did not assign work or make up the crews. Either Sheffer or Arvidson would pick up the files themselves or Juneau would tell them which houses to work on. During his brief tenure as weatherization coordinator, Yackel made one report to the DICAA Board, detailing the progress made by that department during a 2-month period.[7]

2. Duane Juneau—Iron County foreman

DICAA employs a separate weatherization foreman for each of the counties it covers; the Iron County foreman was Duane Juneau. Juneau had started working for Respondent as a laborer in the spring of 1984 and continued in the capacity until laid off in February 1985. He was hired back as a crew leader in October 1985. In December of that year, Bonetti called crew leaders Sheffer, Arvidson, and Juneau to a meeting and suggested that as there was then no Iron County foreman they should decide among themselves who would be foreman. Arvid-

[7] Bonetti and Tefft deny that Yackel was appointed weatherization coordinator solely for budgetary considerations. They contend that his appointment was real, that he spent 50 percent of his time performing the duties of weatherization coordinator, which duties included the inspection of homes before and after the weatherization work was completed and the supervision of the employees within that department. Specifically, Bonetti claimed that he told Yackel that he possessed the full range of supervisory authorities. As between Bonetti and Tefft on the one hand, and Yackel, and Juneau and Kenny who corroborate his testimony, on the other hand, I find Yackel, Juneau, and Kenny to have been the more convincing witnesses. In addition to my observations of their comparative demeanors, I note Respondent's shifting and inconsistent positions. I further note that Bonetti was a frequently vague or evasive witness given to making broad, unresponsive, and self-serving statements. His repeated use of stock phrases concerning the authority of the various individuals was unconvincing.

son was the most senior of the three, but declined the position. Juneau agreed to take it. Bonetti approved and instructed Juneau that he would be a working foreman. Juneau's wage of $5.50 per hour, less than Arvidson's $5.55, remained unchanged. His duties included preinspecting the homes to be weatherized, determining what needed to be done and at what cost, assigning the general assistance workers to the crew leaders, checking the progress of the weatherization work as it was being done, correcting work that had not been done properly, and inspecting the work on its completion to make sure that it had been done properly. The work itself was performed by Juneau, the crew leaders, and the general assistance workers. The only laborer employed by Respondent to do this work, albeit for only a week, was William Weier. Juneau credibly testified that he was never told what authority, if any, he had over other employees. He understood that his responsibility as foreman was to make sure that the work was done properly and to work out any problems brought to him by the crew leaders. Had there been any problems that he could not handle, he would have brought them to Bonetti. He was never told that he could hire or fire employees, and he never had the occasion to attempt to do so. Similarly, he did not understand that his authority extended to demoting employees, promoting them, granting them time off, or doing anything else that could affect their employees status. He was never told that he would be doing employee appraisals or evaluations. As foreman, Juneau signed and sometimes completed the timesheets for the crew leaders. He never disapproved the time records, but overtime, which he certified as correct, was sometimes disallowed by either Tefft or Bonetti. Bonetti had told him that Respondent could not afford to pay overtime and did not want employees claiming it. Similarly, leave requests went through Juneau to Tefft. Juneau did not understand that he had any authority to disallow such leave requests and, on occasion, leave requests that he signed as approved were disallowed. If any of the crew leaders or laborers were going to be absent, they called Juneau.

Bonetti was present nearly every morning when Juneau and the crew leaders gathered prior to going out into the field. Bonetti assigned the employees and general assistance workers to various projects, and general assistance workers who were not assigned to other DICAA projects were assigned by Juneau to the crew chiefs for weatherization work. Juneau would then check that the beneficiaries of Respondent's weatherization work were at home so that the work could be carried out. The crew leaders would usually pick up the individual files to determine which homes they would do. Juneau spent between 50 and 70 percent of his time in physical work; the remainder of his time was spent inspecting homes and preparing monthly reports and other paperwork.

On 4 April, Juneau had received a disciplinary notice from Bonetti (not Yackel, his alleged supervisor), purporting to discharge him for unsatisfactory performance and attitude, showing him to be a "disloyal and negatively productive Community Action Agency Worker." The letter stated that Respondent had provided him with employment and charged him "with responsibility of leadership." Respondent did not carry through with Juneau's discharge at that time.[8]

3. Robert Kenny—automotive shop foreman

Robert Kenny first performed work for Respondent as a general assistance worker assigned to DICAA. After 3 or 4 months, Respondent hired him as a laborer. In April 1985, Bonetti made him a crew leader with a raise to $5.55 per hour. He was told that he would be supervising general assistance workers in the automotive shop. However, for 80 to 90 percent of his time he worked alone. On occasions, Dan Thurston would work in that shop and sometimes there were general assistance workers helping them. Kenny got complete instructions daily from Bonetti, either orally or in writing. To the extent that Kenny would instruct Thurston or others about what work they should be doing, it was usually pursuant to such instructions from Bonetti.[9] Kenny was told, when made a crew chief, that he should watch over Thurston, keep an eye on him, make sure that he was working. He was never told what he could do regarding discipline or personnel actions, he was not told that he could issue written warnings, and he did not sign Thurston's timeslips or approve time off or leave for Thurston.

According to Bonetti, Kenny made many recommendations concerning the hiring or firing of individuals. The record reflects that after Martin Sheffer had worked for a period while on general assistance, Kenny recommended that he be hired as a regular employee. Kenny, however, did not interview Sheffer or give him employment application forms. Sometime after Kenny had made this recommendation, Sheffer was hired by Bonetti, who had evaluated Kenny's recommendation. On other occasions, Kenny has recommended that Bonetti hire another individual, Dale Petz, and recommended that a foreman, Marcell, be fired because he was wasting time. Bonetti interviewed Petz, but did not adopt either of these recommendations.

4. Danny Thurston—assistant auto shop foreman

The record contains little direct evidence concerning Dan Thurston, whom Respondent has called the assistant foreman of the auto shop. It appears that Thurston had been working for Respondent about 1 year; his rate of pay was $4.75 per hour. He spent much of his time hauling fuel pellets for AFE, pursuant to instructions from Bonetti and, when he was not hauling pellets, he was assigned to the auto shop because he possessed mechanical skills. No one other than the general assistance workers who might be assigned to the auto shop on a sporadic basis worked under Thurston and, when working in the

[8] To the extent that the testimony of Bonetti and Tefft is inconsistent with the above, I have credited the testimony of Juneau as corroborated by Arvidson and Sheffer for the reasons previously stated. I have considered, but have accorded little weight to, the authority that prior county foremen may have possessed when Respondent' weatherization program was a considerably larger operation.

[9] Bonetti did not deny giving Kenny detailed daily instructions. It was, according to Bonetti, part of Kenny's training as a foreman.

auto shop, Thurston got his instructions from Bonetti, either directly or through Kenny. Respondent did not contend, either in its 10 June position letter Bonetti's 3 July affidavit, or Bonetti's 21 August presentation to his board of governors that Thurston was a supervisor.

5. Francis Arvidson and Martin Sheffer—crew leaders

Weatherization department crew leaders Francis Arvidson and Martin Sheffer received their assignments, i.e., the houses on which they would be working, either from Bonetti or Juneau or by drawing them out of a folder themselves. They performed their work in the homes to be weatherized, working alone or with other crew leaders and the foreman. Sometimes they worked with a DICAA employee or with general assistance workers. When they worked with other crew leaders and the foreman, each performed his own work with no need for direction. When Sheffer worked with William Weier, he instructed Weier concerning the work that had to be done and let him do it. When Juneau or Bonnetti assigned general assistance workers to them, the crew leaders told those workers what had to be done, instructed them how to do it, and attempt to keep them busy during an 8-hour shift. According to Sheffer, Juneau would ask at the end of each day whether he had had any problems. Normally there was nothing to report; if there were any problems with any of the general assistance workers or DICAA employees, Sheffer would relate them to Juneau. Other than seeing that the DICAA employees put in their 8 hours and that the work was done, neither Arvidson nor Sheffer were ever told what authority they had over such employees. Neither was told that they had the authority to discipline employees. Although both believed that if they felt that discipline of either DICAA general general laborers or general assistance workers had been warranted, they could have recommended it to Foreman Juneau.[10] The crew leaders received detailed instructions from Bonetti each morning and spent 90 percent or more of their time doing the physical work involved in home weatherization. Arvidson's hourly rate of pay was $5.55; Sheffer's, however, was only $4.75.

C. *Conclusions With Respect to Alleged Supervisory Status*

Respondent contends that six of the eight individuals named in the complaint, individuals who comprised essentially the entire work force of the DICAA weatherization department and AFE, are statutory supervisors to whom the protections of the Act do not apply.[11]

The party seeking to establish that individuals are supervisors within the contemplation of the statute bears the burden of proving that such individuals actually possess and exercise at least one of the authorities delineated in Section 2(11) of the Act. *George C. Foss Co.*, 270 NLRB 232 (1984), enfd. 752 F.2d 1407 (9th Cir. 1985); *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Commercial Movers*, 240 NLRB 288 (1979). Section 2(11) provides:

> The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Hydro Conduit Corp., supra, and cases cited therein at 437, stated:

> [S]upervisory status exists only if the power is exercised with independent judgment on behalf of management, and not in a routine or clerical manner . . . "the statute expressly insists that a supervisor (1) have authority (2) to use independent judgment (3) in performing such supervisory functions (4) in the interest of management. These latter requirements are conjunctive."

Conclusionary statements attributing supervisory authority to any given individual are insufficient to carry Respondent's burden of proof. Moreover, in resolving questions of supervisory status, one must keep in mind that "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the act is intended to protect." *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970); *Hydro Conduit Corp.*, supra at 437.

Applying the foregoing principles to the record before me, I must conclude that Respondent has failed to sustain its burden of proving that any of the six named individuals are statutory supervisors outside the ambit of the Act's protection.

First, I must reject Respondent's contention that supervision of general assistance workers (or any others similarly situated, such as court referrals) renders the overseeing individual a statutory supervisor. The general assistance workers, like the court-referred workers, are assigned by a public agency to assist Respondent in carrying out its charitable mission. They are not interviewed, hired, or selected by Respondent and they derive no benefits from Respondent. They remain with Respondent only so long as they are on welfare or the referring

[10] I do not credit Bonetti's rote assertions that the crew chiefs could discipline, correct, send home, or remove general assistance workers or anyone else from the job. His statement, "They know it, you know it, I know it and the world knows it," oft-repeated during this hearing, was unsupported by any concrete examples.

[11] Prior to the hearing, Respondent also argued that the remaining two individuals, Richard Makela and William Weier, were independent contractors. While Bonetti referred to Makela as an independent contractor in the course of his testimony, Respondent did not repeat this assertion on brief. The only evidence concerning their status established that they were hourly paid employees who, for budgetary reasons, were denied any other benefits of the employment relationship. The limitation of their employment benefits to hourly wages does not establish that they were independent contractors. To the extent that the status of Makela and Weier is in issue, I find them to be employees entitled to the Act's protection.

agency deems that they shall remain. They earn no wages or other benefits and therefore cannot be granted raises, promoted, or rewarded in any sustantive way by their overseer. The only action that might be taken against them is that they might be sent home or rejected from further service by Respondent. Any detriment that might come to them from such an action would be determined by the referring agency, not Respondent. Moreover, there is no evidence in this record that any of the named individuals ever took such an action with respect to any of the general asisstance workers. Inasmuch as these workers are not statutory employees, the persons under whose oversight they happen to work at any given time are not supervisors. The relationship, if any, is more akin to that of teacher to pupil or guard to prisoner. See *Key Opportunities*, 265 NLRB 1371 (1982; *Oakland Press Co.*, 229 NLRB 476, 477 (1977); and *Amalgamated Clothing Workers of America*, 210 NLRB 928 (1974) (Chairman Miller and Member Kennedy dissenting).

Even if the general assistance workers were to be deemed "employees," the extent of authority exercised over them by the crew leaders, foremen, and weatherization coordinator would not be sufficient to render those later individuals statutory supervisors. The general assistance workers work for limited periods of time on what appears to be an irregular basis. At most, they would be deemed to be casual employees excluded from any appropriate collective-bargaining unit. The persons Respondent alleges to be supervisors spend the great bulk of their time performing the physical labor entailed in weatherizing homes, delivering fuel, and installing furnaces. The amount of time any one of them spends in directing the general assistance workers in their labors is minimal (and such direction as is given is routine). The Board has addressed the issue of supervisory status derived from the exercise of supervision over nonunit personnel and concluded that when, as here, individuals spend less than 50 percent of their time "supervising" nonunit personnel, they should not be denied the protections of the Act as employees. *Amalgamated Clothing Workers*, supra at 930, *Adelphi University*, 195 NLRB 639 (1972); *Westinghouse Electric Corp.*, 163 NLRB 723 (1967). Indeed, the Board has held that even the occasional hiring of such nonunit personnel is insufficient to establish supervisory authority. *John Cuneo, Inc.*, 238 NLRB 1438 (1978); *Amalgamated Clothing Workers*, supra.

The situation that is present here is one of a small, eight-man unit of employees performing functions that are routine and well known to them and that therefore, require little or no direct supervision at diverse locations, under the general supervision of a single individual in whom, essentially alone, resided statutory authority, Bonetti.[12] It is improbable that an operation the size of Respondent's weatherization department, even including AFE, would have as many supervisors, and as few employees, Respondent would have us believe. *Health Care Logistics*, 273 NLRB 822 (1984). (Employer's contention that there were three supervisors in a unit of not more than eight employees held improbable.) Moreover, the titles attributed by Bonetti to the specific individuals warrant no contrary conclusions about any of them. *Lovilia Coal Co.*, 275 NLRB 1358 (1985); *Health Care Logistics*, supra at 824; *Thayer Dairy Co.*, 233 NLRB 1383 (1977).

I have credited Edwin Yackel's testimony to the effect that he was given the title of weatherization coordinator essentially as a means of ensuring that he would be paid for the hours he spent working for AFE. The weatherization department was able to function for more than half a year prior to his appointment without a functioning coordinator and continued to do so after his nominal appointment. His duties changed little. He continued to spend at least 90 percent of his time performing AFE's labors. What little time he spent in the job of coordinator, including the signing of timesheets, involved routine clerical functions that were not necessarily indicative of supervisory status. Indeed, his signature on a timesheet or leave request carried little if any weight. *Hydro Conduit Corp.*, supra (the isolated signing of a few warning notices deemed insufficient to establish supervisory authority); *Cuneo*, supra (recording hours and signing timesheets not sufficient to establish supervisory authority). Neither can Yackel be found to have been a supervisor in May 1986 on the basis that he may have occupied a supervisory position for Respondent at some time in the past. Such prior experience is irrelevant. *Health Care Logistics*, supra. Respondent has not established his supervisory authority.

Unlike Yackel, Juneau actually functioned in the position to which he was nominally assigned. As Iron County foreman, he inspected the homes to be weatherized, determined what work needed to be done, checked to see that it was being done in a proper fashion, and checked again to determine that it had been done properly. The crew leaders nominally worked under him in carrying out the weatherization functions. Nonetheless, I conclude that he did not possess real supervisory authority. He was, at most, a "leadman" or "strawboss" rather than a part of management and a statutory supervisor. *George C. Foss*, supra. Like Yackel, he was named to fill a position that was vacant for a considerable period of time, indicating that supervision at that level was not essential. He spent the majority of his time performing the same physical work as the other crew leaders. Work assignments were made by Bonetti, or by Juneau as a conduit from Bonetti. Those work assignments, moreover, were routine in nature, to do this house rather than that house first, and had no effect on the employees' compensation. The work itself was routine and each employee knew what to do. Even if it could be said that Juneau was "running the jobs," he exercised authority only in routine matters that did not require the exercise of independent judgment. Similarly, his recordkeeping duties with respect to hours worked was routine or clerical in

[12] Although the General Counsel conceded that Barnhart, as general manager of AFE, was a statutory supervisor, the record contains no evidence concerning his role with respect to the supervision of the eight dischargees.

nature and his signature approving payment for overtime worked carried no weight against Respondent's determination that it could not afford to pay for overtime. Respondent has failed to establish his supervisory authority.

Robert Kenny, as the nominal foreman of the automotive shop, had even less real authority than Juneau. He received daily instructions from Bonetti, designating the work to be done and, to the extent that he directed Thurston, he did so primarily as a conduit from Bonetti. As with Juneau and each of the others alleged to be supervisors, there is nothing other than conclusionary statements concerning purported authority to establish possession of any of the statutory indicia. Kenny worked as a mechanic, usually alone, and on those occasions when he had Thurston and/or general assistance workers in the shop, the relationship was one of experienced employee to helper, not supervisor to employee.

If Kenny is not a supervisor, then Dan Thurston, whom Respondent claimed to have been the assistant automotive shop foreman, is, a fortiori, without supervisory authority. The record contains no evidence of any employee who would have been supervised by Thurston and there was nothing beyond Respondent's claim that he held the title of assistant supervisor to confer such authority on him. His hourly wage of $4.75 is surely not indicative of supervisory status. Respondent has not established that either Kenny or Thurston were statutory supervisors.

Like Juneau, crew leaders Francis Arvidson and Martin Sheffer are, at most, leadmen or strawbosses. They do the physical work of the weatherization department and give routine direction concerning the work to be done to very few employees, if any, and others who may not be employees at all. Beyond Bonetti's conclusionary statements, there is no indication that they actually possessed any of the statutory indicia. At most, they may be empowered to tell other employees on the worksite to keep busy. The authority to issue such minor oral reprimands does not establish one as a supervisor, particularly where, as here, there is no showing that such reprimands have any effect on an employee's job status. *John Cuneo*, supra. See also *Vanport Sand & Gravel*, 267 NLRB 150 (1983). Finally, the wages paid to crew leaders, particularly Sheffer's $4.25 per hour, are hardly indicative of supervisory status.

Considering all the foregoing, I must conclude that Respondent has failed to sustain its burden of proving that Edwin Yackel, Duane Juneau, Robert Kenny, Dan Thurston, Francis Arvidson, or Martin Sheffer are statutory supervisors within the meaning of Section 2(11) of the Act. I find them to be employees as defined in Section 2(3).

III. WORK STOPPAGE AND DISCHARGE

A. *Events Leading Up to the Work Stoppage*

The work stoppage for which these employees were ultimately discharged was precipitated, in large measure, by ill-will between Respondent's employees and William Fagan, the owner, and Jack Vinnedge, the employee, of Action Welding, a small business that leased space in A-J Center, adjacent to Respondent's automotive shop. That ill-will, in turn, stemmed from a number of problems, particularly the mutual borrowing of tools and equipment and Vinnedge's efforts, by threats of physical harm, to prevent such borrowing by Respondent's employees. On one occasion, around March or early April, a meeting was held between Respondent's employees and Vinnedge to discuss the problem of missing tools. In the course of that meeting, Vinnedge stated that if his tools were not returned he would break someone's arms or legs. He had made similar threats directly to employees Kenny and Thurston earlier that same day. Additionally, Vinnedge had threatened to get certain employees fired by Bonetti, had threatened to get himself placed in charge of the employees, and had complained to Bonetti about what he perceived to be deficiencies in their work. In addition to Vinnedge's threats, Respondent's employees were concerned with dangerous working conditions caused by Vinnedge welding on gas tanks, Action's usurping of space from the automotive shop, and noise, smoke, and clutter caused by Action Welding.

The problems between Respondent's employees and Action Welding came to a head during the week of 21 April. On Wednesday evening, 23 April, Fagan and Barnhart exchanged strong words in a phone conversation over the lack of heat in the A-J Center. Fagan told Barnhart that he was an ex-Marine and would "not put up with it," that Barnhart had gotten in the first lick, but would "get it in the end." Fagan then told Vinnedge of his conversation with Barnhart, making Vinnedge aware that he was angry. On the morning of 24 April, Vinnedge came into the automotive shop where Kenny and Thurston were working. He angrily stated, "I don't see why you are siding up with Tom Barnhart for . . . it is going to come and haunt you in the end. . . . You have Fagan so F'n pissed off, he is going to come with a shotgun and blow you all away."[13] Kenny, who knew Fagan to have a drinking problem, post combat stress syndrone, and a history that included some violent conduct, took this threat seriously. He reported it to Yackel, who had earlier heard of Fagan's threat to Barnhart, and to Barnhart. Barnhart directed Kenny and Thurston to assemble the rest of the crew at the warehouse. When they were gathered, they discussed the threats and Barnhart suggested that they all go to the Hanna Building, Respondent's main office.

B. *The Work Stoppage*

About 10 a.m., the employees went to the Hanna Building. Bonetti was out of town and they met with Gilbert LaFave, Respondent's associate director. They told LaFave of the threats and of their other complaints. LaFave left them briefly to call Bonetti and, in his absence, the employees examined Respondent's personnel manual. Most of them had never seen it before. They learned of a grievance procedure and discussed such matters as it provisions for annual, personal, and sick leave, and holidays. When LaFave returned, he told the

[13] Vinnedge did not testify and Fagan's denial that he had told Vinnedge he would take any such action is irrevelant. Irrelevant also is the absence of evidence that Fagan was observed carrying any weapons.

employees that Bonetti would return that evening. LaFave requested that they clean up the Eagle Furnace facilities for Bonetti, who had a potential buyer for that property, and the employees did so. Several employees also finished up the installation of a furnance.

The employees then prepared a list of complaints, problems, and demands to be presented to Bonetti on Friday. The list, somewhat paraphrased, included:

(a) Vinnedge's lying to Bonetti about the employees.

(b) Vinnedge's attempts to take over the jobs and run the show.

(c) Vinnedge's threats of bodily harm.

(d) Vinnedge's threats to their job security.

(e) Action Welding's imposition on their working space.

(f) Action Welding's use of tools and equipment.

(g) Fagan's drinking on the job.

(h) Poor work being done by Action Welding on Respondent's equipment, necessitating that the work be redone.

(i) Respondent's requiring that employees pay for broken or damaged property even when the damage was not intentional.

(j) Compensation for accumulated leave time between layoff and rehire.

(k) Two week's advance warning if leave was disapproved.

(l) Blaming the employees for messes left by Vinnedge.

(m) Pay for annual leave over 15 days rather than forfeiture.

(n) Reinstatement of the half-hour lunch.

(o) Management to keep its promises of extra days, bonuses, and compensatory time.

(p) Safe equipment such as ladders and power tools needed for weatherization to be provided.

(q) A single day per month for cleanup.

On Friday morning, the employees went directly to the Hanna Building, purposely avoiding the A-J Center so as not to come into contact with Fagan or Vinnedge. They met with Bonetti, Tefft, and Glenwood Johnson, a consultant retained by DICAA, and presented the foregoing list of demands. Each item was discussed, with little or nothing being resolved. There was specific discussion of Vinnedge's threats, including his remarks about Fagan and a shotgun. Bonetti asked each man if he had been personally threatened. According to Bonetti, only Barnhart said that he had. Bonetti concluded that the threat had been exaggerated and that Barnhart was inciting the men. Bonetti's recollection is not corroborated by Johnson, who testified that the men stated that they felt threatened and wanted Action Welding moved away from the automotive shop. Johnson further recalled the employees as stating that they would not return to work unless the problems were cleared up.

At the conclusion of the morning session, Johnson suggested that each side compromise. He told the employees that they should reduce their demands to the most important ones. Following his advice, the employees prepared a shortened list of five demands:

1. Move said party over to some [other part] of compex [sic] with no affiliation whatsoever with said party;

2. No loss in pay for all people present at meetings;

3. All work of Community Action to be done by Community employees;

4. All department heads be in full charge of persons under his or her charge; and

5. [Makela and Weier] on full benefits May 1, 1986 and no loss of pay.

At the bottom of this list was written, in a different hand, "return to work Monday, 7:30 A.M." None of the employees knew who placed that on the list, or when it was placed there.

The shortened list of demands was discussed in the afternon session. Bonetti agreed to meet demands 2 and 4. With respect to item 5, he agreed to put Makela on full benefits, but only to consider such benefits for Weier. In response to item 3, he told the employees that some of the functions of DICAA required the use of professionals, like bookkeepers and other technicals from outside the Agency.[14] No agreement was reached on the central issue, moving Action Welding away from DICAA employees, even though those employees volunteered to move Action Welding into another space. According to Kenny, Bonetti stated that this would be too much trouble.

In this afternoon session, Bonetti believed that Barnhart was losing control of the men. He also claimed to believe that Barnhart was being less than turthful and "felt that it was [his] obligation to jump [Barnhart] on that." About the third time he accused Barnhart of lying, Barnhart took umbrage, rose to his feet, and stated, "We are not making any progress here."[15] Barnhart left and was followed within a few minutes by the rest of the men.

Before they walked out of the meeting, at least some of the employees believed that they would be returning to work on Monday, 28 April. Several had even agreed to unload a truck of windows that had arrived during the meeting. Once outside, however, the men agreed that they would have to do something different to get the issues resolved. Sheffer suggested that they all go home; he, at least, expected the discussions to continue on Monday morning. The employees did not unload the truck; Bonetti did.[16]

---

[14] This response, like many of his answers to question propounded at trial, was unresponsive to the issue raised. The employees were obviously concerned with Action Welding doing their work, not whether DICAA employed its own bookkeeping or legal staff.

[15] Bonetti's claim on direct examination to the effect that Barnhart had said, "This isn't getting *me* anywhere" is contradicted by both his testimony as a Sec. 611(c) witness and his transcribed testimony before the DICAA board of governors in the personnel hearing held on 7 May. I am constrained to conclude that he was shading this testimony to support his contention that Barnhart was "inciting" the men for his own purposes.

[16] At this hearing, Bonetti testified that, in his "heart and mind," he believed that he had solved each of the employees' concerns and that the employees had agreed to return to work on Monday. At the personnel

Continued

According to Kenny, some of the employees met on Saturday. There was some discussion of securing help from a labor organization, and Kenny, at least, decided that he was not going to work on Monday because Bonetti had not resolved the problem involving Vinnedge and the location of Action Welding. On Sunday night, Barnhart called Sheffer and told him that they would have a meeting on Monday morning at the home of a former DICAA administrator, Glen Polich.[17]

Barnhart and the employees met with Polich on Monday morning. They told him of what had transpired in the prior week and of their concern for their own safety because of Vinnedge's threats. Knowing that Polich had a rapport with one of the DICAA board members, Garland Mainville, they asked for his help in pursuing DICAA's grievance procedure. On their behalf, Polich called Mainville and Mainville promised to call Dorothy Peroceschi, chairperson of the board, to start the grievance procedure. About the same time, the employees, with Polich's assistance, wrote out a request to the local law enforcement authorities, seeking to restrain Bonetti, Vennedge, Fagan, and others from harassing them and took it to the sheriff.

C. *The Discharge*

When the employees did not return to work as he expected, Bonetti prepared a notice, directing each of them to come to a meeting in his office at 2 p.m. that day. It was personally served on some but not on all of them. None, however, attended Bonetti's meeting. When they failed to attend, Bonetti sent each of them a letter by certified mail, stating that they had been discharged for "misconduct in walking off the job in an un-authorized work stoppage and not attending a scheduled meeting with the Executive Director for which you received written notice." At the hearing, Bonetti testified that they were discharged for failing to come to work and to the meeting on 28 April, not for their refusal to work on 24 and 25 April.

On Tuesday morning, before they learned of their discharges, the employees met again at Polich's home. From there, they drove to Iron Mountain and met with Mainville. Mainville called Peroceschi. She told him that a grievance hearing would not be necessary as Bonetti had already discharged all the employees; Mainville relayed that message to them. They requested a meeting with her and drove to her home where she reiterated what she had told Mainville. After further discussions concerning their situation, she agreed that a grievance hearing would be appropriate. The employees then prepared a grievance, protesting the threats of bodily harm by Vinnedge, threats of job loss if they refused to work overtime, and their discharges while pursuing the grievance procedure.

On 6 May, the employees were informed that a hearing on their grievances would be held the following day. They attended, and appointed Barnhart to be their spokesman to request a postponement so that they could adequately prepare. The request was denied and they refused to cooperate further. The DICAA board of governors sustained the discharges.

D. *Analysis and Conclusions*

The General Counsel contends, and I agree, that the activity for which the employees were discharged was concerted activity protected by Sections 7 and 8(a)(1).[18] The work stoppage began with the employees seeking their employer's aid in protecting them from serious harm threatened by an employee of a business to whom their employer had leased adjacent space. Employee complaints related to their safety are protected, even when the threat comes from someone other that the employer. See, for example, *Consumers Power Co.*, 282 NLRB 130 (1986), in which employee complaints about threats of violence by customers were found protected. See also *Tamara Foods*, 258 NLRB 1307 (1981), enfd. 692 F.2d 1171 (8th Cir. 1982), in which the Board stated "that the Act protects the rights of employees to strike over what they honestly believe to be unsafe and unhealthy working conditions." That is precisely what these employees did.[19]

Moreover, the employes' complaint concerning Vinnedge's threats was not the sole basis for the work stoppage. When they met with Bonetti, they brought up other areas of concern, virtually all within the ambit of statutorily protected conduct. These included other safety complaints (unsafe ladders and tools), threats to their job security, and their work opportunities (see *Key City Contractors*, 227 NLRB 1884, 1888 (1977)), compensation, leave policies, and breaktimes. All the concerns that they raised were clearly susceptible of resolution by Respondent. While they put some of these issues aside when urged to compromise in the interests of securing an agreement, there is no evidence that they were satisfied with Bonetti's response to these demands. Further, even on their shortened list, there were other protected matters. They sought pay equity for fellow employees

---

hearing of 7 May, earlier referred to, however, he testified to his assumption at that point in time that they would return if management agreed to all five points. He admitted there that no such agreement had been reached. Instead, he told the directors that the employees had been directed to return to work, that he had not given them permission to continue their work stoppage.

[17] I credit Polich's testimony that his first involvement in this dispute was on 27 April when Barnhart informed him of the threats and solicited his help. However, even if I were to find that he had been involved with these employees at some earlier point, I would not find his involvement to detract from what I hereinafter find to be the protected character of the employees' job action. So long as the employees were engaged in protected concerted activity, Polich's reasons for becoming involved are irrelevant.

[18] The employees' protest and work stoppage were clearly concerted and Respondent does not contend that it was unaware of its concerted nature. *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

[19] There is not a scintilla of credible evidence to support Respondent's claim that the employees relied on Vinnedge's threats as a pretext to justify their work stoppage or to promote any unprotected objective. Having observed these witnesses and reviewed their testimony, I am totally convinced that they perceived the threats as real. Considering the pervasive and mindless violence constantly reported in the news media, it was certainly not unreasonable for them to have done so. Even if I were to find that their fear was unreasonable and their work stoppage unwise and unnecessary, I would still be compelled to find their conduct protected. *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962); *Serendippity-Un-Ltd.*, 263 NLRB 768 (1982).

Makela and Weier. That demand was among those that even Bonetti realized had to be satisfied if the work stoppage were to end. It was not resolved to the employees' satisfaction.

Respondent contends that the employees' failure to report for work on Monday, 28 April, was in breach of contract, indefensible disloyalty, and in support of an illegal secondary boycott. These defenses are patently without merit. There was no collective-bargaining agreement; therefore, there was no contractual no-strike clause to breach. An employer may not impose a work rule prohibiting walkouts and thereby deprive employees of their statutory rights. *Tamara Foods*, supra. Similarly, there was no secondary activity involved in the instant case.

Neither was the employees' walkout an act of "indefensible disloyalty." It was a common, everyday strike, totally distinguishable from the actions of the employees in *NLRB v. Electrical Workers IBEW Local 1229*, 346 U.S. 464 (1953). There, the employees attacked the quality of their employer's product in vitriolic leaflets, which made no reference to the union, the labor controversy in which they were engaged, or the bargaining that had broken down.

Further, Respondent cannot contend that these employees were somehow insubordinate when they failed to report for work on Monday without advising Bonetti of their intention to continue their protest or when they refused to attend the meeting that he had scheduled. After they refused to unload the truckload of windows on Friday, Bonetti had no basis to expect them to report for work on Monday, even if he believed that he had satisfied their demands. More importantly, however their failure to notify Bonetti and their rejection of his proposed meeting as a method of resolving the problems are totally irrelevant to the question of whether their concerted activities were protected. *Serendippity-Un-Ltd.*, supra. Indeed, at the very time that Bonetti was ordering them to attend his meeting and then discharging them for their failure to comply, these employees were pursuing other avenues within Respondent's organization to resolve their complaints. They were not required to do otherwise. Having experienced frustration in their attempts to deal with Bonetti, they were free to engage in the concerted activity that they deemed appropriate and to pursue their goals through members of Respondent's board of governors and Respondent's own grievance procedure. In *Millcraft Furniture Co.*, 282 NLRB 543, 595 (1987), the employees refused to obey an order that they discussed their complaint with a particular supervisor, the subject of their complaint, and insisted that they would only meet with a particular higher-level official. The Board found that their conduct was protected, not insubordinate, and stated:

> Rather . . . the employees . . . had the right under Section 7 of the Act to seek to voice their grievances to the Respondent official of their choice . . . . Thus, the Board has long held, with court approval, that the Act allows employees to engage in any concerted activity that they decide is appropriate for their mutual aid and protection, unless that activity is specifically banned by another part of the statute, or falls within other well-established proscriptions, such as violent conduct or indefensible disloyalty.

As we have seen, the employees' conduct was not violent, did not fall within any other statutory proscriptions, and was not disloyal as the Board and the courts have used that term.

The individuals named in the complaint, I have found and concluded, were employees entitled to the protections of the Act. They were engaged in protected concerted activities and were discharged because they were so engaged. Their discharges violated Section 8(a)(1) of the Act and I so find.

THE REMEDY

It having been found that Respondent, Dickinson-Iron Community Action Agency; Dickinson-Iron Alternative Fuel Energy Corporation; Eagle Fiber Fuels Manufacturing, Inc., has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discharged Edwin Yackel, Duane Juneau, Robert Kenny, Francis Arvidson, Martin Sheffer, Daniel Thurston, Richard Makela, and William Weier because they engaged in protected concerted activity, I shall order that Respondent offer each of them immediate and full reinstatement to their former positions, or to substantially equivalent positions if their former positions no longer exist, without prejudice to their seniority and other rights and privileges. I shall further order that Respondent make each of them whole for any loss of earnings they may have suffered by reason of the discrimination practiced against them, such earnings to be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Further, I shall order that all references to their discharges be removed from Respondent's files and that Respondent notify them, in writing, that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel actions against them.

The General Counsel seeks, for compliance purposes, a visitatorial clause in the recommended Order. Such a clause would permit the Board, for compliance purposes, to obtain discovery from Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Board's Order. Under the circumstances of this case, including the absence of any indication of prior violations and the straightforwardness of the compliance issues, I deem it unnecessary to include such a clause and shall deny the General Counsel's request. See, for example, *Two-M*, 281 NLRB 502 (1986).

CONCLUSIONS OF LAW

1. The Respondent, Dickinson-Iron Community Action Agency; Dickinson-Iron Alternative Fuel Energy Corporation; Eagle Fiber Fuels Manufacturing, Inc., which together comprise a single employer, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Edwin Yackel, Duane Juneau, Robert Kenny, Francis Arvidson, Martin Sheffer, Daniel Thurston, Richard Makela, and William Weier are employees within the meaning of Section 2(3) of the Act.

3. By discharging the above-named employees because they engaged in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection, Respondent has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Dickinson-Iron Community Action Agency; Dickinson-Iron Alternative Fuel Energy Corporation; Eagle Fiber Fuels Manufacturing, Inc., Iron River, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Edwin Yackel, Duane Juneau, Robert Kenny, Daniel Thurston, Francis Arvidson, Martin Sheffer, Richard Makela, and William Weier immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from Respondent's files all references to the terminations of the above-named employees and notify them in writing that this has been done and that evidence of their unlawful terminations will not be used as a basis for future personnel actions against them.

(c) Post at its Iron River, Michigan facilities, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because they engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Edwin Yackel, Duane Juneau, Robert Kenny, Daniel Thurston, Francis Arvidson, Martin Sheffer, Richard Makela, and William Weier immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

THE DICKINSON-IRON COMMUNITY ACTION AGENCY; DICKINSON-IRON ALTERNATIVE FUEL ENERGY CORPORATION; EAGLE FIBER FUELS MANUFACTURING, INC.

International Longshoremen's Association, Local 1426 (Waterfront Services, Inc.) *and* James Luther Johnson Jr. Case 11–CB–1407

19 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 10 June 1986 Adminstrative Law Judge William N. Cates issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Janet Holland Branch, Esq., for the General Counsel.
Andrew A. Canoutas, Esq., of Wilmington, North Carolina, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. The hearing in this case held on 24 March 1986 is based on a charge filed by James Luther Johnson Jr., an individual (Johnson), on 31 December 1985,[1] and amended on 18 February 1986, and an amended complaint and notice of hearing (complaint) issued on 24 February 1986 on behalf of the General Counsel of the National Labor Relations Board (Board) by the Regional Director for Region 11 alleging that International Longshoremen's Association, Local 1426 (the Union) has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). The Union in its answer to the complaint admitted various allegations of the complaint, but denied the commission of any of the alleged unfair labor practices.

[1] All dates are 1985 unless otherwise indicated.

All parties were given full opportunity to participate and introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Union.

On the entire record of the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Waterfront Services, Incorporated (Waterfront) is a North Carolina corporation with a facility located at Wilmington, North Carolina, where it is engaged in the docking and undocking of ships at the port of Wilmington, North Carolina. During the 12 months preceding issuance of the complaint, a representative period, Waterfront, in the course and conduct of its business operations, received at its Wilmington, North Carolina facility goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina. During the same period, Waterfront provided to customers outside the State of North Carolina services valued in excess of $50,000. The complaint alleges, the Union admits, and I find, that Waterfront is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Wilmington Shipping Company (WSC) is a North Carolina corporation with a facility located at Wilmington, North Carolina, where it also is engaged in the docking and undocking of ships at the Port of Wilmington, North Carolina. During the 12 months preceding the issuance of the complaint, WSC received at its Wilmington, North Carolina facility goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina. During the same period, WSC provided to customers outside the State of North Carolina services valued in excess of $50,000. The complaint alleges, the Union admits, and I find that WSC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The parties admit, and I find, that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Central Issue*

The central issue presented in this case is whether the Union failed and refused for unfair, arbitrary, and invidious reasons, and in contravention of its exclusive hiring hall arrangement with the North Carolina Shipping Association (Association) to refer Johnson to employment with Association member Waterfront at the port of Wilmington on 22 August and to employment with Association member WSC at the port of Wilmington on 30 De-

cember.[2] For the reasons hereinafter discussed, I find for the Union.

B. *Background*

The Association is an organization composed of approximately 14 employers and exists at least in part for the purpose of representing its employer members in negotiating and administering collective-bargaining agreements with various labor organizations including the Union herein. At all material times, Waterfront and WSC have been employer members of and have authorized the Association to bargain collectively with the Union covering wages, hours, and other terms and conditions of employment of their respective employees in admittedly appropriate bargaining units.[3] At all material times, the Association and Union have maintained a practice[4] permitting the Union to be the sole and exclusive source of referrals to employment with members of the Association including Waterfront and WSC for the units just described above.

In operating the hiring hall, the Union conducts what is referred to as "shape-up" on a daily basis. A number of things occur during shape-up, some of which will be referred to only in general terms while others will be discussed in greater detail. The Union's business agent or his designated assistant is present in the hiring hall for shape-up.[5] Two Guaranteed Annual Income (GAI) dispatchers[6] are also present in the hiring hall during and after each days' shape-up. Certain longshoremen are guaranteed an annual income and if they are not referred for work the required number of hours to meet their guaranteed income, they are paid the amount they are annually guaranteed from a special fund established for that purpose.

The GAI dispatchers who work 5 days per week from 6 a.m. until 1 p.m.[7] generally commence daily at approximately 6:15 a.m. to give each GAI longshoreman, who is present in the hiring hall and desiring to work that day, a badge.[8] The GAI longshoremen are also given slips that are filled out and at approximately 6:30 or 7 a.m. the business agent (or assistant business agent) announces that it is shape-up time. Headers (or foremen) obtain certain paperwork from the Union and then proceed to hire their work gangs for that day. The hiring of work gangs is done inside the hiring hall. The headers first hire those who are regularly assigned to their gangs.[9] The work gangs are hired based on the workers' GAI status and by seniority classification. After a header has hired all longshoremen regularly assigned to his work gang and finds he still needs workers, he hires the additional workers by seniority classification from those present in the hiring hall.[10] If all of the seniority classifications are exhausted, the header may then hire casuals. Whenever a header has completed assembling his work gang for any particular workday, he takes the necessary paperwork to the employer at the docks and the longshoremen then go to work. The two GAI dispatchers remain behind at the hiring hall to process the paperwork necessary to administer the GAI program.[11] Inasmuch as the GAI dispatchers are on the payroll of the GAI fund from 6 a.m. until 1 p.m., they are precluded from going to work at any other job during that time.[12]

If after all headers have hired all the longshoremen they need for their gangs for any particular day and there still are those seeking to be employed on that day, those unemployed longshoremen and casuals generally remain in the hiring hall for a portion of the workday to see if any header will, for any reason, need any additional workers. If additional workers are needed, the header comes to or calls the hiring hall. The business agent (or assistant business agent) will announce the need for additional longshoremen over a public address system[13] and those longshoremen or casuals waiting in the hall will present themselves by seniority to the business agent (or assistant business agent) for employment.

---

[2] Johnson contends he lost a half day's work on 22 August and a full day's work on 30 December. The General Counsel acknowledges Johnson was properly referred to employment by the Union prior to 22 August and after 22 August until 30 December. She also acknowledges he has been properly referred to employment at all times since 30 December.

[3] The admittedly appropriate unit at Waterfront is as follows:

> All employees engaged in the loading or discharging of ships at the Employer's location at the Port of Wilmington, North Carolina; excluding all other employees, guards, and supervisors as defined in the Act.

The admittedly appropriate unit at WSC is as follows:

> All employees engaged in the loading or unloading of ships at the Employer's location at the Port of Wilmington, North Carolina; excluding all other employees, guards, and supervisors as defined in the Act.

[4] A copy of the hiring hall procedures, which it appears was posted at the hiring hall in 1976, was received in evidence as Jt. Exh. 3(b).

[5] Sammy Hicks (Hicks) is the Union's business agent and when he is not present his assistant, Clayton Alfred Vaught (Vaught), fills in for him.

[6] The two dispatchers are Chester Wiggins (Wiggins) and Johnny McCoy (McCoy).

[7] I find the evidence is persuasive that the GAI dispatchers' tours of duty at the hiring hall are from 6 a.m. until 1 p.m. notwithstanding the General Counsel's contention to the contrary. The General Counsel was never able by any reliable evidence to demonstrate the GAI dispatcher's hours were otherwise.

[8] The badges are simply plastic cards with the longshoreman's name and classification thereon.

[9] Longshoremen must stand in front of the headers in the hiring hall to present themselves for employment.

[10] GAI longshoremen are given first priority by seniority for employment. Thereafter there are six seniority classifications utilized, namely, (A) through (F) inclusive, with (A) being the most senior. Others who may be present in the hiring hall who have no classification are referred to as casuals. (Wilmington, North Carolina Longshore Seniority Plan Jt. Exh. 2).

[11] The GAI dispatchers do not work for, nor are they paid by, the Union; rather, they work for the GAI fund which is administered from Jacksonville, Florida.

[12] I credit Local Union President Willie Sloan's (Sloan) testimony that he established the above-stated rule to preclude the GAI dispatchers from being on two payrolls at the same time and to prevent them from being in competition with other longshoremen who might be present at the hiring hall wanting to go to work. After 1 p.m., the GAI dispatchers revert to the status of GAI longshoremen with a seniority classification. President Sloan credibly testified he did not want a GAI dispatcher to take a job before 1 p.m. if there were any longshoremen waiting in the union hall for a job.

[13] The public address system can be heard in the hiring, dining and restroom areas. There is an outside speaker, but it is usually not utilized.

If a header returns to the hiring hall and the business agent or his assistant is not present, the header may hire by seniority classification anyone in the hiring hall area.

C. *Applicable Hiring Hall Principles*

It is appropriate at this point to very briefly highlight some applicable principles governing hiring hall practices. Applicable law clearly establishes that unions operating exclusive hiring halls must do so in a manner that is free from arbitrary or invidious treatment of those utilizing the hiring hall services. A union's power in operating an exclusive hiring hall is so great that any action by it that prevents an employer from hiring a user of its hiring hall services will be presumed to encourage union membership among those who perceive the union's actions and hence will be found to violate Section 8(b)(1)(A) and (2) of the Act. *Teamsters Local 5 (Hebert & Co.)*, 272 NLRB 1375, 1378–1379 (1984). *Carpenters Local 720 (Stone & Webster)*, 274 NLRB 1506 (1985). Applicable law as reflected in *Carpenters Local 25 (Mocon Corp.)*, 270 NLRB 623, 630 (1984), enfd. 769 F.2d 574 (9th Cir. 1985), also establishes:

> A union which demonstrates the fair and regular utilization of facially valid hiring hall regulations in determining the order of dispatch among registrants clearly establishes a sufficient defense to allegations of impropriety in the selection or rejection of applicants for employment referral. If, however, following proper rules is a defense to a hiring hall allegation, ignoring or violating such rules is not. The Board holds that where clear and unambiguous hiring hall regulations are ignored or violated so as to prevent an otherwise entitled individual from being dispatched to employment, without more, a prima facie violation of Section 8(b)(1)(A) and (2) of the Act has been established.

It is not unlawful for a union to enforce a valid exclusive hiring hall arrangement by requesting that an employer discharge an employee from a job that the employee secured outside the valid exclusive hiring hall procedure. See *Laborers Local 596 (Hood Contractors)*, 216 NLRB 778 (1975).

D. *The 22 August Referrals*

1. Facts

On 22 August, Johnson went to the hiring hall at approximately 9 a.m.[14] Johnson testified he ate breakfast with Local Union President Sloan and after doing so went to the hiring area at the union hall to wait for any job that might become available that day.[15] Johnson testified he did not leave the hiring area at the union hall until 1:30 p.m.

Leo Wilson (Wilson) testified he rotated working as a header with Joseph M. Pridgen (Pridgen) on a particular work gang at Waterfront. On 22 August, Pridgen worked as the header. Pridgen's work gang tied up a vessel at the port that morning and Waterfront's management then told him his work gang would be tying up a larger vessel that afternoon and he would need two longshoremen in addition to his regular gang in order to be able to tie up the larger vessel.[16] Pridgen told Wilson to go to the hiring hall and get two additional longshoremen to assist his work gang that afternoon in tying up the larger vessel. Wilson credibly testified he went to the union hall between 11 and 11:30 a.m.[17] Wilson stated he entered the hiring hall, but saw no one in the hall.[18] After looking around the hall he happened to see Wiggins. Wilson told Wiggins he was going to need two additional longshoremen that afternoon. Wiggins wanted to know what time that afternoon and Wilson told him 2:30 p.m. Wiggins told Wilson he would not take the job unless it was after 2 p.m.[19] Wilson told Wiggins not to mess him up and to be at the dock at 2:30 p.m.[20] Not finding anyone else, Wilson returned to the docks and finished tying up the vessel that was already in port.

After tying up the vessel already in port, Wilson returned to the hiring hall at about noon.[21] When Wilson arrived at the hiring hall, he saw Johnson sitting on the stage in the hiring area and told him:

> We're going to need a man to tie up . . . . We got a ship coming in and we're going to need a line handler . . . . Go to the office and let Vaught

---

[14] Johnson had worked that morning from approximately 5 to 8 a.m. at a port location in Wilmington, North Carolina.

[15] Johnson holds a "F" seniority classification, is not a regular gang member, and is not a GAI longshoreman.

[16] Actually a third additional longshoreman was needed that afternoon because longshoreman William Canaday (Canaday), who normally worked in Pridgen's gang and in fact worked during the morning hours of 22 August, did not work that afternoon. Pridgen allowed J. C. Corbette (Corbette) to work over from a previous shift to replace Canaday that afternoon. No contention was made that it was improper for Pridgen to allow Corbette to work over.

[17] Wilson stated it was normal procedure to go to the hiring hall because all hiring took place there.

[18] Contrary to Wilson's testimony, Johnson stated he was in the hiring area of the union hall when Wilson came into the hall at approximately 11:30 a.m. Wilson impressed me as attempting to testify truthfully and with good recollection. He appeared very conscientious and was a forthright witness with a sincere and believable expression. Accordingly, I credit his testimony that no one was in the hiring hall when he entered the hall at 11:30 a.m. It would be mere speculation on my part to comment on where Johnson may have been at the time Wilson was in the hall on his first visit to the union hall on 22 August. The thing I am persuaded of is that Wilson did not see Johnson in the hiring area at the union hall during his 11:30 a.m. visit. I am convinced that if Johnson had been in the hall, Wilson would have seen him because he was anxiously seeking to find two additional workers so he could go to lunch and then report back to the port. The fact that Wilson had nothing against Johnson nor any reason not to want to hire him is borne out by the fact that Wilson specifically told Johnson about the remaining job during his second visit to the hiring hall on 22 August.

[19] Wiggins, although placing the time of the meeting somewhat differently than Wilson, corroborated in essential parts Wilson's testimony. Wiggins stated he could not work that day before 2 p.m. because he had to go to the post office and run an errand for his wife. Wilson stated he is a GAI longshoreman with an "A" classification after 1 p.m. daily.

[20] Wilson stated that when no one was in the hiring hall it was proper for him to hire in the manner he did. Johnson acknowledged that Wilson had the authority to hire necessary workers when the business agent or his assistant were not present in the hiring hall.

[21] Johnson places the time at 12:15 p.m.

> know, you know, and, you can probably get the job.[22]

Wilson then spoke with Vaught who was acting on behalf of business agent Hicks and told him he needed one additional longshoreman.[23]

Union President Sloan testified he spoke with Wilson at the hiring hall and that Wilson told him he needed a line handler for that afternoon and that Johnson was the only one in the hall so he guessed Johnson would probably be the one coming down to the docks.[24] Sloan testified he then walked over to the stage where Johnson was and told him:

> Buddy [Johnson], Leo [Wilson] said he had a line handling job down there, so you better go in and asked Vaught about that job . . . before somebody comes in here with a higher classification than you have.

President Sloan stated he asked Johnson if he was going to get the job and Johnson told him he did not know, that he was waiting on the announcement for the job. Sloan again told Johnson to go and ask Vaught for the job before someone came in with a higher seniority classification.[25] Sloan left the area while Johnson was still sitting on the stage in the hiring hall area.

Johnson testified he passed in front of Vaught's office two or three times to ask him about the job but each time he did so Vaught was on the telephone. Johnson testified he went to the door at the back of the hiring hall to see if there was any other longshoreman out there possibly with a higher classification than he had. Johnson stated he noticed Lee Clark (Clark) coming down the hill toward the hiring hall. Johnson testified he went back past Vaught's office door and Clark headed toward the dining area in the building. Vaught came out of his office and announced he needed a line handler.[26] Clark stated, "Well, I guess that's me." Vaught replied he guessed so since Clark was the senior man.[27] Clark got the job. Johnson told Vaught that both Wilson and President Sloan had mentioned the job to him.[28]

After Clark got the job, Johnson went upstairs to look for President Sloan to let him know what had happened and to tell him how Vaught had sat on the job and that he had not been given the job. When Johnson went upstairs, which was about 1:15 p.m., he saw Canaday, a regular work gang member. Johnson testified Canaday told him that header Pridgen needed three line handlers for that afternoon. Johnson stated he asked who had been selected and Canaday told him Wiggins and Corbette, and he did not know who Vaught had been able to get as the third longshoreman. Johnson asked Canaday about the circumstances of Wiggins being hired. Canaday told him he did not know. Johnson then went back downstairs and asked Vaught about Wiggins having been hired and told Vaught what Canaday had said. Vaught told Johnson he did not know what the situation was with Wiggins, but he was on his way to the docks and he would check it out. Thereafter, Vaught returned to the hiring hall and told Johnson Wiggins had been hired at the union hall.[29]

Johnson testified he then left the union hall and went to the docks to find Pridgen to see if Pridgen was aware of the procedure by which Wiggins had been hired for that day.[30] Johnson testified that after he arrived at the docks, he encountered Wiggins before he found Pridgen. Wiggins credibly testified Johnson approached him and asked him who had given him his job. Wiggins told Johnson Wilson had given him the job.[31] Johnson told Wiggins he was going to have that job, that Wiggins did not have any business at the docks, and asked where Wilson was. Wiggins told Johnson he did not know where Wilson was and added:

> Well, I didn't come down here for no hassle from you or anybody else . . . . If the job means that much to you, we don't have to argue about it. You can have it.[32]

Wiggins immediately went to where Pridgen was. Wiggins told Pridgen and Wilson he did not want to cause any problems and he was going home. Thereafter, Johnson came to where they were.[33] Wilson testified he told

---

[22] I credit Wilson's testimony that he did not tell Johnson he had the job. Wilson's explanation that he did not tell Johnson he had the job is very plausible. Wilson stated if he had told Johnson he had the job he would not have needed to inform Vaught of the position or have had Vaught make an announcement about the position.

[23] Vaught corroborated Wilson's testimony regarding his second visit to the hiring hall.

[24] After Wilson spoke with Sloan, he went home to eat lunch and then went directly to the docks.

[25] Johnson acknowledged that about 15 minutes after Wilson talked to him, President Sloan approached and told him an extra line handler was needed and said he should speak to Vaught about it immediately and not give Vaught time to call anyone else on the telephone. I specifically do not credit Johnson's denial that President Sloan mentioned anything about the possibility of someone coming in with a higher classification.

[26] Vaught made the announcement without using the public address system; however, there is no evidence that anyone else was in the hall other than Clark and Johnson and both of them heard the announcement.

[27] It is undisputed that Clark had a "C" classification whereas Johnson had a "F" classification.

[28] It is undisputed that, about noon, header Walter Nelson came to the hiring hall and told Vaught he needed an additional longshoreman. Johnson heard Nelson ask for the additional help and he heard Vaught announce the job. Johnson presented himself for that job; however, there was another longshoreman present with identical classification and the header chose the other longshoreman. There is no contention of any wrongdoing on the part of the Union or the header in selecting the other longshoreman.

[29] Johnson testified Vaught told him Wiggins said he had been hired by Wilson. I do not view this statement of Johnson to be inconsistent with Vaught's credited testimony.

[30] Wilson testified he let Pridgen know the gang had been filled and told him about Wiggins.

[31] Wilson testified he saw Pridgen, Clark, Wiggins, and Johnson at the docks and figured Johnson had been given a job at the hiring hall.

[32] Johnson contends he asked Wiggins if he knew about President Sloan's not allowing GAI dispatchers to accept employment before 2 p.m. when longshoremen were available and that GAI dispatchers were not to accept work outside their original work gangs. Although I have not credited Johnson's testimony when it was contradicted by others, I do not view this contention of Johnson to be in contradiction of any of Wiggins' testimony. Johnson acknowledged Wiggins told him he could have the job he (Wiggins) had been given.

[33] Johnson testified that after he approached the others, the only thing he heard Wiggins say to Pridgen was that he would catch him next time.

best copy available

Wiggins he was the one that had hired him (Wiggins) and to make it right he (Wilson) would leave. Wiggins made no response to Wilson's comments and left. Wilson told Pridgen that he (Wilson) was responsible for hiring Wiggins and for getting the gang shaped up for that day and because of that he would leave and give his job to Johnson. Wilson then told Johnson he could have his job. Johnson told Wilson he could handle it.

Pridgen told Johnson he could have the job Wiggins had been given.

At approximately 3:30 p.m. when the larger vessel arrived at the dock and as Johnson was reaching for the ropes that the vessel crew threw over for the longshoremen to tie the vessel up with, Vaught approached and told Johnson he did not have a job because he had not gotten his job through the hiring hall. Vaught told Johnson he was trespassing and replaced him with Vince Spencer, a more senior longshoreman.[34]

2. Analysis and conclusion

The General Counsel has not established that the Union violated the Act in any manner with respect to its actions related to Johnson on 22 August. Wilson's hiring of Wiggins to work on the afternoon of 22 August was in keeping with established procedures at the hiring hall. Neither the business agent nor his assistant was present in the hall when Wilson hired Wiggins. No longshoremen were present in the hiring hall seeking employment when Wilson hired Wiggins. Wilson, Vaught, and Johnson all stated that when the business agent or his assistant was not in the hiring hall, a header (such as Wilson) could hire anyone he located in the hiring hall so long as he observed seniority classifications. Wilson needed additional longshoremen as soon as he could get them, and he employed the only person he could find at the hiring hall at that time, namely, Wiggins. Inasmuch as there were no business agents in the hiring hall and no one seeking employment, there was no requirement for, nor is there any evidence to suggest that it had ever been the practice for, a header or his designee to make an announcement about a job vacancy when no one was present. It appears such an act in futility had never been required. The actions related to Wiggins did not violate President Sloan's rule regarding GAI dispatchers accepting employment. President Sloan's rule regarding GAI dispatchers was simply that they could not *go* to work between 6 a.m. and 1 p.m., not that they could not *accept* work during that period if the work was to commence after 1 p.m. and if there were no longshoremen in the hall waiting for a job.

I note there is nothing to suggest that the referral of Clark to one of the jobs on 22 August was other than in accordance with the rules of the hiring hall. Vaught announced the job, albeit verbally instead of over the public address system, to the only two longshoremen in the hall. Clark had more seniority than Johnson and was properly given the job. Johnson did not make his availability for the job known to Vaught before Clark arrived at the hiring hall.[35]

Finally, it was within the hiring hall rules for Vaught to remove Johnson from the job at Waterfront on 22 August because he had not obtained his position through the hiring hall. Johnson knew he could not obtain employment by having a longshoreman walk off the job and he then be given that job without going through the hiring hall. Johnson clearly did not go through the hiring hall when he took the job Wiggins had been properly given earlier.

In summation, I am persuaded the record evidence demonstrates the Union followed its hiring hall rules in making referrals on 22 August. There is no contention the Union's rules were invalid in any manner. In accordance with applicable law, utilization, as was the case herein, in a fair and regular manner of facially valid hiring hall regulations establishes a sufficient defense to allegations of impropriety in the referral of applicants for employment. Accordingly, I shall recommend that the complaint allegations that the Union unlawfully refused to refer Johnson for employment with Waterfront on 22 August be dismissed.

E. *The 30 December Referrals*

1. Facts

Johnson reported to the hiring hall on 30 December at approximately 6:25 a.m. Johnson wrote out a "gang card" for header Soloman McKant because the longshoreman who writes out the gang card for a header is "usually" selected by that header to work on his work gang. Johnson was unable to work on McKant's gang because all the longshoremen McKant hired were senior to Johnson. Johnson asserts he tried to get on header Philip McCoy's gang but stated by the time he presented himself to McCoy, there was only one slot left on McCoy's gang and McCoy selected someone else for that remaining slot. According to Johnson, McCoy's gang was going to work on a tobacco laden boat that day.[36]

Johnson then left the hiring hall area and went upstairs to the office area around 8 a.m. where he met President Sloan at the water fountain. President Sloan testified he knew that all longshoremen that wanted to work that day would already be gone from the hiring hall by that time because jobs were plentiful, in fact so plentiful that 12 or 13 casuals had been referred for employment on

[34] Johnson left the dock area and went to the union hall where he contacted Local Union President Sloan. President Sloan, Vaught, and Johnson met briefly that evening; however, I find it unnecessary in deciding the issues herein to consider what took place at the meeting between those three that evening.

[35] There is no evidence to establish that Clark was called to the hiring hall for the specific purpose of giving him the job in question in order to preclude Johnson from getting it.

[36] I do not credit Johnson's testimony that he sought employment with McCoy's gang that morning. McCoy's gang was, as just indicated, going to work on a tobacco laden vessel. Johnson admitted that when President Sloan asked him that morning if he was going to work that day, he told him: "[N]o, I didn't think I wanted to bother with tobacco. I'd been handling it for the last five days and I was having trouble with my back." Additionally, the uncontradicted testimony of President Sloan reflects that 12 or 13 casuals were hired to work on tobacco laden vessels that day and Johnson with a "F" classification could have been referred for employment ahead of any casual if he had wanted to work handling tobacco that day.

hat day. Sloan stated he observed that Johnson and one ther longshoreman Charles Knox (Knox), were still in he hiring hall. Sloan questioned Johnson about his still eing at the hiring hall, and asked, "Buddy [Johnson] ou're not going to work?" Johnson responded, "No, res. I've been handling that tobacco for five days and 'm not going to today." Sloan told Johnson, "Okay, vell, you know why I asked you this question don't ou?" Johnson asked, "Why?" and Sloan told him, Well, I'm asking you this question so if you come up hort of hours at the end of the year, you'll know vhy."[37] President Sloan then questioned Knox in the ame manner that he had questioned Johnson.[38]

At approximately 8:30 or 9 a.m., Vaught was notified hat an extra winchman was needed at once on one of he work gangs. Vaught made an announcement for the osition but there were no winch operators in the hiring all.[39] Vaught testified winch operators were in short upply, and as a result, they did not have one on each vork gang each day.[40] Vaught stated he had to leave he union hall and go to the docks to try and find a vinch operator. Vaught testified he asked Lanier Sloan, casual, if he would like to take a chance on making a witch that he had to go to the docks to try to locate a vinch operator. Vaught stated he took Lanier Sloan vith him to the docks so that he would have someone to swap out with the header of whatever crew he was able o secure a winch operator from. Vaught testified he did not observe Johnson in the hiring hall when he left; however, he stated he was not particularly looking for anyone because there were plenty of jobs that morning. Johnson made no mention to Vaught about wanting to go to work on 22 August. According to Vaught, any ongshoremen who wanted employment could have had a job on that day. Vaught stated he assumed that anyone who was still in the hall at the time he went to look for a winch operator did not wish to work that day.

Business Agent Hicks notified President Sloan of the need for an extra winch operator. Hicks told Sloan he had sent Vaught to the docks with an individual to swap out for a winch operator.[41]

Vaught visited at least two boats (a tobacco laden one and a steel laden one) at two different berths (4 and 8) before he was able to persuade header McKant to release longshoreman Richard Jenkins (Jenkins), a qualified winch operator. Vaught gave McKant Lanier Sloan as a replacement for Jenkins.[42] Vaught then transported Jenkins to the vessel that needed an extra winch operator and thereafter returned to the hiring hall.

After lunch that same day (30 December), Johnson spoke with Business Agent Hicks and then asked Vaught if he had made a swap out at the state docks that day.[43] Johnson testified he asked Vaught why he had not made an announcement about the job that he gave to Lanier Sloan. Vaught told Johnson he did not think it was necessary because he thought all longshoremen with any classification that wanted a job that day had already gone to work earlier that morning. Johnson told Vaught there were four longshoremen with classifications in the hall.[44] Johnson then met with President Sloan in Vaught's presence and told him what had taken place. President Sloan told Johnson there was nothing he could do about it at that time.[45]

2. Analysis and conclusions

I am persuaded the General Counsel has failed to establish that the Union unlawfully refused to refer Johnson for employment with WSC on 30 December for the following reasons. It is clear that job positions were plentiful at the shapeup on 30 December, and Johnson was present at shapeup. Twelve or more casuals were referred for employment on that day and any longshoremen, including Johnson, who wanted a job that morning could have obtained employment. At some point after shapeup, an extra winch operator was needed and an announcement was made about the position; however, there was no one in the hiring hall qualified as a winch operator.[46] Under the circumstances herein, it was not unreasonable for Vaught to ask Lanier Sloan, a casual, if he wanted to accompany him as a possible replacement for any winch operator he might find on any work gang at the docks. Johnson had clearly stated he did not want to work on a tobacco laden vessel that day. Vaught at the time he left the hall with Sloan did not know whether he would find a winch operator on a tobacco laden vessel or on some other type ship. Likewise, Vaught was justified in assuming that anyone who was still at the hiring hall at the time he left with Lanier Sloan did not

[37] President Sloan stated he always asked Johnson and others when he observed them at the hiring hall when jobs were plentiful whether they desired to work that day or not. Sloan stated he questioned them so he could remind them when they did not get certain benefits at the end of the year based on a lack of hours that they had been too "choosy" about the jobs they accepted and as such they had not accumulated the necessary hours to receive the extra benefits.

[38] Knox told Sloan he had a shoulder injury and was not going to work that day.

[39] I do not credit Johnson's testimony that Vaught did not make an announcement about the winch operator's position. It is undisputed that Johnson was not qualified as a winch operator.

[40] Vaught stated the shortage came about because some of the longshoremen who had been trained as winch operators had retired, and others were simply not taking the training necessary for that type position.

[41] Hicks also informed President Sloan that Vaught had found a winch operator and had made a swap out with the work gang that he had taken the winch operator from. Sloan gave Hicks his okay.

[42] Jenkins did not want to be utilized as a winch operator, but after some persuasion agreed to the swap out.

[43] Johnson stated he saw Jenkins in the hiring hall about 11:45 a.m., and asked him what he was doing there so early. According to Johnson, Jenkins told him he (Johnson) could not do the job that he (Jenkins) was doing but he did not tell Johnson what it was he was doing. Johnson stated he learned from others that Vaught had taken Jenkins to another job and had replaced Jenkins with Lanier Sloan.

[44] Johnson testified that other than himself, Leroy Tidsdale, Knox, and William Brooks (Brooks) were in the hall. According to Johnson, Tidsdale, who had a "C" classification, was referred to a job pursuant to an announcement by Vaught at approximately 9 o'clock that morning. Knox, as noted earlier, told President Sloan he did not want to work that day. Brooks was not called as a witness and there is no evidence regarding his actual availability for referral other than Johnson's testimony that he was at the hiring hall. Brooks has a D classification according to Johnson.

[45] President Sloan testified that the worker who got the swap out job had been on the job for 4 hours at the time Johnson spoke with him. Sloan also stated Johnson could have gone to work that morning if he had wanted to.

[46] Johnson did not contend he was qualified as a winch operator.

want to work that day because there had been a large number of casuals referred for work that morning. The evidence clearly suggests Vaught was not trying to circumvent the policy of making an announcement for a job vacancy when he took Lanier Sloan with him because other position vacancies were announced that morning including the winch operator's position. Johnson did not express to Vaught any interest in working that day. Of the four longshoremen that Johnson contends were still in the hiring hall, Knox did not want to work that day, Tidsdale did work, and Brooks did not testify, therefore little, if anything, is known about his actual availability for work that morning. According to President Sloan, it was not unusual for longshoremen to be at the hiring hall and yet not be seeking employment. In fact, President Sloan testified he always questioned those who were present in the hiring hall when jobs were plentiful about their not going to work and even reminded them, as he did on this occasion, that if they came up short on hours at the end of the year, not to blame him but to simply recall that they had been too "choosy" in selecting jobs they would accept. The Union's failure to make an announcement about the possible replacement job was not an arbitrary or unlawful breach of its rules. Vaught could not have known at the time he left the hiring hall if a swap out would actually take place or, if it did, on what vessel it would take place. Therefore, there was really nothing for him to announce. Inasmuch as jobs were plentiful on the day in question, Vaught was justified in assuming that no one at the hiring hall had any interest in filling a vacancy that a possible swap out might create. Accordingly, after considering all the circumstances herein, I cannot find the Union acted unfairly, unreasonably, without justification, or in an arbitrary manner in its actions on 30 December. I shall, therefore, recommend that the complaint allegations that the Union unlawfully refused to refer Johnson for employment with WSC on 30 December be dismissed.

On the foregoing factual findings and conclusions, I reach the following

CONCLUSIONS OF LAW

1. Waterfront Services, Incorporated is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Wilmington Shipping Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. International Longshoremen's Association, Local 1426 is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union has not engaged in the unfair labor practice alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The complaint is dismissed in its entirety.

---

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Middle Earth Graphics, Inc. *and* James Cannon, Jr. *and* Lidell Ford, Jr. *and* Wayne Ford *and* Karen Root *and* Clark Olson *and* Patricia Ann Cole *and* Garry Wayne Root *and* Lamar Edwards *and* United Paper Workers International Union, AFL–CIO–CLC. Cases 7–CA–24013(1), 7–CA–24019, 7–CA–24013(2), 7–CA–24914(1), 7–CA–24013(3), 7–CA–24856(2), 7–CA–24030(1), 7–CA–25033, 7–CA–24030(2), 7–CA–24856(3), 7–CA–24914(2), 7–CA–24953, 7–CA–24030(3), 7–CA–24030(5), 7–CA–24052, and 7–CA–24921

19 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 6 June 1986 Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We further find totally without merit the Respondent's allegations of bias and prejudice on the part of the judge. On our full consideration of the record and the judge's decision, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence. We also find nothing improper in the judge's questions to the Respondent's witnesses.

We agree with the judge's finding that the Respondent failed to comply with the reinstatement provisions of the settlement agreement. In agreeing with the judge, we recognize that the Respondent experienced a significant reduction in orders for Cadaco game cards in 1985. The Respondent hired the discriminatees in May and June 1984 when its business was expanding dramatically because of the Cadaco contract. The employees were discharged in November 1984 and the settlement agreement was executed on 22 April 1985. By the summer of 1985, orders for Cadaco game cards had decreased, with a resulting decline in bindery work. Although the amount of bindery work available after the settlement agreement was substantially less than what existed in 1984, the record shows that the Respondent periodically produced game cards for Cadaco throughout 1985. The record further shows that on numerous occasions the Respondent bypassed the discriminatees and used employees with less seniority, including individuals referred by temporary employment services, to perform the Cadaco work. In view of this evidence, we find that the Respondent did not abide by the reinstatement provisions of the settlement agreement.

[2] We correct the judge's inadvertent error in par. 2(b) of his recommended Order, under which the Respondent is to notify the employees in writing that the discharges and warning will not be used against them in any way.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Middle Earth Graphics, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

A. Bradley Howell, Esq., and *Richard F. Czubaj, Esq.*, for the General Counsel.

Francis T. Coleman, Esq., and *Scott R. Merrill, Esq.*, of Washington, D.C., for the Respondent.

Clare Annen, of Scotts, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY JR., Administrative Law Judge. The first nine of the consolidated cases initially came on for hearing before me on April 22, 1985, and they all came on for hearing ultimately on January 28, through February 5, 1986, at Kalamazoo, Michigan, on consolidated complaints[1] issued by the Regional Director of Region 7, which allege that Respondent Middle Earth Graphics, Inc.,[2] violated Section 8(a)(1), (3), and (4) of the Act and that it failed to comply with the provisions of a settlement agreement, thereby authorizing the Regional Director to set aside the agreement and to prosecute earlier unfair labor practices ostensibly settled therein. More particularly, the consolidated complaint alleges that the Respondent repeatedly threatened employ-

[1] The principal docket entries in the consolidated cases are as follows: Charges filed by James Cannon Jr., Lidell Ford Jr., Wayne Ford, Karen Root, Clark Olson, Patricia Ann Cole, Garry Wayne Root, and Lamar Edwards, respectively, against Respondent Middle Earth Graphics, Inc., between November 13 and 29, 1984, in Cases 7–CA–24013(1), 7–CA–24019, 7–CA–24013(2), 7–CA–24013(3), 7–CA–24030(1), 7–CA–24030(2), 7–CA–24030(3), 7–CA–24030(5), and 7–CA–24052; consolidated complaint issued by the Regional Director for Region 7 against the Respondent on December 31, 1984; Respondent's answer filed on January 8, 1985; hearing scheduled for Kalamazoo, Michigan, on April 22, 1985; informal settlement agreement executed by all charging parties, the General Counsel, and the Respondent and approved by me on April 22, 1985; charges filed against the Respondent by Wayne Ford, Clark Olson, Lidell Ford Jr., United Paperworkers International Union, AFL–CIO–CLC (Union), and Karen Root, respectively, between August 2, and September 26, 1985, in Cases 7–CA–24856(2), 7–CA–24856(3), 7–CA–24914(2), 7–CA–24953, 7–CA–24914(1), 7–CA–24921, and 7–CA–25033; consolidated complaint issued against Respondent by Regional Director for Region 7 on September 30, 1985, and first amended consolidated complaint issued against Respondent by Regional Director for Region 7 on October 30, 1985; Respondent's answer filed on November 7, 1985; hearing held in Kalamazoo, Michigan, on January 28 through February 5, 1986; briefs filed by the General Counsel and the Respondent on or before April 28, 1986.

[2] The Respondent admits, and I find, that it is a Michigan corporation that maintains its principal place of business in Kalamazoo, Michigan, where it is engaged in the commercial printing business. In the course and conduct of this business Respondent during the preceding 12 months sold and distributed from its Kalamazoo, Michigan place of business products valued in excess of $100,000, of which products valued in excess of $50,000 were shipped directly to points and places located outside the State of Michigan. Accordingly, Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

ees with plant closing if they unionized, created the impression among employees that their union activities were the subject of company surveillance; threatened to fire employees if they joined a union; threatened to discharge employees and require them to become employees of a temporary employment referral service if they continued to discuss unionization; attempted to suborn perjury by an employee in a Board proceeding; coercively interrogated employees, threatened to fire employees who supported the Union, and to prevent them from receiving unemployment compensation; threatened an employee with reprisal on returning to work if he engaged in union activities; issued disciplinary warnings to employees because they were union sympathizers; discharged James Cannon Jr., Lidell Ford Jr., Karen Root, Garry Wayne Root, Clark Olson, and Wayne Ford because of their union sympathies and activities; contracted out work in order to prevent unionization by removing union sympathizers from its payroll and placing them on the payroll of a temporary employment referral service; failed to recall Wayne Ford to work and discharged him because of his union sympathies and activities; harassed, demoted, and transferred Lidell Ford Jr. on his return to work because of his union sympathies and activities; and since September 1985 failed to recall Karen Root from layoff because of her union sympathies and activities. The Respondent denies the commission of any independent violations of Section 8(a)(1) of the Act; asserts that it discharged Lidell Ford Jr. because he sabotaged company machinery; discharged James Cannon Jr. because of his poor work performance; and discharged Garry Wayne Root, Karen Root, Clark Olson, and Wayne Ford because they refused to sign up with the temporary employment referral service that it had employed. It contends that it failed to recall employees because of lack of work and that Lidell Ford Jr. was demoted on his return to the job because he was unable to perform assigned work. The Respondent also contends that violations settled by an agreement concluded on April 22, 1985, are barred from prosecution by limitations. On these contentions the issues herein were joined.[3]

FINDINGS OF FACT

I. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent Middle Earth Graphics, Inc. is a small printing firm located on the north side of Kalamazoo, Michigan. It is owned and operated by Louis Hall, who founded the business about 12 years ago. Until the spring of 1984, it employed about 10–15 individuals and was engaged principally in handling small and medium-sized commercial printing jobs. In the spring of that year, it obtained a contract from a Chicago firm, Great Cadaco Games, a Division of Rapid Mounting & Finishing Co. (Cadaco), to produce sets of question-and-answer cards used in a game modeled after Trivial Pursuit. The Cadaco game is known as "Bible Trivia." Subsequent orders received from Cadaco included printing of question-and-answer cards for two similar games, "Children's Bible Trivia" and "Catholic Trivia." Taking on these orders meant a rapid increase in the staffing of the Respondent's plant, particularly in unskilled employees in the bindery who performed such functions as merging, collating, and banding. The discriminatees involved in this case were hired in May or June 1984 when this upsurge in business began. Concurrently with the increase in staff, the plant began to operate on weekends and occasionally on an around-the-clock basis during the regular workweek. The initial Cadaco order was only for 25,000 sets of Bible Trivia cards, but, as that order was filled, other orders followed rapidly. Respondent continues to produce Cadaco game cards but not at the hectic pace it experienced in 1984. At the same point in 1984 Hall began to enlarge the physical facilities of his plant and to acquire new machinery for his expanded operation.

The bindery operation involves the cutting of large "signatures" or printed sheets into quarters, collating them on a nine-sheet collator, merging these collated sheets into larger bundles by what is, in effect, a hand-collating process, cutting or "trimming" the newly formed bundles of question-and-answer sheets into individual game sets, and then putting rubber bands around individual sets before they are boxed for shipment. In this operation, Lidell Ford Jr. operated a collator (sometimes called a Harris multi-stitcher); James Cannon Jr. was a merger; Karen Root was a bander; Lidell Ford's brother, Wayne Ford, worked as a merger and collator helper; and Karen Root's brother, Clark Olson, was a bander. Karen Root's husband, Garry Root, had a semi-skilled job as trimmer operator.

In June 1984, shortly after they had been hired, Garry and Karen Root were carrying on a conversation in the office with Hall. Hall had been talking with Jim English, a salesman from another print shop, Kalamazoo Label, and was repeating to the Roots what the salesman had said. Hall noted that Kalamazoo Label was running at about a third capacity because of union work rules and a high union scale. Karen Root asked Hall what would happen if a union came into Middle Earth Graphics. Hall replied that a union would never "get in here. I will close my doors before I will let a union in here."

Sometime in May or June, Lidell Ford was working with Hall at the collator and asked Hall if he would ever have a union in the shop. Hall replied that he would "close the g.d. doors" before he would permit a union to come into the shop. Ford had a similar conversation at this same point in time with Chalker. Chalker expressed the opinion that Hall would close the plant before he would permit it to become unionized.

During the summer of 1984, Wayne Ford was engaged in a conversation with Foreman Don Antolovich and fellow employee Mike Ibeck at Antolovich's home. Ford observed that, if the plant were unionized, the Company would stop a lot of activities that Ford objected to, such as 12-hour workdays and cutting incentive rates. Antolovich replied that a union would be nice but there was "no chance of it."

Early in the fall, K. Root became upset by an incident at the plant involving her son, employee Steven Kilburn. Kilburn was attacked by a dog that had been tied up

[3] Errors in the transcript have been noted and corrected.

ehind the plant and had been allowed to stay there for lant security reasons. Kilburn was not injured but had een frightened by the dog's aggressive behavior. On arning of this incident, K. Root complained to Plant anager Keith Tap and the General Foreman Rod halker, but received a rebuff. On returning to her job ation, she angrily shouted to employees in the merging ea of the plant, "Like hell we don't need a union." Anlovich was present when these remarks were made.

Shortly thereafter, K. Root phoned the office of the nited Paperworkers Union and sought information on w to go about organizing a union at the Respondent's ant. She did not follow up immediately on this infor-ation but, along with other employees, began to discuss e possibility of unionization. Much of this talk took ace at the merging line. On one occasion, Antolovich ld employees on the merging line that the Respondent as keeping a complete file on who talked union at the ant.

On Friday, November 2, 1984, the Respondent staged open house at the plant. Respondent had just complet-l an addition to the company premises, and this mile-one provided the occasion for the celebration. Custom-s, friends, and public officials were invited to view the larged building, see the plant in actual operation, and in Hall and others for a light lunch and a ceremonial bbon cutting. A humorous program booklet, prepared d for the open house, was introduced into evidence. mong the visitors was Patrick Allgood, the regional anager for Manpower, a supplier of temporary help. llgood suggested to Hall that Manpower could be of lp in providing him with extra help during peak peri-ls, and Hall was amenable to the suggestion. He told llgood to prepare a specific proposal and present it.

The following Tuesday, November 2, Allgood visited ll and presented a written proposal. The document in estion appears to have been derived from a word ocessor, with individual name changes on the cover d an individual quotation of a rate for temporary help $4.92 an hour. This figure represented the charge by anpower to Middle Earth Graphics. Although the pro-sal did not say so, record evidence indicated that this ure presumed an actual payout rate to employees of out $3.50 or $3.75 an hour. The balance represented ductions and supplements for withholding and insur-ce, payroll computations, and Manpower's profit. It came clear that Hall had in mind not merely procuring ditional help from Manpower but was interested in cing a number of his current employees on Man-wer's payroll, thus treating them as temporary help. ll insisted to Allgood that none of the employees he shed transferred from the Middle Earth Graphics pay-l to the Manpower payroll should experience reduc-ns in their hourly rate, although it is clear that eventu-y all of them lost benefits, inasmuch as they were cov-d by a health insurance program as Respondent's em-yees while Manpower had no such program for the nporary help it supplies. Both Hall and his manage-nt employees were quite evasive about the actual rly rate they were being called on to pay to Man-wer in order to maintain a $4 payout rate to current ployees. Eventually, another Manpower representative, Debra Kuhn, who assisted in the implementation of Manpower's contract with the Respondent, testified that for employees earning $4 per hour, Manpower charged the Respondent $5.65 per hour for existing employees being transferred to its payroll, and $5.88 for new employees supplied from Manpower sources. Billing records and invoices in evidence confirm this testimony. The differential in rates represented Manpower's recruiting costs. Higher rated employees were billed at other amounts. Kuhn testified that the Manpower markup was from 17–30 percent, although a simple arithmetic calculation makes it clear that the Manpower markup on the $4-an-hour employees was about 41 percent.

On the afternoon of Wednesday, November 7, Greg Henderson, a representative of Manpower, talked to the mergers in the merging area about signing up for Manpower. Both Chalker and Antolovich were present. There was some objection from Respondent's employees to the idea of leaving the Respondent's payroll and transferring to Manpower. The objections centered on the fear of losing their jobs and of receiving cuts in pay. As the discussion drew to a close, Lidell Ford, who was not a merger but who happened to be in the area, told the assembled mergers that if they signed up for Manpower their action would be tantamount to quitting Middle Earth Graphics, and they would have no standing to organize a union among the Respondent's employees. Antolovich admits reporting this or similar statements on the part of L. Ford to Hall.[4]

On the evening of the same day, Ford phoned Clare Annen, the Union's representative in the Kalamazoo area, told him what was happening at Middle Earth Graphics among the mergers, and arranged for Annen to meet with interested employees at Ford's home on Saturday, November 10. On the morning of Thursday, November 8, Hall summoned Ford to his office. In the course of a private interview, Hall told Ford that he was in possession of written proof that Ford had wilfully damaged the Respondent's collating machine and proceeded to fire Ford for doing so. Ford denied the accusation and asked to see the statements that Hall had referred to. He also asked Hall to produce the second-shift employees who had made the written allegations. Hall declined and said they would be given to him with his final paycheck. Ford protested this action and claimed he could run the collator better than any two employees. He told Hall to "cut out the bullshit" and accused Hall of using him as a scapegoat. Hall's only response was that nobody would run the Company but Hall himself. When Ford picked up his paycheck the following day, he asked Comptroller Joseph Hagenbarth for the statements, and Hagenbarth refused to produce them on advice of counsel. No such statements have ever been furnished, even in response to the General Counsel's sub-

[4] Although there is some confusion in the record concerning the sequence of events that surrounded the discharge of L. Ford, it appears, as detailed later, that damage had been done to a collator the previous afternoon or evening, which the Respondent attributed to Ford. Ford was discharged for this infraction on November 8, the morning following his statement to the mergers recited above.

poena. I conclude that they never existed in the first place.[5]

During the next few days, several supervisors made statements to various employees indicating that only mergers would be required to sign up for Manpower. On Friday, November 9, Chalker spoke to several employees, including Garry Root, near the trimmer and indicated to them that Manpower was only for mergers, explaining that mergers were part-time employees and that the Respondent was taking this action because it was not sure how long orders for Cadaco games would last so it wanted to be sure that the mergers had some alternative source of employment if the Cadaco contract ran out. Later on in the day, Garry Root spoke to Antolovich and asked him if Manpower was just for mergers. Antolovich assured him that this was so. On the same day, Patricia Ann Cole, a merger, came to the plant to pick up her paycheck. She spoke to Antolovich and asked him if she had to join Manpower. He told her that she would have to sign up and stated that this requirement applied only to mergers because they were regarded as part-time employees. Chalker had also told Clark Olson that only the mergers were being required to transfer to the Manpower payroll.

Debra L. Schrock worked as a collator helper on the evening shift.[6] On November 9 she asked Chalker if she had to sign up for Manpower. Chalker's reply was, "Not as long as you don't talk union." Later on in the following week, Tap asked Schrock if she had signed up for Manpower. Her reply was that Chalker told her that she did not have to sign up so long as she did not talk about "onions." She used the word "onions" to avoid mentioning the forbidden term "union." Tap told her at that time that everyone had to sign up, so she did the following day.

The mergers worked on Saturday, November 10. During the course of this workday, Cole made the observation to her fellow employees and to Antolovich that the only reason the Company was bringing in Manpower was because of union organizing activity. Antolovich's reply was, if there was any further mention of unions, employees would be laid off permanently and the plant doors would be closed. Antolovich admitted making this statement but explained for the record that he was just expressing his opinion. He also stated for the record that Hall was the "kind of guy who will cut off his nose to spite his face" and ventured the statement that "if he doesn't get his way, nobody will."

A union meeting took place the same evening at Lidell Ford's home. Among those who attended were the Roots, Olson, Cannon, and Wayne Ford. As noted previously, Ford had been discharged by this time. Among the questions discussed was whether employees should obey a directive to sign up for Manpower. Annen replied that it was up to each employee about whether he or she signed up, and each employee would have to make this judgment on the basis of what he could afford to do if faced with discharge. Annen expressed an opinion that it was an unfair labor practice for an employer to force employees off its payroll and felt it would be appropriate to file a charge. He did not state that he felt that employees who signed would be disenfranchised from participating in a representation election. Union authorization cards were distributed on this occasion and every employee who attended signed a card.

About this same time, Antolovich met Cole at a friend's house. I credit her testimony to the effect that Antolovich told her that the Company was trying to make a case against Lidell Ford and asked her how she would like to make $25? She flippantly replied, "What do I have to do—kill someone?" Antolovich told her that all she would have to do was to go into court and say she saw Ford tampering with machinery. Cole objected, saying that she did not know anything about the machinery. Antolovich replied that she could just say that she saw him tampering with valves and hoses. Cole refused, insisting that she would not lie either for or against Ford.

On Monday, November 12, Respondent's supervisors, including Hall, and Manpower representatives Allkins and Kuhn, met with all shop employees. At this time Hall announced that all employees, except for "the original ten," would be required to transfer from the Middle Earth Graphics payroll to the Manpower payroll. The "original ten" was Hall's way of describing the employees who had been working for him before the work force expansion took place in the spring of 1984. This number included the pressmen, all supervisors, and the office staff. The Manpower representatives were asked a series of questions about seniority and other matters. They answered some questions and were unable to answer others. Hall was asked why this was taking place and his only answer was, "No comment." Cole and Cannon then stated aloud that the only reason the transfer to Manpower was taking place was because of the Union. Hall said it was taking place so that he could protect himself from what Lidell Ford had done the preceding week.

Later on that day in a private conversation, Cole asked Hall what would happen if she refused to sign up for Manpower. He replied that she would be fired. She said that she did not want to become a "rent-a-jerk." Hall told her that he did not care if a union did come into the plant, observing that he had enough money, and could quit and close the doors. After consulting with her husband, Cole resigned.

[5] Respondent's second-shift employees, Mihally Csiszar and Schrock, gave diametrically opposed statements concerning making written statements on November 11. Csiszar, who is Hungarian and has trouble writing English, testified that he and Schrock prepared a joint statement in their own handwriting on being questioned by management about vandalism performed on the collator and turned the statement over to their supervisor. Schrock testified that she prepared no such statement and, in fact, was never interviewed by management concerning the events of November 6 until, on November 14, she and Csiszar were presented with a typewritten statement, dated November 12, detailing the damage done to the collator and accusing Ford by necessary implication of doing the damage. She insisted that the statement be modified before she would sign it and it was changed. This statement, signed both by her and by Csiszar, is in evidence. At the hearing in this case, Hall admitted that he had been "mistaken" when he said that he had statements in his possession alleging Ford's responsibility for vandalism *before* Ford was fired.

[6] At a much later point in time Schrock became a merger.

On the following day Cannon was terminated just fter he reported for work. When Antolovich gave him he news his reply was, "I knew it was coming." Antolo-ich told Cannon that he had found a number of mis-akes in Cannon's work the day before. Cannon argued hat Antolovich was in no position to complain about Cannon's work when Antolovich's brother, Walter, also merger, was "goofing off." Antolovich said that he would divide up the mistakes that had been found be-ween Cannon and his brother. However, Walter Anto-ovich was not disciplined.

On Wednesday, November 14, a third meeting was eld between a Manpower representative and the pro-uction and maintenance employees. Kuhn represented Manpower on this occasion. She attempted to answer employee questions that had been left unanswered during previous meetings. Thereafter, she conducted private nterviews at which time she solicited applications from hose who were being required to transfer.

On November 14 Tap called Garry Root into his office and asked Root if he had heard about any union ctivities. Root replied that he had talked to someone bout the Union the previous week. Tap asked Root whom he had talked with, but Root refused to answer. Tap went on to ask Root if he had seen any union cards. Root replied untruthfully that he had not seen any.

About this same point in time, Tap had a conversation with Lamar Edwards, the janitor and maintenance man. He asked Edwards if Edwards had signed for the Union. Edwards replied that he had not done so. Tap then asked Edwards if Edwards had received a union card from Garry Root. Edwards had in fact received a union card from Garry Root. After engaging in a conversation with another employee named Dove, Edwards showed the card to Tap. Tap asked if he could make a copy of the card and Edwards consented. Tap then asked Edwards if Garry Root had signed him up on company property. Edwards replied that Root had come to his house and had signed him up there. Tap then told Edwards that Garry Root had "lied to save his own ass" because Root had told Tap something else. He then instructed Ed-wards to return to the merging line.

On the morning of Thursday, November 15, both Roots and Olson came to work wearing union buttons. They had attended a union meeting the night before and presumably had obtained the buttons at the meeting. Ha-genbarth asked them when they arrived whether they had signed up for Manpower. All three replied that they had not done so. Hagenbarth told them that if they had not signed with Manpower, they would have to leave the plant. Garry Root replied that he did not work for Manpower, "I work for Middle Earth Graphics." Ha-genbarth told Root that he could not give him his check until he signed for Manpower. Root told Hagenbarth to go get someone with authority.

K. Root went to her job and began to work. Some of her fellow employees asked her if she had signed up for Manpower. She replied that she had not done so and that she was not going to so do because she was trying to get a union into the plant. Not long thereafter, Root heard Antolovich report this conversation to Hall in Hall's office. Antolovich told Hall, "You've got to do something. Those people are downtalking Manpower and talking union. We've got to them them out of there."

Before long, Hall, Tap, and Antolovich came into the bindery and went up to Garry Root. Hall asked Root if he had signed up for Manpower. Root said that he had not done so, adding that he was working to get a union into the plant. Hall stepped toward Root, backed him into a machine, and called him an s.o.b. Root said taunt-ingly that Hall would love to have an excuse to hit him. Hall replied that he knew a hundred people in Kalama-zoo who would like to hurt Root. Hall then instructed Tap to call the police. Shortly thereafter, they arrived. Hall pointed to both Roots and to Olson and asked the police to remove them. As the police began to do so, Root asked one of the officers why she was being re-quired to leave and he replied, "Trespassing." She ob-jected, telling the officer that she had punched in and was just doing her job. Hall insisted that she be removed as well and she was.

Wayne Ford had originally signed an application for Manpower but then withdrew it on November 16 by calling the Manpower office. On November 19 when he went to work, Tap asked him if he had signed for Man-power. W. Ford replied that he had done so but had withdrawn his application. Tap then told him that "we no longer need you," whereupon W. Ford left the plant. Manpower's invoices for the first 2 weeks of its contract with the Respondent indicate that it supplied the Re-spondent with 11 newly recruited employees during this period: Lynne M. Alston, Sheila A. Forney, James A. Feringa, Marilyn J. Hosteller, Michael J. Stanfill, Gerald L. Stump, Veronica D. Swi-, Deborah E. Talley, Cheryl A. Heighton, Julie K. Kimball, and Jerome W. Phelps. They also indicate that 19 former Middle Earth Graphics employees were transferred to the Manpower payroll: Walter Antolovich, James H. Butler, Dale E. Croy, Houston B. Ford, Bonnie K. Garton, Mary Ann Hollis, Michael J. Ibach, Scott R. Kellogg, Lamar Ed-wards, Mytris McCants, Ricardo Nunn, Margaret A. Ross, Debra L. Schrock. Calvin C. Shafer Jr., Brenda K. Van Tilberg, Charles J. Deneau, Tamara Stickney, Janet M. Van Tilberg, and Phyllis J. Narlock.

Between November 13 and 29, the first series of unfair labor practice charges in this dispute were filed. On No-vember 21 the Union filed a representation petition seek-ing to represent the Respondent's production and mainte-nance employees. That petition is still pending, having been blocked by the outstanding unfair labor practice charges against the Respondent.

Lidell Ford's brother Houston Ford continued to work at the Respondent's plant on the Manpower pay-roll. Sometime late in November, Hall spoke with H. Ford about his brother's discharge. He told H. Ford that he hated to fire Lidell but that Lidell had been harassing employees and had tampered with the collator, so that others who worked on the machine were prevented from operating it to full capacity, and making their full piece-work incentive rate. Hall added that Lidell was trying to bring a union into the plant, and there was "no way in hell" that he would permit a union to come into the Company.

Hall also had a private conversation with Lamar Edwards in late November, in the course of which he told Edwards that he did not want to give anyone any trouble and he did not want anyone to give him any trouble. His words were that if someone gave him trouble, "he would give it to him back," mentioning that he had an employee who was a real troublemaker. Shortly thereafter, Hall told Edwards that he would be laid off for lack of work. Edwards said that he would quit and apply for unemployment compensation.

The original consolidated unfair labor practice complaint was issued by the Regional Director on December 31, 1984. The case was set for hearing on April 22, 1985. On that date, the parties executed an informal settlement agreement, which included an undertaking on the part of the Respondent to pay specified sums of money to both Roots, Olson, Wayne Ford, Lidell Ford, and Cannon in settlement of the outstanding complaint. It also obligated the Respondent to offer these six individuals "full and immediate reinstatement to their former jobs without prejudice to their seniority or other rights and privileges previously enjoyed" and to cease and desist from committing further unfair labor practices.

There is no dispute that the Respondent paid to the six discriminatees the sums required under the settlement agreement or that it posted the required notice. At issue is whether the Respondent offered these individuals full and immediate reinstatement to their former jobs and whether it refrained from committing further unfair labor practices. Of the six discriminatees who were parties to the April 22 agreement, only three ever worked for the Respondent thereafter. Two did not begin to work until June 28 and the third did not start back to work until August 19. Neither was working when the case came on for hearing again on January 28, 1986.

On May 9, 1985, Hall wrote identical letters to all six discriminatees who were involved in the settlement agreement. The letter read:

> Pursuant to the terms of the settlement agreement entered into between Middle Earth Graphics, Inc., and the National Labor Relations Board, on April 22, 1985, you are hereby notified that you are reinstated to your former position as an employee and any reference to your discharge and/or layoff has been removed from your file.
>
> Due to lack of production requirements, there is no work available for you at this time. However, you will be given the normal notice when that does occur. Therefore, you should keep us advised of your current address.

During this same period of time, the Respondent transferred nine former employees whom it was continuing to utilize on the Manpower payroll back to their former status as Middle Earth Graphics employees. These included Ann Ross, Charles Deneau, Beth Breed, Debra Schrock, James Butler, Scott Kellogg, Bonnie Garton, Calvin Schaeffer, and Brenda Van Tilberg. Some resumed their places on the Middle Earth Graphics payroll on or before June 26, 1985, when the first two discriminatees came back to the plant. All were back by August 19 when the third discriminatee returned. Chalker explained that he had bee. told by Hagenbarth that it was more expensive to maintain these individuals on the Manpower payroll, with the attendant markup for Manpower's services, than to employ them directly as Middle Earth Graphics employees. Hagenbarth testified that the anticipated savings in administrative costs in the preparation of payrolls did not materialize. Hall was asked why he transferred these individuals from the Respondent's payroll to Manpower and then back again. He said that he assumed that it was for a reason other than cost effectiveness but he could not quite recall what that reason was.[7] Nobody explained why it took the Respondent over 6 months to come to the conclusion that it was costing more to employ former employees on the Manpower payroll than it cost to hire them directly.

K. Root was recalled on June 28 to her position as a bander. She was laid off again on July 2. She was recalled a second time on July 30 and worked about 2 weeks, when she took sick leave. She returned again on August 20 and worked until September 20, when she was laid off ostensibly for lack of work. She has not worked since that time.[8]

Late in July when K. Root was notified a second time to report for work, her brother, Clark Olson, was at her home. On learning of his sister's recall, Olson phoned Chalker and asked him if he should come back to work as well. Chalker informed Olson that there was no work for him and that there would be no work for him in the near future. About August 9, an office employee, identified only as Brenda, phoned K. Root's home and asked for Olson. He was not there. On receiving this information, Olson phoned Chalker, who informed him that he had to keep the office updated as to his current phone number. Olson told Chalker that he had the correct phone number. Chalker said nothing about Olson's reporting for work. He admitted at the hearing that he had no work for Olson at that time. Shortly thereafter, Olson received a letter, dated August 10 and signed by Hall, in which Hall simply noted that Company records indicated that Olson's phone number was the same as his sister's number and reminded Olson that it was his responsibility to keep the Respondent informed as to any change in his address or phone number. It said nothing about reporting for work. A few days later, Olson received a letter from Hall, dated August 20, informing him that he was being discharged, effective August 20, for his failure to report to work on August 19.[9] Olson insisted at the hearing that

---

[7] Hall had a very selective memory and professed absence of recollection on crucial matters relating to events in this case. He also was evasive in the answers he did give. I note also his profane outburst during the hearing, the fact that he was photographing witnesses in the hallway outside the hearing room as they sat waiting to testify, and that he was coaching a company witness in the hallway, prior to her testimony, notwithstanding the existence of a sequestration order. In short, his partisanship at trial was unrestrained and out of control. I discredit his testimony.

[8] K. Root testified that, during this period of her employment, she wore a union button to work.

[9] Chalker stated at the hearing that he had only a day or two of work for Olson on August 19 and that the purported offer was for temporary work.

he never received any letter or other communication instructing him to report for work on August 19 or any other date. Respondent insists that it mailed Olson such a letter a few days before this date. Although the Respondent was able to produce copies of other similar correspondence with its employees, it failed, in response to a subpoena by the General Counsel, to produce a copy of the disputed notification letter to Olson. I conclude that no such letter ever existed or was ever sent.

On June 24, 1985, Csiszar, who by this time had become a supervisor, phoned the Root house for the purpose of requesting Garry Root to return to work. He spoke with K. Root. On learning of the call, Garry Root returned it and was told by Csiszar that there was work available on a 6-hour-a-day basis and requested Root to report the following morning. Root said he could not do so, since he was working for Merchant's Publishing Company and would be obligated to give them a 2-week notice. Csiszar informed Root that the job in question would last only 2 weeks. Hall testified that Root was only being offered a couple of days' work. Root told Csiszar that he would have to have 2 weeks' notice of any offer to return and further informed Csiszar he would not come back to work for the Respondent on a 6-hour-a-day basis because he regarded such a job as part-time. On the following day, Garry Root received a letter from Hall, in which Hall stated:

> This letter is confirming the telephone conversation Mike Csiszar had with your wife Karen on Monday, June 24. You were advised to report to work on Tuesday, June 25, 1985, no later than 8:00 a.m.

Root did not report for work on June 25. Instead, he wrote Hall a letter on that date that stated:

> This letter is to acknowledge my conversation that I had with Mr. Csiszar late in the afternoon of June 24, 1985.
>
> As you are aware, I am presently employed and it is my contention that less than twenty-four hours notice to return to work is less than adequate.
>
> As stated in the settlement agreement, I am to be reinstated to my former position with benefits as a fulltime employee. Mr. Csiszar informed me that his offer was for a six-hour shift which is less than full time, and consequently without benefits.
>
> Therefore, I am advising you that at this time your offer is unsuitable and does not constitute compliance with the settlement agreement. However, if and when a position of fulltime employment does open, I would expect to be properly notified within (sic) a timely fashion.

Root has heard nothing from the Respondent since that time.

On June 26, 1985, Hall sent a certified letter to Cannon instructing him to report to work no later than Friday morning, June 28, at 8 a.m. The letter was sent to Cannon at 207 Alamo Hills, Kalamazoo. At that time Cannon had temporarily moved back to his parents' home in Grand Rapids in order to assist in caring for his father, who was ill. When Cannon eventually received the letter, he phoned the shop and spoke to a secretary identified only as Sandy. He asked to speak with Hall and with other supervisors. He was told by Sandy that they were busy and could not speak with him. This is the last communication that he has received from the Respondent.

A letter, dated June 26, was sent by the Respondent to Wayne Ford instructing him to report for work on June 28 no later than 8 a.m. W. Ford did so and was assigned to run the collator. Later that day, Chalker moved him to the merging line. W. Ford was employed as a collator operator before his discharge. This was an incentive job on which he was able to earn about $7 an hour, including the piecework rate which was attached to it. However, a merging job pays a straight $4 an hour, without incentive. W. Ford worked as a merger until July 2 when he was laid off. At that time he asked Antolovich when he would be recalled. Antolovich told him that he would give him a call or stop by his apartment to inform him when work would again be available.

W. Ford heard nothing more from the Respondent for nearly a month, so he went to the plant and spoke with Chalker. Chalker told him at this time that in order to come back to work he would have to have a phone so that he could be notified at short notice that work would be available. Ford pressed Chalker to learn when work would be available. Chalker's only reply was to let him know when he had a phone installed in his apartment because he did not want to have to go through third parties in order to call him back to work. On August 9 W. Ford received the following letter from Hall:

> Rod Chalker called your phone number on August 7, 1985, that you have given us to call. He received a recording stating that the number had been disconnected.
>
> The scheduling of the work that you qualified for does not allow the time to notify you by mail.
>
> It is your responsibility, as an employee, to inform Middle Earth Graphics, Inc. of any changes of your address and/or phone number.

Respondent sent W. Ford another letter, dated August 13 and signed by Hall. It read:

> This letter is to confirm Rod Chalkers instruction of August 12 when you came into the shop, that we need a phone number to reach you when there is work.
>
> Our work load does not permit the time to notify people by letter.
>
> If we do not hear from you by Monday the 19th, we will assume that you do not want to work here.

On Monday, August 19, about 3:50 a.m., Chalker gave W. Ford a call from his home. Chalker had just returned from a social engagement and, before going to sleep, attempted to contact W. Ford to tell him to come to work that morning. Chalker reached a neighbor of Ford who lived in a downstairs apartment. He told the neighbor that he was Ford's boss and wanted to speak with him.

The neighbor went upstairs, knocked on the door of Ford's apartment, and awakened him to relay this message. Meanwhile, Chalker was placed on hold. By the time that Ford had dressed and had come downstairs to take the phone call, Chalker had hung up without disclosing to anyone the substance of what he wanted to say to Ford. Ford went back to bed. The next day, Ford received a letter, dated August 20 and signed by Hall, that stated:

> This is to inform you that your failure to report to work by Monday, August 19, 1985, results in the termination of your employment Middle Earth Graphics [sic] as of August 20, 1985.

Chalker stated in his testimony that he had only 1 to 3 days' work available for W. Ford at that time.

In mid-July, Lidell Ford complained to the Board agent who was supervising compliance with the settlement agreement that he had not been recalled to work. On August 1, 1985, Production Manager Douglas B. Harris wrote L. Ford a letter that stated as follows:

> This letter is to inform you that as of August 1, 1985, Middle Earth Graphics is giving you a two week notice to report to work.
>
> There is presently work available for you. If you desire work, please let us know immediately and report to work no later than 7:30 a.m. August 19, 1985.

Shortly after receiving this letter L. Ford called the plant and spoke with Chalker. He told Chalker that he would like to come back to work on August 12 but was not sure that he could make it by that date because he was having car trouble and wanted to get his car repaired before starting work. He also told Chalker that if he could not make it by August 12 he would certainly be back to work by the August 19. Chalker told him that he should simply call the plant during business hours and let the Company know the date on which he would actually return. Ford then asked Chalker if he would experience any trouble after he came back. Chalker replied that he would have no trouble "as long as [he] did his work, kept [his] nose clean, and didn't talk union." About August 15, Ford called the plant, talked to a clerical employee named Brenda, and told her that he would be in on August 19 at 7:30 a.m.

When Ford reported for work on August 19, Chalker told him to go to work on the collator he had used before being discharged but instructed him to set it up in the stitcher mode for a practice run. While operating this machine (sometimes called a Harris multibinder) in 1984, Ford had used it only for collating pages of the Cadaco games into sets of nine. With the addition of different accessories, the multibinder can also be used to fold pages of printed material and to stitch or staple the folded pages together into booklets. To operate the machine in a stitcher mode, it is necessary to attach the stitcher head, insert a spool of wire used for stitching, attach different receiving trays, and make various adjustments in order to permit the machine to perform these facets of the operation in proper sequence. Timing is of critical importance in setting up the machine in the stitcher mode.

Ford had never before set up the machine in the stitcher mode, nor had he operated it as such. His familiarity with the machine was limited to its use as a collator. During the interim while the discriminatees were away, the Respondent had purchased a new collator that assembled packets of 20 pages rather than 9 pages, so it used its new collator for this purpose and relegated the older machine to occasional use as a stitcher. The only person employed by the Respondent who was skilled in setting it up and operating it in the stitcher mode was Csiszar. He was on vacation on August 19. Chalker was familiar with this aspect of the operation but did not regularly operate the machine for stitching.

Hall had instructed Chalker to assign Ford to the stitcher on his return to the plant. Chalker admits that he had reason to believe that Ford would have difficulty in setting up the machine and in operating it in the stitcher mode. He was correct in his assumption. After working on the machine for several hours, Ford was unable to set it up and to get it into operation. He could not attach the collator to the stitcher. On several occasions, he asked Chalker for assistance in setting it up and each time Chalker refused to help him, claiming that he was too busy with other matters. Ford asked for the machine manual and Chalker brought it to him, but Ford was unable to complete the set up work with the assistance of the manual. Two other employees, including Houston Ford, came over to help L. Ford on their lunch hour but Chalker told them to leave L. Ford alone.

By early afternoon, Ford still did not have the machine in operation and Chalker reported this fact to Hall.[10] He told Hall that Ford could not set up the machine and was not getting out any production. Respondent then made up a written statement, dated August 20, 1985, that read:

> I cannot set up and run the multibinder that Rod Chalker has asked me to set up and run.

There was a place following this statement for Ford's signature and the signature of a witness.

Chalker took the blank statement to Ford and asked him to sign it. Ford insisted that he could get the machine in operation and declined to do so. After Ford had worked unsuccessfully for another hour or so on the multibinder, Chalker again presented the paper for Ford's signature and insisted that he sign it. Ford did so but told Chalker that he was signing it under protest. Chalker then summoned Margaret Ann Ross to the machine and asked her to sign the statement as a witness.

At this time, Ford was reassigned to become a collator operator's helper. Chalker explained that this was the only other job available. In doing so, he took a cut in pay from $5.50 to $4 an hour, without incentive bo-

[10] There is no contention that Ford was malingering. Chalker testified that he felt that Ford was making his best effort to get the stitcher in operation.

nuses.[11] Ford continued to work at this job until September 20, when he was laid off, ostensibly for lack of work. He has not worked at the plant since that time.

II. ANALYSIS AND CONCLUSIONS

In order for the Board to set aside the settlement agreement of April 22, 1985, it is necessary for it to find that the conduct of the Respondent following the execution of this agreement either violated specific undertakings set forth therein, or that the Respondent committed additional unfair labor practices, which, in general terms, it also agreed to avoid when it signed the settlement. As discussed in more detail, infra, the Respondent failed utterly in its obligation to offer the six discriminatees full and immediate reinstatement to their former or substantially equivalent positions. Moreover, the Respondent committed additional unfair labor practices that also vitiated any protection it might otherwise enjoy from prosecution for unfair labor practices committed before the settlement was signed. In order to treat the events in this record in approximate chronological sequence, the analysis of the record should begin with a consideration of the Respondent's presettlement conduct.

A. *Evidence of Animus*

Quite apart from any specific violations of the Act alleged and found in this case, the Respondent demonstrated clear evidence of animus that should be considered in placing the events described herein in proper focus. Among the documents in the record is a large multicolored brochure that the Respondent has printed and circulated to advertise the capability of its new multicolor press. The document is a humorous elaboration of Hall's tongue-in-cheek proposal for a new 51st state, to be carved out of the existing state of Michigan and named Six-One-Six after the telephone area code for Western Michigan. Entitled "A New State. A New Start." the brochure features Hall as its centerfold, dressed in regal attire and holding a sword and scepter. Also portrayed on this page are two cartoon figures, dressed as attendants from an insane asylum, who are chasing Hall and are making ready to apprehend him and place him in a straightjacket. Inside the brochure is a large map of Michigan. The eastern half is portrayed as a barren wasteland while the western half—State Six-One-Six—is shown as a flourishing, verdant paradise. At the center of State Six-One-Six is its capital, Kalamazoo. Access to Six-One-Six from Eastern Michigan is limited to a drawbridge over a moat. This feature is captioned:

> Access to the State of Six-One-Six will be severely restricted. Drawbridges will be raised to keep out such undesirable elements as labor organizers, dead beats, carpetbagging politicians, and itinerant lawyers.

When asked at the hearing if he was opposed to unions, Hall replied: "Just in Six-One-Six."

B. *Independent 8(a)(1) Violations*

1. When, in June 1984, Hall told the Roots that a union would never come into the plant and that he would close the doors before letting a union come in, the Respondent violated Section 8(a)(1) of the Act.

2. When, in late May or June 1984, Hall told Lidell Ford that he would "close the g.d. doors" before he would permit a union to come into the shop, the Respondent violated Section 8(a)(1) of the Act.

3. When, during the same period of time, Chalker told Lidell Ford that he felt that Hall would close the plant before he would permit it to become unionized, the Respondent violated Section 8(a)(1) of the Act.

4. When, on November 9, Chalker told Debra Schrock that she did not have to sign up for Manpower if she did not talk union in the shop, the Respondent violated Section 8(a)(1) of the Act.

5. When, on November 10, Antolovich told the mergers that any further talk of unionization would cause the Respondent to close the plant doors and lay off its employees permanently, the Respondent violated Section 8(a)(1) of the Act.

6. When, about November 9, Antolovich solicited Patricia Ann Cole to commit perjury in order to support the Respondent's case against Lidell Ford, the Respondent violated Section 8(a)(1) of the Act.

7. When, on November 14, Tap coercively interrogated Garry Root in his office about whether Root had heard about any union activities, with whom he had discussed unionization, and whether he had seen any union cards, the Respondent violated Section 8(a)(1) of the Act.

8. When, about November 14, Tap asked Edwards if he had signed a union card and when he asked Edwards if he could duplicate a copy of a union card in Edwards' possession, the Respondent violated Section 8(a)(1) of the Act. When, in the course of the same conversation, Tap told Edwards that Garry Root had lied about Root's union activities "to save his ass," the Respondent further violated Section 8(a)(1) of the Act.

9. When, in late November, Hall told Houston Ford that he had fired Ford's brother in part because he was trying to bring a union into the plant, and when he told H. Ford that there was "no way in hell" that a union would come into the plant, the Respondent violated Section 8(a)(1) of the Act.

10. When, in August 1985, Chalker told Lidell Ford in the course of a phone conversation that there would be no reprisals against Ford when he returned to the plant so long as Ford did his work, kept his nose clean, and did not talk union, the Respondent violated Section 8(a)(1) of the Act.

C. *The Discharges of both Roots, both Fords, Olson, and Cannon in November 1984*

All six discriminatees named in the original complaint and made parties to the settlement agreement were union supporters. Except for Lidell Ford, all had signed union

[11] In addition to demoting Ford, Chalker then gave him a disciplinary writeup, which he dated August 13. The writeup stated:

> Lidell called me at my mother's house on 8–3–85 and said that he would come to work on . . . 8–12–85. He didn't call in a day later. He has had 2 verbal warnings before and 1 wk. suspension.
>
> Action taken: 3rd verbal warning. Next action taken will be suspension and after that termination.

cards before they were discharged. K. Root was the original contact between the Respondent's employees and the Union. Ford had renewed this contact the night before he was discharged. All were discharged by an irascible and outspoken Employer whose intense and implacable antiunion sentiments have been itemized and documented above.

All six were also known to the Respondent to be union sympathizers. K. Root made known her views in September when, in the presence of Antolovich, she shouted angrily to other employees that they needed a union because she could obtain no redress of a grievance concerning the maintenance of the watchdog behind the plant. Lidell Ford warned mergers on the afternoon of November 7 that they would forfeit their right to organize the Middle Earth Graphics plant if they became Manpower employees. His remarks were immediately reported to Hall. In a private conversation in the summer of 1984, Wayne Ford had made his prounion sympathies known to Antolovich. Moreover, his close family relationship with Lidell certainly placed him under suspicion that he harbored the same sentiments which his brother expressed. Cannon voiced prounion sentiments on the merging line in Antolovich's presence and again at a meeting of employees attended by Hall and other supervisors. Olson and Garry Root were close relatives of Karen Root and, like Ford's brother, likely candidates for company suspicion that they engaged in union activities. Garry Root was the subject of considerable interrogation by Tap and also the subject of Tap's statement to Edwards that G. Root had lied about union activities "to save his ass." Both Roots and Olson wore union buttons to work the day they were discharged. I have also credited a reported statement in the record by Antolovich that the Company was maintaining a complete record of who talked union at the plant. Certainly such a record must have contained the names of most, if not all, of the above-named employees because they did discuss unionization at the plant.

The discharge of Lidell Ford was a clumsy fabrication from beginning to end. Apparently someone vandalized the collator on November 6. The Respondent admits that anyone in the plant could have damaged the machine. Having heard of Lidell Ford's union outburst the following day, he then became the likely candidate, and was the subject of an investigation designed not to find out who actually damaged the machine but to pin a rap on Ford as the guilty party. Following the procedure of "verdict first, trial later," three supervisors came to the conclusion that Ford was the culprit. He was never asked if he was the one who damaged the machine. Hall admitted lying to Ford during the discharge interview by telling Ford that he had in his possession written statements naming Ford as the guilty party. He had no such statements. Serious efforts were taken to obtain such evidence in the days following Ford's discharge. One supervisor asked another employee to lie about seeing Ford tamper with the collator. Two other employees—whose stories were at wide variance—ultimately signed a paper implicating, though not directly naming, Ford as the one who damaged the machine. However, this statement was not in company hands until long after Ford was discharged. Like the hearing examiner at the Michigan Employment Security Commission who heard this same defense during an unemployment compensation case, I conclude that there is not a shred of evidence that Ford damaged the Respondent's collator, either deliberately or through negligence. Moreover, the behavior of the Respondent makes it abundantly clear that it had no reasonable grounds to believe that Ford had done so and was scurrying about to find an evidentiary basis to support an action it had already taken. Later on, Hall admitted to Ford's brother that Ford's union activities played a partial role in his discharge. Coming as it did 1 day after Ford had urged mergers to refrain from signing up for Manpower so they could continue their organizing efforts, Ford's discharge was the direct result of Ford's union activities, which were the only reason for his termination. By discharging Ford the Respondent violated Section 8(a)(1) and (3) of the Act.

The next to go was Cannon. Like L. Ford, he was discharged within 24 hours after making a prounion statement in the presence of supervisors. He complained publicly, in the presence of Hall and others, that the only reason for bringing Manpower into the plant was to stymie the organizing effort. The asserted reason for Cannon's discharge was errors made on the merging line. There is no doubt that he made some errors the day before in selecting collated packets of game sheets for merging into a full or completed packet. The exact number of errors is unknown, as is the magnitude of these errors in the context of the Respondent's operation. Antolovich's brother was guilty of similar errors on the same day and this fact was brought to the attention of Cannon's supervisor when the discharge was announced. The only reply made by D. Antolovich was that he would divide up the errors found and attribute an equal number to the other merger. However, he did not exact the same penalty from his brother that he did from Cannon.

Cannon had been an employee of the Respondent for nearly 6 months. His virtues and failings as an employee were well known. His discharge follows the familiar pattern of a marginal employee whose deficiencies could be overlooked until he became interested in union activities, at which time they were no longer tolerable. *Fisher Stove Works*, 235 NLRB 1032 (1978); *Markle Mfg. Co.*, 239 NLRB 1142 (1979); *Buffalo Concrete*, 276 NLRB 839 (1985). Because an expression of union sympathies was what triggered the removal of James Cannon, Jr., I conclude that his discharge violated Section 8(a)(1) and (3) of the Act.

The decision of the Respondent in November 1984, to require all of its employees other than the "original ten" to sign up for Manpower bears considerable scrutiny. Expressions in the record about "signing up for Manpower" tend to obscure the fact that all of the affected employees were in fact discharged by the Respondent. Whether or not any such employee signed up for Manpower after being discharged simply indicated whether or not he or she continued to perform work in the Respondent's plant. Those who opted for this route were no longer Middle Earth Graphics employees any more

than were those who left the plant. Properly viewed, the question at issue is whether the decision of the Respondent to discharge all except its long-time employees was discriminatorily motivated, or was it prompted by considerations falling within the scope of business judgment.

This decision was taken at the same point in time that union activity began to surface at the Respondent's plant. Moreover, the economic benefits and cost effectiveness of the move were only casually considered by the Respondent before the decision was taken, if, indeed, such matters were even considered at all. Third, at the beginning of May 1985, many of the employees who were required to become Manpower employees were taken back on the Middle Earth Graphics payroll. One of the reasons advanced by supervisors for this contrary move was that it was costing the Respondent more to maintain individuals on the Manpower payroll than it was to employ them directly. Hall stated in his testimony that the later move in 1985 was taken for reasons other than cost effectiveness. A fourth consideration relates to some of the reasons offered by Hall for making the move in the first place. Beginning in May 1984, Respondent had experienced a sudden expansion of its work force. Many of its new employees proved to be unreliable and it was occasionally faced with shortages of unskilled (and sometimes semiskilled) help to get out Cadaco orders. As Manpower representatives might well have pointed out, this was a situation in which a supplier of temporary help could be of assistance by providing, at short notice, additional employees to supplement absences or vacancies in an existing work force. Supplying temporary help for peak production periods or to replace absentee employees is one of the principal functions served by such companies. Hectic production problems fail to answer the question why the Respondent not only asked Manpower for additional help to get it through peak periods and to compensate for absenteeism among its regular work force but also placed some 19 of its regular employees on the Manpower payroll under circumstances that admittedly proved more costly than simply keeping them on as Middle Earth employees and supplementing their efforts from time to time with temporary workers supplied by an outside firm.

The only excuse that lends any credence to the legitimacy of this decision is Respondent's excuse that it was trying to provide its regular employees with a source of income and employment if and when the Cadaco job ran out. Actually, the evidence in the record indicates that the Cadaco jobs continued to be produced in large quantities throughout the fall and winter of 1984–1985. Moreover, it is also clear from the record that the Respondent's own income nearly doubled in 1985 over 1984. It had many commercial accounts other than the Cadaco job and it continued to service those accounts.

The record discloses that at the time a union organizing drive surfaced a bitterly antagonistic employer fired several key inhouse organizers, and discharged the bulk of its new employees, informing them that they could continue to earn a livelihood in its establishment only as the employees of another employer. Six months later, when it was faced with the prospect of bringing union sympathizers back to its payroll, it then transferred back to the same payroll, admittedly for reasons other than cost effectiveness, a number of former employees who had continued to work for it throughout the winter without engaging in any union activities. The effect of the second move—packing a prospective bargaining unit with employees of another employer (Manpower) to offset the return of union sympathizers—is simply reverse spin on the same tactic it followed in November. Respondent manipulated its staff to prevent unionization in November by transferring employees out and, faced with a contrary situation in May, took the opposite tack for the same underlying reason.

As the General Counsel points out, the Respondent's original intention was simply to use Manpower employees to replace its merging employees. When evidence evolved that union sentiment was spreading throughout the plant, the Respondent enlarged on its original plan and discharged all of its bindery employees. By subcontracting this work to Manpower to avoid the unionization of its employees the Respondent violated Section 8(a)(1) and (3) of the Act. The General Counsel does not seek a remedy for all of the employees who were treated in this fashion. However, both Roots, Wayne Ford, and Olson were seen as prominent in the union effort and were discharged as a part of this defensive scheme. Accordingly, their discharges violated Section 8(a)(1) and (3) of the Act. The fact that any or all of them could have applied for and obtained jobs with Manpower is an irrelevancy that bears, if anything, only on the remedy in this case, not on a determination of whether in fact a violation of the Act took place when they were discharged.

D. *Reinstatement and Postsettlement Activity*

It is well settled that presettlement activity of a respondent may be examined and relied on in assessing its conduct following the execution of the settlement agreement to determine if any postsettlement conduct amounts to an unfair labor practice. *Laborers' Local 185 (Joseph's Landscaping)*, 154 NLRB 1385 (1965); *Lawyers Publishing Co.*, 273 NLRB 129 (1984). To warrant setting aside a settlement agreement, the General Counsel must establish that following the execution of the agreement, the Respondent either failed to comply with its specific terms or that it engaged in subsequent unfair labor practices. If the General Counsel is successful in establishing either or both of these facts, then the settlement agreement may be treated as if it had not been executed, and the original complaint, as well as any subsequent complaint, may be prosecuted as if the settlement had never taken place. Contrary to contentions made by the Respondent, the mere execution of a settlement agreement constitutes neither the withdrawal nor the dismissal of a complaint and does not bar future prosecution if the settlement is not honored.

The Respondent agreed on April 22, 1985, to offer to the six named discriminatees full and immediate reinstatement to their former or to substantially equivalent employment in the event that their former jobs no longer existed. What constitutes a valid offer of reinstatement has been the subject of extensive litigation extending

over a long period of time. In order to constitute a valid offer of reinstatement, the offer of work must be specific, unequivocal, and unconditional.[12] The work offered must entail similar skills, similar pay, and similar working conditions.[13] A mere inquiry, directed to an employee for the purpose of ascertaining whether or not he is available for work, does not constitute an offer of reinstatement.[14] Asking employees to come back to work and then telling them that business had not picked up sufficiently to permit reinstatement is a contradiction that amounts to no offer of reinstatement at all.[15] An uncommunicated offer of reinstatement is no offer of reinstatement at all.[16] An employee has no obligation to decide whether he wishes to return to work until he has received a valid offer of reinstatement.[17] Only when an offer of reinstatement has been unequivocally rejected is an employer relieved of his duty to reinstate an employee.[18] An offer of a few days' work or an offer of part-time work to a full-time employee does not constitute an offer of reinstatement.[19] An employee must be given a reasonable time in which to accept a valid offer of reinstatement. Two and four days, respectively, as well as 3 weeks, have been held not to be a reasonable time to accept such an offer.[20] Conditioning reinstatement on avoidance of future union activities is not a valid offer.[21] If an employer asserts an economic defense, such as unavailability of jobs, to justify not making a valid offer of reinstatement, the burden is on it to establish such a defense by a preponderance of credible evidence.[22] Tested by these principles, the Respondent herein has yet to make a valid offer of reinstatement to any of the six discriminatees in this case, with the possible exception of Karen Root.

Under certain circumstances, an economic defense may serve to toll the backpay liability of an employer who is under an obligation to offer reinstatement to designated employees and does not do so. However, no economic defense short of plant closing serves to erase the reinstatement obligation of an employer who is required to offer reinstatement and has failed to do so. In this case, the Respondent played games with the six discriminatees in an effort to strike them from its rolls on a permanent basis while giving lip service to the obligation it incurred when it signed the April 22 settlement. The letter that the Respondent wrote to the six discriminatees on May 9, offering reinstatement but no jobs, was patent nonsense. Whether it tolled a backpay liability will be discussed infra. As satisfaction of a reinstatement obligation it was a nullity.

It should be noted that all six discriminatees were permanent full-time employees. The definitions of permanent employee and full-time employee are contained in the Respondent's handbook, either explicitly or by necessary inference. The handbook defines probationary employee as one who has worked more than 3 months. By implication anyone who had served more than 3 months was no longer in this status. If he was also a full-time employee, he was eligible for certain stated company benefits. All of the discriminatees had worked at least 5 months at the time of their respective discharges and were eligible for company benefits. A full-time employee is defined in this booklet as anyone who works an average of 36 hours a week or more. This definition fitted all of the discriminatees, many of whom were complaining because they had been working 50 or 60 hours a week. When the Respondent began referring to them and to others similarly situated as part-time employees, it was not only violating common usage in the English language but the definition contained in its handbook.

The offer of a few days' work to Karen Root late in June 1985 did not constitute reinstatement to her former or substantially equivalent employment. It was only an offer of a few days' work, not permanent employment. Her recall late in July was arguably reinstatement to a permanent position. However, she worked only 6 more weeks before she was laid off again. She has not been recalled since that layoff. When she was laid off again in September, Plant Manager Harris told her that the layoff would be short, that he was going to operate on a skeleton crew for a week, and that she would be called back in order of seniority. In fact, throughout the fall of 1985, others with less seniority than K. Root continued to work along with employees who were brought in from time to time from various temporary services. Despite the fact that the Respondent has continued to prosper and to produce substantial numbers of Cadaco games along with its regular commercial work, K. Root has not been working. I conclude that the layoff of Karen Root on September 20 was discriminatorily motivated, as was her discharge 10 months earlier, and that by laying her off and failing to recall her, the Respondent violated Section 8(a)(1) and (3) of the Act.

Wayne Ford was recalled to work for 2 or 3 days late in June. Because it was a recall to temporary work, it did not satisfy the Respondent's reinstatement obligation. Moreover, the letter that he received at that time giving him only a day's notice to report was not sufficient to satisfy a reinstatement obligation, notwithstanding the fact that Ford was able to respond to it.

In early August, W. Ford called the plant and asked for work. He was told there was none available. However, he was told that he would have to maintain a telephone in order to be eligible for recall. This instruction was confirmed by a letter that was sent the next day. Placing such a condition on Ford's right of reinstatement violated the terms of the settlement agreement as well as settled Board law. The call to W. Ford at 3:50 a.m. for

---

[12] *Information Control Corp.*, 196 NLRB 504 (1972); *Controlled Alloy, Inc.*, 208 NLRB 882 (1974); *Standard Aggregate Corp.*, 213 NLRB 154 (1974); *Moro Motors, Ltd.*, 216 NLRB 192 (1975).

[13] *KSLM-AM & KSD-FM*, 275 NLRB 1342 (1985).

[14] *Rea Trucking Co.*, 176 NLRB 520 (1969); *National Business Forms*, 189 NLRB 964 (1971).

[15] *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975), enfd. in pertinent part 552 F.2d 519 (3d Cir. 1977).

[16] *J. H. Rutter-Rex Mfg. Co.*, 158 NLRB 1414 (1967).

[17] *Richard W. Kaase Co.*, 162 NLRB 1230 (1967).

[18] *Crown Handbag*, 137 NLRB 1162 (1962).

[19] *Flite Chief, Inc.*, 258 NLRB 1124 (1981); *C. S. McCrossan, Inc.*, 272 NLRB 414 (1984); *Seyforth Roofing Co.*, 263 NLRB 368 (1982).

[20] *Matlock Truck Body Corp.*, 248 NLRB 461 (1980); *Harowe Servo Controls*, 250 NLRB 958 (1980); *Browning Industries*, 213 NLRB 269 (1974).

[21] *Standard Aggregate Corp.*, supra.

[22] *W. C. McQuaide, Inc.*, 237 NLRB 177 (1978).

the asserted purpose of having him report for 2 or 3 days' work at 7:30 a.m. on the same day likewise is not a valid offer of reinstatement. Inasmuch as Chalker never told Ford to report or even transmitted such a message through a third person, the call was not an offer at all. It was merely an act of harassment. Accordingly, I conclude that the Respondent failed utterly in its obligation to offer W. Ford reinstatement to his former or substantially equivalent work. Moreover, the Respondent was not satisfied merely to leave W. Ford in the position of an unreinstated employee. When he did not report at 7:30 a.m. in response to an offer that he did not receive, either actually or technically, it discharged him in violation of Section 8(a)(1) and (3) of the Act.

Late in June, Csiszar spoke with Garry Root and offered him what was essentially part-time employment of a temporary nature. The offer failed to give Root a reasonable opportunity to conclude his present employment and report for work. The excuse used with respect to him as well as other employees, namely, that the Respondent could not give much advance notice or written notice to report to work because of the sporadic nature of its operation, simply illustrates that the offers that it was making to the six discriminatees were not bona fide offers of permanent employment but were merely attempts to remove the discriminatees from its rolls while offering colorable compliance with the settlement agreement. I conclude that the overture made to Garry Root was not a bona fide offer of reinstatement and that the Respondent has failed to comply with the terms of the settlement agreement with respect to his employment.

I have concluded that as a matter of fact Olson was never sent a letter of any sort that offered him employment of any kind. Moreover, Chalker testified that the work available for Olson when the disputed letter was sent was of 2 or 3 days' duration. Accordingly, Olson was never given a bona fide offer of reinstatement, as required by the terms of the settlement agreement.

Hall's letter to Cannon, dated June 26, instructing him to report for work no later than June 28, was insufficient notice to constitute a valid offer of reinstatement. The fact that the letter did not reach Cannon until several days after June 28 merely compounds the failure of the Respondent to honor its contractual commitment. When Cannon responded to the letter, the management of the Respondent refused to speak to him, thus demonstrating that the Respondent was simply trying to avoid bringing him back to work while laying a paper trail suggesting compliance with the settlement.

As noted above, a valid offer of reinstatement must be made to the same position or to a substantially equivalent one. In the case of Lidell Ford, he was brought back to work on August 19 at a job that required the exercise of substantially greater skill than the one that he vacated when he was discharged. The Respondent had reason to believe that Ford was not capable of performing the tasks to which he was assigned on August 19 because he had never performed that job before. As anticipated, Ford was not up to operating the collator in the stitcher mode nor was he able to set it up for stitching. The reason he was assigned this was was obvious. The Respondent wanted to embarrass Ford and to put him in a position in which he would either quit or take a lower paying job. Ford chose the latter route. Chalker then decided to rub it in by giving him a reprimand for reporting late for work when in fact he was told in writing that he had until August 19 to report. The reprimand recites allegations that were factually false and does so in such a manner that laid a groundwork for a discharge for cause. The reason for both of these moves was the Respondent's abiding hostility to unionization and to Ford, whom it continued to regard as a principal cause of the union effort in its plant. The August 19 recall does not amount to reinstatement and the reprimand, motivated as it was by antiunion considerations, violated Section 8(a)(1) of the Act.

Because the Respondent has yet to offer Ford a reinstatement that comports with its obligations under the April 22 settlement agreement or under the Act, that obligation remains in order to remedy the unfair labor practice that it committed on November 8, 1984. During August and September, Ford continued to promote the union cause actively. On September 20, 1985, he was laid off along with Karen Root. As in the case of Karen Root, Ford was told at this time that the layoff was prompted by lack of work and that he would be called back in order of seniority when work again became available. Respondent has not recalled Ford but continued to employ individuals with less seniority, including persons referred by temporary employment services, throughout the fall of 1985. During this period of time, it has continued to perform a large amount of work both for Cadaco and for its other customers. As in the case of Karen Root, I conclude that this layoff was discriminatorily motivated and, as such, violated Section 8(a)(1) and (3) of the Act.

The second complaint alleges that certain of the Respondent's actions violated Section 8(a)(4) of the Act. There is no doubt that the six discriminatees herein and others filed charges and that certain unlawful acts were committed by the Respondent following the filing of those charges. However, there is some doubt that the filing of charges added anything but context to the actions taken by the Respondent, i.e., but for the filing of the charges, the settlement agreement could never have taken place. However, Respondent's underlying motive was, and remained, its implacable opposition to unionization and to those who engaged in union activities. The fact that these individuals sought redress with the Board added nothing to the Respondent's determination to get rid of them. Accordingly, I would dismiss so much of the consolidated complaint that alleges that the Respondent violated Section 8(a)(4) of the Act.

On the foregoing findings of fact and on the entire record considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Respondent Middle Earth Graphics, Inc. is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Paperworkers International Union, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging James Cannon Jr., Lidell Ford Jr., Wayne Ford, Karen Root, Garry Wayne Root, and Clark Olson because of their union sympathies and activities; and by subcontracting work to another employer; and discharging employees in order to prevent the unionization of the plant, the Respondent violated Section 8(a)(3) of the Act.

4. By the acts and conduct set forth in Conclusion of Law 3; by threatening employees that the Respondent would close the plant if it became unionized; by coercively interrogating employees concerning their union activities and the union activities of other employees; by telling an employee that she would not be discharged if she did not talk union in the plant; by soliciting an employee to commit perjury in order to support the Respondent's version of a discharge; by telling an employee that another employee lied to prevent reprisals from being taken against him for his union activities; by telling an employee that it had fired another employee because of his union activities; by telling an employee that no reprisals would be taken against him if he did not talk about the union; and by issuing a reprimand against an employee in reprisal for union activities and for the purpose of laying the groundwork for his eventual discharge, the Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices have a close, intimate, substantial, and adverse impact upon the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has committed certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and to take other actions designed to effectuate the purposes and policies of the Act. Because the violations of the Act found herein are repeated and pervasive, and because they demonstrate an attitude on the part of this Respondent to behave in complete disregard of the rights of its employees, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). I will also recommend that the Respondent be required to offer to James Cannon Jr., Lidell Ford Jr., Wayne Ford, Karen Root, Garry Wayne Root, and Clark Olson full and immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or to other rights that they previously enjoyed, and that they be made whole for any loss of pay or benefits that they may have sustained by reason of the discriminations practiced against them, to be computed in accordance with the *Woolworth* formula,[23] with interest thereon at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. *Olympic Medical Corp.*, 250 NLRB 246 (1980); *Isis Plumbing Co.*, 138 NLRB 716 (1962). I will recommend that the Respondent be required to remove from its records any reference to the unlawful discharges or unlawful disciplinary warnings relating to the discriminatees, and that it notify these employees in writing that such acts have been done and that their unlawful discharges and unlawful discipline will not be used as a basis for future disciplinary actions against them. I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results of this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Middle Earth Graphics, Inc., Kalamazoo, Michigan, its officers, agents, supervisors, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities and the union activities of other employees.

(b) Threatening to close the plant if the employees become unionized.

(c) Telling employees that they will not be discharged or suggesting that reprisals will not be taken against them so long as they refrain from talking about the union.

(d) Soliciting employees to commit perjury in order to support the Respondent's version of a discharge.

(e) Telling employees that other employees lied to prevent reprisals from being taken against them for their union activities.

(f) Telling employees that it had fired another employee because of his union activities.

(g) Issuing reprimands against employees in reprisal for their union activities or for the purpose of laying the groundwork for an eventual discriminatory discharge.

(h) Discouraging membership in and activities on behalf of United Paperworkers International Union, AFL–CIO–CLC, or any other labor organization, by discharging employees, contracting out their work, or otherwise discriminating against them in their hire or tenure or in their terms and conditions of employment.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to James Cannon Jr., Lidell Ford Jr., Wayne Ford, Karen Root, Clark Olson, and Garry Wayne Root full and immediate reinstatement to their former positions or, in the event that such positions no longer exist, to

[23] *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

substantially equivalent positions, without prejudice to their seniority or to other rights which they formerly enjoyed, and make them whole for any loss of pay or benefits that they may have suffered by reason of the discriminations found herein, in the manner described above in the remedy section.

(b) Remove from its personnel records any reference to the discriminatory discharges of the above-named employees and the unlawful disciplinary warning given to Lidell Ford, Jr., and notify each employee in writing that these discharges and warning will be used as a basis for future discipline against them.

(c) Post at its Kalamazoo, Michigan plant copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED insofar as the consolidated complaint herein alleges matters not found to be violative of the Act, the said consolidated complaint is hereby dismissed.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees concerning their union activities or the union activities of other employees.

WE WILL NOT threaten to close the plant if the employees become unionized.

WE WILL NOT suggest to employees that they will not be discharged so long as they refrain from talking about the union.

WE WILL NOT solicit employees to commit perjury in order to support our version of a discharge.

WE WILL NOT tell employees that other employees lied in order to prevent reprisals from being taken against them for their union activities.

WE WILL NOT issue reprimands against employees in reprisal for their union activities or for the purpose of laying the groundwork for an eventual discriminatory discharge.

WE WILL NOT discourage membership in or activities on behalf of United Paperworkers International Union, AFL–CIO–CLC, or any other labor organization, by discharging employees, contracting out their work, or otherwise discriminating against them in their hire or tenure or in their terms and conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer full and immediate reinstatement to James Cannon Jr., Lidell Ford Jr., Wayne Ford, Karen Root, Clark Olson, and Garry Wayne Root to their former or substantially equivalent employment, and we will make them whole for any loss of pay or benefits which they may have suffered by reason of the discriminations practiced against them, with interest.

WE WILL remove from our personnel records any reference to the discharges of the above-named individuals and the unlawful disciplinary warning given to Lidell Ford Jr., and we will inform these individuals in writing that the discharges and warning will not be used against them in the future as the basis for disciplinary action.

MIDDLE EARTH GRAPHICS, INC.

Micro-Chart Company *and* Linda J. Johnson *and* Teresa Stan. Cases 9–CA–23251–1 and 9–CA–23251–2

19 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 17 December 1986 Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board had delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Micro-Chart Company, New Carlisle, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Members Johansen and Cracraft, who did not participate in *Meyers Industries*, 281 NLRB 882 (1986), agree that the activity was concerted and protected.

James E. Horner, Esq., for the General Counsel.
Gary L. Maxton, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These cases were tried at Dayton, Ohio, on 17 September 1986.[1] The charges were filed by two discharged employees on 24 June, and the complaint was issued 1 August and amended at the trial.

In a meeting on 23 May employees Teresa Stan and Linda Johnson led protests that the Company was failing to pay the employees on time four paydays in a row. On 18 June, on the completion of a large overdue microfilming job, President Gary Maxton summarily discharged them.

[1] All dates are in 1986.

The primary issues are whether the Company, the Respondent, (a) unlawfully threatened Stan with discharge for questioning the delayed pay at the meeting, (b) threatened to close the facility if the employees sought a union, and (c) discharged employees Stan and Johnson for engaging in protected concerted activity at the meeting, in violation of Section 8(a)(1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, an Ohio corporation, microfilms records at its facility in New Carlisle, Ohio, where it annually provides over $50,000 in services to nonretail enterprises that annually meet the Board's jurisdictional direct inflow standard. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Threats*

On 23 May, about 30 minutes after Supervisor Sharon Fugate conducted the employee meeting, employee Teresa Stan told Fugate that "we're not trying to cause problems. We just want to know why we're not getting paid on time." Fugate first responded that employee Dee Gantt had "come back here and told me that you girls were getting upset because you weren't getting paid, and that [Fugate] ought to go out there and say something to them or go get [President] Gary Maxton." As credibly testified by Stan (who impressed me most favorably as an honest, forthright witness) (Tr. 34):

> Sharon Fugate also said that "if Gary finds out about today's meeting, you'll get fired."
>
> And I said, "Why? Just for asking questions about our pay?"
>
> And she said, yes, that Gary considers that grounds for dismissal, and that when I was hired, I was told "You do not ask questions."

Fugate claimed to the contrary (Tr. 174–175) that after the employee meeting Stan apologized for her conduct and that although she accepted Stan's apologies, she told her that her conduct "could possibly be grounds for discharge." I discredit Fugate's version of the conversation. (By her demeanor on the stand, Fugate appeared less than candid.)

I find that Supervisor Fugate's statements to employee Stan constitute a threat to discharge her for engaging in what I find was protected concerted activity at the meeting. The threat clearly violated Section 8(a)(1) of the Act.

About 3 weeks earlier microfilm camera operator Debra Sipe was talking to Supervisor Fugate about the film and footage on one of the jobs. As she credibly tes-

tified, she asked Fugate what would happen if someone "called up a union and asked them to come in. Fugate answered, "Well, Gary would shut it down." Sipe asked why and Fugate answered, "Because he wouldn't . . . pay us all equal pay." (Tr. 68–69, 72, 74–75.) I discredit Fugate's denials (Tr. 170, 176). (Sipe appeared to be an honest witness.)

I find that this threat to close the facility if the employees sought a union also clearly violated Section 8(a)(1).

B. *The 18 June Discharges*

1. The protected concerted activity

Teresa Stan and Linda Johnson were microfilm camera operators who were summarily discharged at quitting time on 18 June. The General Counsel contends that they were discharged for engaging in protected concerted activity at the employee meeting on 23 May.

At noon on 23 May, after employee Gantt had checked the incoming mail, she told other employees that no checks had come in and it "looks like we're not getting paid again." About 1:30 p.m. employees Stan and Johnson were discussing not getting paid on time with Gantt and employees Sipe and Alicia Jones. Stan suggested drawing up a petition to get a meeting to discuss why they were not getting paid on time. She did so and she, Johnson, Sipe, and Jones signed it. But when she turned to hand it to Gantt to sign, she saw Gantt walking toward Supervisor Fugate. (Tr. 28–29, 33, 65, 83–84, 183.) (The General Counsel contends that Gantt "apparently has a tendency to play both sides against the middle.")

In a few minutes Fugate came and called a meeting. She told the employees, "You're not getting paid today. No checks came in the mail, and I don't know what else to tell you." She asked for questions and Linda Johnson asked: "When is this going to stop? This is four paydays in a row that we haven't been paid on time." Teresa Stan then said that Dee Gantt had told the employees that a $5000 check had come in the previous Saturday from Christ Hospital "and it seems" that if a check "does not come in on our payday, no matter how many come in during the week, we don't get paid." Fugate explained that Maxton has a small business, that he had just paid $1500 for film, and that other obligations, such as light bills, "come first before he can meet the payroll." Johnson asked, "Why doesn't Gary come down and tell us himself" a few days ahead of time so "we would know what to expect on payday" and "could juggle our bills." Stan said, "When I was hired, I was told that it would happen once in awhile" but "this is four paydays in a row that we're being paid late." Other employees also spoke up, but Stan and Johnson led the protests. It was an orderly meeting. (Tr. 22, 30–32, 55, 65–68, 84–88, 184, 201.)

Although Supervisor Fugate claimed (Tr. 173) that employees Stan and Johnson were "harsh and bitter" and employee Gantt claimed (Tr. 150) that Stan and Johnson were "pretty loud," I find that their conduct at the meeting was protected concerted activity. (Gantt appeared willing to fabricate anything to help the Company's cause.) Fugate was obviously aware that Stan and Johnson were protesting the late pay both on their own behalf and on behalf of other employees.

About 30 minutes after the meeting, as found above, Fugate told Stan that asking questions about their pay was "grounds for dismissal" and that if Maxton "finds out about today's meeting, you'll get fired."

President Maxton did find out about the meeting. But at that time, the Company was behind schedule in completing a large microfilming job for Christ Hospital because of the lack of film. He discharged Stan and Johnson on completion of that job. (Tr. 38–40, 68, 71, 88–90.)

2. The discharges

a. *Teresa Stan*

Stan was one of the Company's best microfilm camera operators. She was often praised by Supervisor Fugate on her roll book for doing work that was "Good!!" "Super Great!!!!" "Great! Great! Great!" and (twice in the week before her discharge) "Super Duper Good!" (G.C. Exh. 3, Tr. 45–48). It is undisputed that "on many occasions" Fugate told her "She was surprised that I could put out the footage as fast as I have" (Tr. 44). It is also undisputed that Fugate had offered, and Stan had agreed to take, the job of assistant supervisor when that position would be vacated in September (Tr. 50). Stan was never reprimanded or disciplined or given any warning of any kind (Tr. 51, 180) except on 23 May, after the employee meeting, when Fugate threatened her with discharge for asking questions about not being paid on time.

On 17 June Supervisor Fugate told Stan and employees Johnson and Gantt that "we're all caught up" on the Christ Hospital microfilming job. About 4 p.m. the next day, in the office with Fugate and Supervisor Sandra Wiley, President Maxton told Stan (in her words, Tr. 41–43):

> "Teresa, I am terminating your services as of today because you have been making several complaints about your pay."
>
> And I said, "No, sir. I made only one complaint."
>
> And he said, "Well, one complaint—that's all it takes." And shrugged his shoulders.
>
> And I said, "I don't understand why you're firing me . . . . I've always been a good employee. I've come to work on time. I've always gotten . . . my footage. I did above-average than anybody else."
>
> And he says, "Yes, you are a good worker."
>
> And I said, "And . . . when I was hired, I was told . . . that getting paid late would only happen once in awhile."
>
> And Sharon Fugate said, "Yes, once in awhile."
>
> . . . .
>
> . . . I said "Gary Maxton, is Dee Gantt getting fired?"
>
> And he said, "Well, I can't tell you that."
>
> I said, "Well, she was complaining about pay just as much as anybody else was, and she was checking

the mail to see if any [checks] had come in, and was getting everybody else upset."

And he said, "Well, I can't tell you that."

And I turned around and walked away.

Supervisor Wiley did not testify, and Supevisor Fugate did not dispute Stan's testimony about what was said. President Maxton claimed at the beginning of the trial (Tr. 18–19) that when he discharged Stan, "I said it appeared that she was unhappy at Micro-Chart Company." He did not testify later to deny Stan's account of what was said. I credit Stan's testimony about the meeting.

Maxton claimed (Tr. 19) that he drew the conclusion that Stan was unhappy because Supervisor Wiley reported that Stan had been "harassing" employee Gantt. He claimed that he "asked what generated this, and they said that Mrs. Stan was unhappy with Mrs. Gantt because [Gantt] had supported the Micro-Chart Company during a meeting that was held on May 23rd." (To the contrary, Stan's and Gantt's immediate supervisor, Fugate, admitted (Tr. 175) not being aware of any problems between Gantt and the other employees after the meeting; "I would check the girls, and there didn't seem to be any dispute going on.") Regarding the 23 May meeting, Maxton testified (Tr 19) that he learned that Stan and Linda Johnson "had requested a meeting with Mrs. Fugate" and "that apparently there was a lot of undercurrent, maybe loud talking, general disruption on the 23rd." He acknowledged (Tr. 20) that the main topic of the meeting was "that the company had not received any payments from the customer and the payroll would have to be delayed."

I note that despite the evidence that the Company frequently paid the employees late or not in full (Tr. 24, 79–82; G.C. Exh. 2), President Maxton testified (Tr. 15) that he would say "90 percent of the time" in the last 12 months he had been able to pay the employees "in full and on time." (He impressed me as a witness who was less than candid.)

b. *Linda Johnson*

Johnson was in good health when she started working 8 February. She had a cyst on her arm, but it did not cause her any trouble on the job until early May when it became swollen. On 28 May she picked up a heavy box, causing much pain, and Supervisor Fugate sent her home. She had surgery on 30 May and was off a total of 6 days and 1 partial day after that. She worked 5 hours Saturday, 14 June, to make up part of the time and told Fugate she would work 5 hours again Saturday, 21 June (not knowing that she would be discharged that Wednesday). Fugate "said that was fine." (Tr. 94–100, 105–107, 125; G.C. Exh. 6.)

Sometime in April Supervisor Fugate had held a meeting and told the employees that President Maxton said there had been too much absenteeism, that it had to stop, and that if it continued, "you would be warned verbally first, then would be given a written warning, and then you would receive a three-day suspension without pay" (Tr. 101). Similarly a notice near the timeclock provided for progressive discipline: an oral warning, a written warning, and then a 3-day suspension without pay for *unexcused* absences (Tr. 105). None of Johnson's absences, however, were "unexcused" (G.C. Exh. 6; Tr. 140–144). Fugate gave Johnson permission each time to be absent. Fugate never indicated that her sick leave would be a problem and Johnson never received any warning for her absences or any reprimand or discipline for any reason. (Tr. 95, 98, 100–101.)

Supervisor Fugate showed only concern for Johnson. As Johnson credibly testified, "every day that I was absent, I called [Fugate] every morning around 8:00 o'clock and told her, and she was very concerned about the cyst; and 'what did the doctor say,' and 'what is he doing,' and 'how are you feeling,' and 'we're all worried about you here,' and 'we want you to get better.' It was all concern. There was never anything negative." (Tr. 97.)

On one occasion, as employee Stan credibly testified, Supervisor Fugate said, "Just as long as Linda Johnson calls in and lets me know what's going on, she doesn't have to worry about her job." On another occasion Fugate was standing with President Maxton's wife Gerry in the processing room when Stan walked up. Fugate asked about Johnson and told Stan "that Gerry Maxton said that anything about a lump scares me . . . and she really felt for Linda and that Linda Johnson didn't have to worry about her job when she comes back. She didn't have to film; that we could have her prep . . . . We could find something for her to do." (Tr. 217.)

When Johnson returned to work, Fugate told her not to do anything that would cause her any pain or trouble "and that if that did, to let her know, and I could do something else." Johnson resumed her microfilming work and never requested other work. (Tr. 107.)

On the morning of 18 June (the date that Johnson was summarily discharged at quitting time) Gerry Maxton again showed some concern for her. When checking the roll books (showing production the day before) Gerry Maxton asked Supervisor Fugate whether the fast job that Johnson was on should be given to employee Alicia Jones, who was on a slow job that would be easier on Johnson's arm. As Fugate reported to Johnson, she told Gerry Maxton that Johnson had requested to stay on that job to build up her speed (after working on a slow index card job) and "Linda knows that if any job . . . causes her any pain or discomfort to her arm, all she has to do is tell me" and she can "either slow down or prep, or whatever" she needs to do. (Tr. 77–78, 91.)

Instead of slowing down that day, Johnson "was trying to see how fast" she could go and ran 315 feet of film. Going above 300 feet was unusual for her. When she took off the last roll of film she went back and jokingly told Supervisor Fugate she "expected a party the next day for doing that." But "Fugate acted real funny at the time. She wouldn't look me in the face." (Tr. 91–92, 108.)

At 3:55 p.m., a few minutes later, Johnson was called to the office (with employee Stan) and discharged without any prior warning. In the presence of Supervisors Fugate and Wiley, President Maxton told her: "I'm terminating your employment here as of today due to your health . . . when you applied here, on your application,

you stated that you were in good health, but you had [known] about the cyst for the past two years." Johnson insisted that "it never caused me any trouble until it became inflamed in May," but Maxton responded that "you're missing too much work by going to the doctor." She asked if that was all and she left. (Tr. 92–93.) This testimony is undisputed.

3. Contentions and concluding findings

Relying on *Meyers Industries*, 268 NLRB 493, 497 (1984), reaffirmed 281 NLRB 882 (1986), the General Counsel contends (a) that employees Stan and Johnson were engaged in protected concerted activity at the 23 May employee meeting, (b) that President Maxton knew at the time he discharged them that they were the leading protagonists at the meeting, complaining about the Company's pay practices, and (c) that his motivation for discharging them was this protected concerted activity.

As proof of this motivation, the General Counsel points out that Maxton terminated Stan and Johnson at the same time, that Supervisor Fugate told Stan after the 23 May meeting that if Maxton "finds out about today's meeting, you'll get fired" for asking questions about the pay, and that Maxton told Stan she was being discharged for "making several complaints about your pay." The General Counsel argues that Maxton could not discharge the two employees immediately for their protected concerted activity at the 23 May meeting because the Company "was behind in its production due to the absence of microfilm." But on 18 June, the very next day after completion of the Christ Hospital job, he summarily fired them "for the rankest of pretextual reasons." She points out that "nowhere is there any testimony that any supervisor made any recommendation to Gary Maxton that these two women be summarily discharged for any transgression." She also cites their good work records, the absence of complaints toward them by any supervisor before their discharge, and the favorable comments and offer to promote Stan as additional factors, establishing a prima facie case of unlawful discharge.

The Company contends in its brief that Stan and Johnson were discharged for "good and proper reasons . . . not connected with the events of May 23." Disregarding the evidence to the contrary, the Company also contends: "It should be noted that Counsel for the NLRB made no attempt to relate the discharge of June 18, 1986, with the events of May 23, 1986."

When summarily discharging employees Stan and Johnson at quitting time on 18 June without any prior notice or warning, President Maxton revealed to one of them that he was motivated by the complaining at the 23 May meeting. He informed Stan that he was discharging her for making several complaints, and when she responded that she made only one complaint (at that meeting), he stated "that's all it takes." As found, Stan and Johnson led the protests about the late pay at that meeting, and the Company was aware that they were protesting both on their own behalf and on behalf of other employees, engaging in protected activity. Also as found, Stan was warned after the 23 May meeting that "you'll get fired" if Maxton finds out about the meeting. Maxton did find out, but as the General Counsel contends, he waited until the Christ Hospital job was completed before discharging the two leaders of the protests at the meeting.

The evidence is clear that Fugate, the two employees' immediate supervisor, was not recommending their discharge. Fugate was praising Stan for her high production and was planning to promote her. Fugate gave assurances that Johnson's sick leave, caused by the removal of the cyst, would not affect her job, and Johnson was working again at top speed and on Saturdays. None of her sick leave was considered unexcused absences, and she had not been given any oral or written warning or suspended for 3 days as required by the rule before discharging an employee for excessive absences, even if her absences had been unexcused.

I agree with the General Counsel that she has established a prima facie case under *Meyers* that the protests about late pay made by Stan and Johnson at the 23 May meeting on their own behalf and on behalf of other employees were "concerted," that the Company knew of the concerted nature of this activity, that the activity was protected by the Act, and that their discharge was motivated by this protected concerted activity. I also find that the Company has failed to rebut the prima facie case by carrying its burden to demonstrate that it would have discharged them in the absence of their protected conduct. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Accordingly I find that the Company unlawfully discharged Stan and Johnson in violation of Section 8(a)(1) of the Act.

Conclusions of Law

1. By discharging Teresa Stan and Linda Johnson on 18 June 1986 for engaging in protected concerted activity, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By threatening to discharge an employee for engaging in protected concerted activity, the Company violated Section 8(a)(1).

3. By threatening to close the facility if the employees sought a union, the Company further violated Section 8(a)(1).

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged two employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Micro-Chart Company, New Carlisle, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

(b) Threatening to discharge any employee for engaging in protected concerted activity.

(c) Threatening to close the facility if the employess seek a union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Teresa Stan and Linda Johnson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in New Carlisle, Ohio, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply. To determine or secure compliance with the Order, the Board or any authorized representatives may obtain discovery from the respondent, its officers, agents, successors, or assigns or from any person having knowledge of any compliance matter, as provided in the Federal Rules of Civil Procedures. The discovery shall be conducted under the supervision of the United States Court of Appeals enforcing the Order and may be on any matter reasonably related to the compliance.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT threaten to discharge any of you for engaging in such activity.

WE WILL NOT threaten to close our facility if you seek a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Teresa Stan and Linda Johnson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify them that we have removed from our files any reference to their discharge and that the discharge will not be used against them in any way.

MICRO-CHART COMPANY

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Constructive Sheet Metal, Inc. *and* Sheet Metal Workers' International Association, Local Union No. 410, AFL–CIO *and* Harry Joe Walters. Cases 7–CA–23493, 7–CA–24227, and 7–CA–23718

19 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 14 April 1986 Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Constructive Sheet Metal, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Howard M. Dodd, Esq., for the General Counsel.
Anthony P. Gauthier, Esq., of Grand Rapids, Michigan, for the Respondent.
John R. Van Noller, of Grand Rapids, Michigan, for the Union.
Harry Joe Walters, of Wyoming, Michigan, pro se.

DECISION

BENJAMIN SCHLESINGER, Administrative Law Judge. This proceeding involves one alleged discharge in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq., and alleged violations of Section 8(a)(5) by unilateral changes and reductions of terms and conditions of employment and failure to execute a written contract embodying a collective-bargaining agreement. The relevant docket entries are as follows: The charge in Case 7–CA–23494 was filed by Charging Party Sheet Metal Workers' International Association, Local Union No. 410, AFL–CIO (Union) on 31 May 1984 and in Case 7–CA–24227 on 28 January 1985. The charge in Case 7–CA–23718 was filed by Charging Party Harry Joe Walters on 6 August 1984. A complaint in Case 7–CA–23493 issued on 26 June 1984; an amended consolidated complaint issued on 25 September 1984, consolidating Case 7–CA–23718; and on 30 April 1985 a second amended consolidated complaint issued, consolidating Case 7–CA–24227. The hearing was held in Grand Rapids, Michigan, on 4 December 1985.

I find, as Respondent admits, that Respondent Constructive Sheet Metal, Inc., a corporation duly organized and existing by virtue of the laws of the State of Michigan, maintains its principal office and place of business in Grand Rapids, Michigan, where it is engaged in the manufacture, sale, and distribution of fabricated sheet metal products for industry. During the year ending 31 December 1984, a representative period, Respondent purchased and caused to be transported and delivered to its Grand Rapids facility, sheet metal and other goods and materials valued in excess of $50,000, of which goods valued in excess of $50,000 were transported and delivered to its Grand Rapids facility directly from points located outside Michigan. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further conclude, as Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act. The Union represents the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of Constructive Sheet Metal, Inc. engaged in but not limited to the (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing, and servicing of all ferrous or nonferrous metal work and all other material used in lieu thereof and of all air-veyor systems and air handling systems regardless of material used including

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the judge's inadvertent error in fn. 4 of his decision in referring to "the delay between 3 May and 5 July . . . ."; the phrase should read, "the delay between 31 May and 5 July . . . ." We also correct the judge's inadvertent error in stating in the third to last paragraph before the remedy section of his decision, "Furthermore, when Walters was paid off on 3 October . . . ."; the phrase should read, "Furthermore, when Walters was paid off on 3 August . . . ."

[3] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by implementing unilateral changes in terms and conditions of employment without bargaining with the Union, we additionally find that the Respondent failed to give sufficient notice to the Union of the changes prior to their implementation. See *Stone Boat Yard*, 264 NLRB 981 (1983), enfd. 715 F.2d 441, 444–445 (9th Cir. 1983).

We also adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) by discharging employee Walters. In so doing, we find that the General Counsel has established a prima facie case by showing that Walters' complaint under the collective-bargaining agreement that he was not paid for his overtime work led to his discharge. We further conclude, based on our agreement with the judge's findings of fact concerning the Respondent's asserted defense that Walters was discharged for working on his toolbox on company time, and the judge's rejection of that defense, that the Respondent has not met its burden of establishing that it would have discharged Walters in the absence of his protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

> the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketchs used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

For approximately 20 years prior to the fall of 1983, Respondent was a member of the Sheet Metal Employers Association of Western Michigan (Association).[1] As a result, Respondent and the Union were parties to successive collective-bargaining agreements, the last of which (before the agreement in dispute), dated 1 May 1980, expired by its terms on 1 May 1984. On 21 November 1983 the Association wrote to its Michigan members, including Respondent, enclosing a form authorizing it to bargain for the membership for signature. The record does not indicate that Respondent replied to this letter. When the Association sent another authorization form to Respondent by letter dated 17 February 1984,[2] Anthony P. Gauthier, Respondent's attorney wrote back on 1 March 1984 returning the unsigned form and advising that:

> Ray Lantz and Vern Johnson have retained us to negotiate a new contract with the union. Accordingly, Constructive Sheet Metal, Inc. will not be represented by SMACNA in the upcoming negotiations.

No copy of this letter was sent to the Union, which had notified the Association on 4 January of its intent to reopen the contract. But the Union was informed by Gauthier in a letter dated 28 February that:

> Vern Johnson and Ray Lantz have asked us to respond to your letter of January 4, 1984 concerning reopening the contract between Constructive Sheet Metal, Inc. and your Union. Constructive Sheet Metal also desires to reopen the contract for wages, hours and other conditions of employment, and will be pleased to meet with you to negotiate these issues.
>
> We will contact you within the next few weeks to arrange for meeting dates and times.

Gauthier again wrote to the Union on 30 March *after* negotiations between the Union and SMACNA for a new contract had commenced, as follows:

> I am writing on behalf of Constructive Sheet Metal, Inc. to restate our willingness to negotiate a new contract with your Union. As I told you today during our phone conversation, Constructive Sheet Metal, Inc. has informed SMACNA that it will participate in the multi-employer bargaining. I trust that your Union will honor my client's right and decision to withdraw from the multi-employer bargaining, and consider yourself on notice of that decision.
>
> In other words, Constructive Sheet Metal, Inc. will not consider itself bound to any new agreement negotiated between SMACNA and Local 410. If your Union desires to negotiate a new contract with Constructive Sheet Metal, Inc., please contact me at your earliest convenience concerning the time, location and subject matter of the proposed contract.

The Association refused to permit Respondent to withdraw from it; and it represented to the Union that Respondent was still a member, for which the Association was bargaining. In a letter dated 20 April, the Association's attorney stated that Respondent's purported 1 March withdrawal was untimely because it had to be made 60 days prior to the commencement of contract negotiations, stated in the letter as 6 March, and improper because it had been mailed to the executive director of the Association, rather than the president, as required. Reacting to that letter, Gauthier wrote to the Union on 25 April, as follows:

> As you know, we have beeen retained by Constructive Sheet Metal, Inc. to represent them in contract negotiations with Local 410. As you also know, we have withdrawn from SMEA and SMACNA their authority to bargain for Constructive Sheet Metal, Inc., and I am writing to restate my client's willingness to enter into contract negotiations with your Union acting on behalf of my client's employee members.

On the same day, Gauthier wrote to the Association and complained that its 20 April letter was the first response to Respondent's notice of withdrawal and that it could not "justify waiting to object to our withdrawal until the day they submit their final offer to the Union." On 10 May the Association decided not to contest Respondent's withdrawal.

In the meantime, on 1 May Respondent implemented unilaterally the following changes in the terms and conditions of employment of its employees: it reduced the hourly wage of its employees to $11.49 per hour and ceased making payments to the pension, vacation and savings, national training, educational, SMACNA industrial, and life insurance funds—a savings of $5-labor costs per hour for each employee. Those changes were announced for the first time in a letter to the Union dated 30 April. On 5 May the Union filed in response an unfair labor practice charge in Case 7–CA–23418 complaining that Respondent "failed to give adequate written notice within the time perscribed in the existing contract for withdrawal from negotiations." In that charge, the Union's business manager, John Van Noller, stated: "Constructive Sheet Metal Company advised Sheet Metal Workers' Local Union No. 410, through its attorneys on February 28, 1984, that it would not participate

[1] The Association (referred to in one letter quoted below as SMEA) is the Michigan Chapter of the Sheet Metal and Air Conditioning Contractors National Association, referred to in some of the correspondence quoted below as SMACNA. I have treated both as the Association.

[2] All dates hereinafter set forth refer to the year 1984, unless otherwise stated.

in multi-employer negotiations with the Sheet Metal Employers of Western Michigan and Sheet Metal Workers' Local Union No. 410."

In light of this statement, "true to the best of [Van Noller's] knowledge and belief," I find that Van Noller understood that Respondent was withdrawing the Association's bargaining authority. Gauthier's letter of 1 March to the Association withdrew from the Association the authority to bargain on Respondent's behalf. The return of the unsigned authorization form and the statement in the letter that Gauthier's law firm was retained to negotiate the contract could hardly have been interpreted as anything but a withdrawal. The last two sentences of Gauthier's 28 February letter to the Union state that Respondent desired separate negotiations with the Union, asking to meet with the Union to negotiate, and promising to contact the Union to arrange for meeting dates and times. Thus, Respondent sought to negotiate with the Union separate from multiemployer negotiations. Fairly read, the Association was not to represent Respondent. Of equal significance, the unfair labor practice charge demonstrates that the Union knew on 28 February that Respondent had withdrawn from the multiemployer negotiations.[3]

Under the Board's rule in *Retail Associates*, 120 NLRB 388, 394 (1958), "The decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis." Respondent timely withdrew from the Association. Its notice to the Union was in writing and was made prior to 23 March, when the Association and the Union first exchanged bargaining proposals. Although the notice may not have been as clear and unequivocal as might be desired, the letter to the Union was intended to be read by Van Noller, and he read it, as the clear and unequivocal notice that Gauthier was attempting to send. His objection appeared to be only that Respondent did not give 90 days' notice, as required by the expiring collective-bargaining agreement, an objection that the General Counsel has not pursued in this proceeding.

Therefore, despite the fact that the complaint alleges that the Association reached full and complete agreement on a new contract on 20 June, Respondent was not bound by those negotiations and did not violate the Act when it refused the Union's request of 20 December to execute the Association contract. In addition, accepting this allegation of the complaint as true, the charge in Case 7–CA–24227 is barred by Section 10(b) of the Act. *Preston H. Haskell Co.*, 238 NLRB 943 fn. 1 (1978), enf. denied on other grounds 616 F.2d 136 (5th Cir. 1980), holds that the 6-month limitation period for the refusal of an employer to execute an agreement through multiemployer bargaining must relate back to the date that the new agreement was reached. The agreement was reached on 20 June 1984 and the charge was not filed until 28 January 1985. The charge is, therefore, barred by Section 10(b).[4]

However, there is simply nothing here that entitled Respondent to change its terms and conditions of employment on 1 May. If it was still a member of the Association, the Association was still engaged in bargaining on that date and no impasse had been reached. If Respondent was not a member of the Association for bargaining purposes, then it had a duty to bargain with the Union, a duty that it has implicitly conceded by its filing of 8(b)(3) charges against the Union. The duty to bargain in good faith, protected under Section 8(a)(5) of the Act, is defined by Section 8(d) as the duty "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." "[A]n employer's unilateral change in conditions of employment under negotiation is . . . a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). It is axiomatic that an employer violates Section 8(a)(5) by unilaterally implementing a change while negotiations are still in progress and impasse has not been reached. See, e.g., *Winn-Dixie Stores*, 243 NLRB 972 (1979).

There are exceptions to this rule. In *Stone Boat Yard*, 264 NLRB 981, 982 (1982), the Board wrote:

> [I]t is true that when an employer has diligently and earnestly sought to engage in bargaining and the union has continually avoided or delayed bargaining, the employer is justified under certain circumstances in implementing unilateral changes in the terms and conditions of employment. See, e.g., *AAA*

[3] The cases cited by the General Counsel are distinguishable. In *Northern Petroleum Equipment Co.*, 244 NLRB 685 (1979), the employer's letter to the union merely stated that he had retained counsel and asked that future correspondence be sent to him. No request for separate bargaining was made. In *Players Restaurant*, 246 NLRB 63 (1979), enfd. sub nom. *NLRB v. Hoover*, 639 F.2d 789 (9th Cir. 1981), the employer notified the union only that it wished to terminate the association contract at its expiration. It indicated no intention "to act contrary to the multi-employer council." Id. In *Groton Piping Corp.*, 246 NLRB 99 (1979), no notice was sent to the union.

[4] For this reason, it is unnecessary to decide Respondent's other 10(b) defense, which presents some weighty issues. I merely note that the Regional Director in Case 7–CA–23418, which was timely filed, found that Respondent's withdrawal was timely and unequivocal and dismissed the charge. (Contrary to the contention of the General Counsel, an untimely attempt to withdraw from a multiemployer group may constitute an unfair labor practice. *Teamsters Local 378 (Capitol Chevrolet Co.)*, 243 NLRB 1086 (1979).) Respondent then allegedly requested repeatedly that the Union bargain with it, but the Union refused to bagain, so Respondent filed an 8(b)(3) charge against the Union in Case 7–CB–6218. The Regional Director found that the Union had not bargained because the Association insisted that Respondent was still its member. When Case 7–CA–23418 was dismissed, the Union then realized that it was obligated to bargain with Respondent and on 5 July contacted Respondent to set up a date for bargaining and 26 July was agreed on as the date to begin. Respondent's charge was dismissed, the delay between 3 May and 5 July being "not so substantial" in light of the Union's willingness to meet on 26 July; and bargaining did commence and continued for several months. (In light of these peculiar circumstances, I do not conclude that the Union waived its position that Respondent had not properly withdrawn from multiemployer negotiations. It was forced into individual bargaining by reason of the Regional Director's disposition of these unfair labor practice charges. It also took that action because Respondent agreed to restore the wages and benefits it had unilaterally reduced. See fn. 5.) For some reason, which I do not understand, Respondent filed another unfair labor practice charge in Case 7–CB–6328 on 29 October, which again alleged that the Union failed to bargain in good faith between 31 May and 5 July. Again, the Regional Director dismissed the charge, but this time he reconsidered his earlier position and found that Respondent never gave a proper notice that it was withdrawing from the Association to begin with. That dismissal on 29 November prompted the filing of the charge in Case 7–CA–24227.

Motor Lines, Inc., 215 NLRB 793 (1974).[2] However, one of the circumstances which the Board insists upon in such cases is that the employer's unilateral change must be consistent with the employer's previous proposal to the union of changes in the expired contract. *Ace Galvanizing, Inc.*, 217 NLRB 144, 146 (1975); *Allen W. Bird II, Receiver for Caravelle Boat Company, a Corporation, and Caravelle Boat Company*, 227 NLRB 1335, 1358 (1977). Here, Respondent never provided the Union any type of written or detailed proposal of changes in the expired contract. As the Union and Respondent did not reach a bargaining impasse, and the Union did not waive its right to bargain about the changes which were implemented, and Respondent did not implement changes which were consistent with any previously rejected offer, Respondent's implementation on July 1 of the changes in terms and conditions of employment violated its duty to bargain. *Dial Tuxedos, Inc.*, 250 NLRB 476 (1980); cf. *AAA, supra* at 794.[3] Accordingly, we hold that Respondent has violated Section 8(a)(5) and (1) of the Act since July 1, 1980, by ceasing to make contributions to the union health and welfare and pension fund and by implementing the company-funded medical insurance plan.

[2] In *AAA*, the employer in April timely notified the union of its intention to terminate the contract and submitted its proposed contract to the union along with a request to commence bargaining. For 2-1/2 months thereafter, the union refused to meet or bargain with the employer. Upon expiration of the contract, the employer unilaterally implemented changes in terms and conditions of employment. All the changes were consistent with the employer's detailed contract proposal, which the union had in its possession for 2-1/2 months.

[3] Our dissenting colleague does not question the long line of Board decisions holding that any changes unilaterally implemented by an employer following contract expiration must, *inter alia*, be consistent with the prior proposal made by the employer during bargaining. See cases cited in the text herein, plus *Peerless Roofing Co., Ltd.*, 247 NLRB 500, 503–504 (1980). In light of that principle, we are at a loss to understand our dissenting colleague's analysis. In effect, he would find that an employer had unlawfully made a unilateral change that is consistent with its prior proposal though it has made no prior proposal. It is this internal contradiction that causes us to reject our colleague's analysis.

Additionally, our decision serves to foster and promote stable labor relations. The important functions of informing the union what changes in the contract are sought by the employer and putting the union on notice that after a reasonable period of time union inaction might result in the employer's unilateral implementation of these proposed changes have led the Board, and leads us, to require that an employer provide a union with a written copy of its proposed contract changes prior to unilaterally implementing them. *Peerless Roofing*, supra at 503; *Allen W. Bird*, supra at 1358; *M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors*, 262 NLRB 1472 (1982).

Despite Gauthier's letter that he would telephone to set up meetings, there is no evidence that he ever did so. Only 2 months had lapsed between Respondent's notice to the Union that it desired to bargain and the unilateral reductions. No bargaining had taken place. No proposals had been made. There was no impasse by 1 May and no impasse through the period ending 14 July, after which Respondent restored the prior terms of employment.[5] Without an impasse, and with Respondent's duty to bargain, either through the Association or by individual bargaining, there is no excuse for Respondent's unilateral change of conditions of employment without a prior proposal, without discussion of union rejection, and without union waiver. I conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

The final alleged violation concerns employee Harry Joe Walters, who was fired from his job on 3 August 1984 at 11:45 a.m. David Lantz, then shop foreman,[6] testified that he took Walters outside the door and told him that he no longer worked there. Walters testified to something vastly different, that Lantz told him that Lantz was getting rid of him because he was a "trouble causer . . . everytime [he] went on a job [he] was causing trouble over overtime pay." Lantz said, "[Y]ou're paid until noon, get your tools and get the hell off my property." Walters said fine, but asked Lantz whether he worked for his overtime. Lantz said, "[Y]es"; and Walters said, "I want my damn money." At some point in the conversation, Lantz said that he had men who worked for Respondent for years and did overtime work for straight-time pay. It is this conflict that gives rise to the instant dispute, whether Walters was discharged for grieving about Respondent's failure to pay him overtime pursuant to the union contract.

I find that Respondent violated the Act. I am convinced that Walters accurately related his conversation with Lantz on August 3. I am equally convinced that Lantz would not merely have told Walters when he terminated him that he no longer worked there. Some reason would have been given for firing Walters in the middle of the day, but Lantz stated none. Instead, he relied at the hearing on events that allegedly occurred that morning, that Walters was constructing a toolbox, which was personal work and was not allowed to be performed on company time. Although Lantz said he saw Walters performing his work all morning, on six separate occasions, Lantz testified that he become angrier and angrier, but he never said anything to or warned Walters. That is most strange, if indeed Walters was actually doing it. Yet, no one other than Lantz said he was.[7] Walters said that he was performing his assigned work, and that testimony was corroborated by Robert Veenstra, who was in charge of a crew, which included Walters, welding a hood. Veenstra did not see Walters doing anything but his assigned work.

There is no doubt that Respondent had a rule that an employer could not work on personal projects during company time. That rule, however, was breached from time to time by employees, including Lantz' son, without

[5] On 7 and 8 May Gauthier advised the Union's attorney that as soon as the Union agreed to bargain in good faith for a new contract with Respondent, the wages and benefits would be restored. The Union's attorney promised to and did convey this message to the Union.

[6] His father was co-owner of Respondent. At the time of the hearing, Lantz was a co-owner of Respondent.

[7] Walters candidly admitted that he sheared two small clips during working hours that morning, while he was otherwise engaged in Respondent's work. Lantz testified that he never saw Walters doing this work.

their being fired. Even Lantz admitted that he had performed some layout work on employees' personal equipment during working hours. Furthermore, Walters admitted working on a toolbox the day before or the day that he was fired, but he did so only before work and during breaks, when there is no question that he could properly do so. His testimony was corroborated by another employee, Robert Howard, who helped Walters bend metal to make trays and to prepare corner clips. Lantz' testimony, to the contrary, was uncorroborated; and I found his testimony concerning when he saw Walters building his toolbox so vague and at times so argumentative and brusque that I do not credit him.

Accordingly, I conclude that at the end of July, Walters and Bruce Felton left Grand Rapids at 5 a.m. for an assigned job in Petosky, Michigan, and returned at 2 a.m. the following day. Walters was not paid off overtime and complained to Respondent's bookkeeper. Getting no satisfaction, he complained to Van Noller, who agreed to look into the matter. Shortly after that, Walters and employee Louis Phillips were assigned to work at Westinghouse, where they had to work nights after the day shift had gone home. Walters called Van Noller to find out how they were supposed to be paid. Van Noller said that there was straight time, time-and-a-half, and double time, but the employees were paid only 10 hours for 8 hours worked. Later, during the week before he was fired, Walters told Van Noller that he had not been paid according to the contract. Van Noller told Phillips to make sure that Walters received his money. Phillips said that Respondent had never paid it before and was not going to start then. Walters said that he wanted his "damn money" within earshot of Lantz' office. Van Noller pursued both complaints with Respondent's co-owner on 26 July and raised the matters with Gauthier on 1 August. Gauthier agreed to consult Respondent about them.

Accordingly, Lantz, despite his denials, must have become aware of Walters' overtime complaints because he mentioned them to Walters as the reason for Walters' termination. Furthermore, when Walters was paid off on 3 October, he was paid the overtime on the Petosky job that was due to him. I do not credit Lantz' denial that he was wholly unaware of any overtime dispute, a denial I found feigned.[8] There is nothing in this record that justifies Walters' discharge, other than his complaint under the collective-bargaining agreement that he was not paid for his overtime work. I conclude that Respondent violated Section 8(a)(1) of the Act. *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (1967), approved in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).[9]

On 27 December, the Union began a strike and picketing against Respondent, and the strike and picketing continued up to the date of the parties' stipulation dated 31 July 1985. The General Counsel contends that the strike was an unfair labor practice strike, but Van Noller testified that the sole reason that the strike was called was because of Respondent's failure to execute the Association's collective-bargaining agreement. Because I have found that Respondent's refusal to execute that agreement was not a violation of the Act, I conclude that the strike was not called to protest the existence of unfair labor practices. That I have found other violations of the Act is immaterial. There has been no proof of a causal connection between that illegal conduct and the strike. *Amber Delivery Service*, 250 NLRB 63, 72 (1980), enfd. in relevant part 651 F.2d 57 (1st Cir. 1981); *Walker Die Casting*, 255 NLRB 212, 216 (1981), enfd. as modified 682 F.2d 592 (6th Cir. 1982).

The unfair labor practices found above, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having concluded that Respondent unlawfully engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action. Specifically, I shall order Respondent to offer Harry Joe Walters full and immediate reinstatement to his former position or, if that position no longer exists to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of wages or other rights and benefits he may have suffered as the result of the discrimination against him in accordance with the formula prescribed in *F. W. Woolworth*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977).[10] I shall also order Respondent to remove from its records any reference to Walters' unlawful discharge and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used against him in any way.

Having found that Respondent, from 1 May to 14 July 1984, violated Section 8(a)(5) and (1) of the Act by ceasing to make contributions on behalf of its bargaining unit employees to the various funds, I shall order Respondent to make the required contributions to the respective funds and to transmit to the appropriate funds the contributions it has failed to make for the period of its unlawful cessation of payments.[11] In addition, I shall order Re-

[8] Lantz denied knowing about any overtime dispute until after Walters had left. When Lantz was initially asked whether he ever knew that Walters had complained that he was not paid overtime, Lantz answered, "I don't really pay a whole lot of attention to pay."

[9] In light of this finding, it is unnecessary to consider whether Walters' discharge also violated Sec. 8(a)(3) of the Act.

[10] See generally Isis Plumbing Co., 138 NLRB 716 (1962).

[11] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. I leave to the compliance stage the question whether Respondent must pay any additional amounts to the funds in order to satisfy this "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, when there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of fund withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

spondent to make whole the employees in the unit for the loss of wages they suffered due to Respondent's unilateral reduction of their wages, with interest computed as set forth above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Constructive Sheet Metal, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Sheet Metal Workers' International Association, Local Union No. 410, AFL–CIO by unilaterally reducing the hourly wages of its employees and discontinuing payments to the pension, vacation and savings, national training, education, SMACNA industrial, and life insurance funds, without bargaining with the Union as the exclusive representative of its employees in the following appropriate unit:

> All employees of Constructive Sheet Metal, Inc. engaged in but not limited to the (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing, and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

(b) Failing and refusing to make contributions on behalf of its employees in the above-described unit to the pension, vacations and savings, national training, educational, SMACNA industrial, and life insurance funds, as required by its expired agreement with the Union.

(c) Unilaterally reducing the hourly wages of its employees in the above-described unit.

(d) Discharging or otherwise discriminating against its employees because they engage in concerted and protected activities by filing grievances or complaining about their rate of pay.

(e) In any like or related manner interfering with, restraining, or coercing any employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, bargain collectively with it as the exclusive representative of the employees in the above-described unit with respect to wages and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) On request of the Union, rescind the unilateral reduction of hourly wages and make payments of such amounts to the employees who were not paid, with interest as provided in the remedy section, and make payments to the pension, vacation and savings, national training, educational, SMACNA industrial, and life insurance funds, as required by its expired agreement with the Union, all for the period from 1 May to 14 July 1984.

(c) Offer immediate reinstatement to Harry Joe Walters to his former position or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay or any other benefits he may have suffered as a result of the discrimination against him in accordance with the provisions set forth above in the remedy section.

(d) Remove from its files any reference to the unlawful discharge of Harry Joe Walters and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used against him in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Grand Rapids, Michigan facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

---

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain in good faith with Sheet Metal Workers' International Association, Local Union No. 410, AFL–CIO by unilaterally reducing the hourly wages of our employees and discontinuing payments to the pension, vacation and savings, national training, educational, SMACNA industrial, and life insurance funds, without bargaining with the Union as the exclusive representative of our employees in the following appropriate unit:

> All employees of Constructive Sheet Metal, Inc. engaged in but not limited to the (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing, and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

WE WILL NOT fail and refuse to make contributions on behalf of our employees in the above-described unit to the pension, vacations and savings, national training, educational, SMACNA industrial, and life insurance funds, as required by our expired agreement with the Union.

WE WILL NOT unilaterally reduce the hourly wage of our employees in the above-described unit.

WE WILL NOT discharge or otherwise discriminate against our employees because they engage in concerted and protected activities by filing grievances or complaining about their rate of pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, bargain collectively with it as the exclusive representative of our employees in the above-described unit with respect to wages and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on request of the Union, rescind the unilateral reduction of hourly wages and make payments of such amounts to our employees who were not paid, with interest, and make payments to the pension, vacation and savings, national training, educational, SMACNA industrial, and life insurance funds, as required by our expired agreement with the Union, all for the period from 1 May to 14 July 1984.

WE WILL offer immediate reinstatement to Harry Joe Walters to his former position or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay or any other benefits he may have suffered as a result of the discrimination against him, with interest.

WE WILL remove from our files any reference to the unlawful discharge of Harry Joe Walters and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used against him in any way.

CONSTRUCTIVE SHEET METAL, INC.

Lo-Pri Plumbing & Heating, Inc. *and* Plumbers Local Union No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL–CIO. Case 5–CA–8242

21 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

Upon a charge filed by the Union, Plumbers Local Union No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL–CIO, 29 July 1986, the General Counsel of the National Labor Relations Board issued a complaint 4 November 1986 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Company was properly served copies of the charge and complaint. The Company then filed an answer, but by letter dated 10 February 1987 withdrew it.

On 24 February 1987 the General Counsel filed a Motion for Summary Judgment. On 4 March 1987 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 10 days of service, "all the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board."[1]

The Company withdrew its answer to the complaint and notices of hearing. The Company has not filed a request for extension of time to file a new answer.

In the absence of good cause being shown for the failure to file a timely answer, or a request for extension of time, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company is engaged in the business of installing and repairing plumbing and heating systems at its facility in Tuxedo, Maryland, where it purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of Maryland. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since at least 1966, the Union has been the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All journeymen plumbers and their apprentices employed by Respondent excluding all other employees, guards and supervisors as defined in the Act.

Since at least 1966, the Union and the Company have been parties to successive collective-bargaining agreements, and the Union continues to be the exclusive representative under Section 9(a) of the Act. The most recent agreement is effective by its terms for the period 1 September 1985 through 31 August 1987.

Since about 15 February 1986, the Respondent changed the terms and conditions of employment for its employees in the unit by failing to make contributions into the pension fund, medical fund, apprentice fund, industry fund, and vacation fund, doing so without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain with it as the exclusive representative of the unit employees with respect to such changes. In addition, since about 24 June 1986, the Respondent has refused to abide by the terms of the collective-bargaining agreement. We find that the Respondent, by such acts and conduct, except for its failure to make contributions into the industry fund,[2] has refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

[1] Sec. 102.20 of the Board's Rules was amended 29 September 1986 to provide for 14 days to file an answer. The complaint erroneously stated that the Company had 10 days to file an answer. This error, however, does not affect the results of this decision.

[2] As industry promotion funds are permissive, nonmandatory subjects of bargaining, it is not an unfair labor practice for an employer to refuse to bargain over them. See *Finger Lakes Plumbing Co.*, 254 NLRB 1399 (1981).

CONCLUSIONS OF LAW

By failing and refusing to abide by the terms and conditions of the collective-bargaining agreement and by failing to make contributions to the pension fund, medical fund, apprentice fund, and vacation fund, the Company has failed and refused to bargain in good faith with the Union and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist, to bargain on request with the Union, and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to transmit the required contributions to the pension fund, medical fund, apprentice fund, and vacation fund; any interest applicable to such payments should be made in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). The Respondent shall also be ordered to make whole its unit employees for any loss of earnings and other benefits resulting from its failure to abide by the terms and conditions of the collective-bargaining agreement as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Lo-Pri Plumbing & Heating, Inc., Tuxedo, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to abide by the collective-bargaining agreement effective 1 September 1985 through 31 August 1987 executed with the Union as the exclusive representative of the employees in the following unit:

> All journeymen plumbers and their apprentices employed by the Employer excluding all other employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to make contributions into the pension fund, medical fund, apprentice fund, and vacation fund, as required by the collective-bargaining agreement between it and the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Abide by the terms and conditions of the 1 September 1985 through 31 August 1987 collective-bargaining agreement between it and the Union and make whole its unit employees for any loss of earnings and other benefits resulting from its failure to abide by the agreement in the manner set forth in the remedy section of this Decision and Order.

(b) Remit to the pension fund, medical fund, apprentice fund, and vacation fund past and currently due contributions pursuant to the collective-bargaining agreement between it and the Union, in the manner set forth in the remedy section of this Decision and Order.

(c) Post at its facility in Tuxedo, Maryland, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.[4]

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[4] The General Counsel in the complaint has requested a visitatorial clause. In the circumstances of this case, such a clause is unwarranted.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to abide by the terms and conditions of the collective-bargaining agreement with the Plumbers Local Union No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL–CIO, the Union, as the exclusive collective-bargaining representative for the

employees in the following appropriate bargaining unit:

> All journeymen plumbers and their apprentices employed by Respondent excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to make contributions to the pension fund, medical fund, apprentice fund, and vacation fund pursuant to the collective-bargaining agreement between ourselves and the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL abide by the terms and conditions of the collective-bargaining agreement and make our unit employees whole for any loss of earnings and other benefits suffered as a result of our failure to abide by the terms and conditions of the collective-bargaining agreement between ourselves and the Union, plus interest.

WE WILL remit to the pension fund, medical fund, apprentice fund, and vacation fund past and currently due contributions pursuant to the collective-bargaining agreement between ourselves and the Union.

LO-PRI PLUMBING & HEATING, INC.

Louisiana-Pacific Corporation *and* Millmen's Local No. 1495, United Brotherhood of Carpenters and Joiners of America. Case 20–CA–19070

21 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 10 May 1985 Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The record shows that on 12 March 1984[2] the Respondent purchased the assets of Diamond International Corporation.[3] Diamond's employees were laid off. At that time, the Union had been the representative of Diamond's employees since 1937, and Diamond and the Union were parties to a collective-bargaining agreement due to expire in July 1985. About the time of the sale, the Respondent's plant manager, Peruman, began interviewing candidates for employment, including a number of Diamond's employees. During the course of these interviews, several applicants, who were former Diamond employees, made unsolicited negative comments about unions in general and the Charging Party in particular. As of 16 April the Respondent had hired a complement of 83 unit employees, 78 of whom were former Diamond employees.

By letter dated 17 April, the Union's president Holm informed the Respondent that the Union represented a majority of the Respondent's employees, that this majority consisted of former Diamond employees, and that, as a successor to Diamond, the Respondent was obligated to bargain with the Union. The letter also requested that the Respondent contact Holm to arrange a meeting for the purpose of collective bargaining. On 23 April the Respondent's personnel manager agreed to meet with Holm and other union officials to discuss the Union's position, but not to negotiate. This conversation was confirmed by letter from the Respondent to the Union dated 25 April. At a meeting held 27 April, the Respondent expressed doubt regarding the Union's claim that it represented a majority of the Respondent's employees.[4] Holm again asserted the Union's claim as to its majority status and requested bargaining. The Respondent then proposed, inter alia, an expedited election on this matter, but did not accede to the demand for bargaining.

Following the Union's request for bargaining on 17 April, the Respondent continued to receive reports of employee dissatisfaction with the Union, from both employees and supervisors. On 20 July the Respondent held a poll for the purpose of determining employee support for the Union. The results of the poll showed 21 votes for, and 75 votes against, continued union representation.

The judge found that the Respondent's refusal to recognize and bargain with the Union was justified on the basis that the Respondent had relied on evidence sufficient to establish a reasonably based doubt of the Union's majority status as of 17 April 1984. The judge also found the 20 July 1984 poll of employees was not unlawful as it was untainted by unfair labor practices and similarly was based on objective factors which placed the Union's majority status in doubt. We disagree for the reasons below.

We find insufficient support for the Respondent's claim that it had a reasonably based doubt of the Union's majority status on 17 April. In order to find a reasonably based doubt, the Board has long held that the asserted doubt must be based on objective considerations and raised in a context free of unfair labor practices. See, e.g., *Golden State Habilitation Convalescent Center*, 224 NLRB 1618 (1976); *Terrell Machine Co.*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970).

The record shows that the Respondent based its withdrawal of recognition on 17 April on the fact that approximately 15 former Diamond employees had made unsolicited declarations to the Respondent regarding their dissatisfaction with the Union or union representation.[5] Of these 15 employees, 6

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are 1984 unless noted otherwise.

[3] The judge found that the Respondent is a legal successor to Diamond International and there were no exceptions taken to that finding.

[4] The evidence that formed the basis for the Respondent's claim is discussed below.

[5] The judge indicated that Peruman received such comments from "many" employees. He then specified 12 employees. The judge indicated that Supervisor William Reidenhauer had said he also spoke to "many"

Continued

stated in employment interviews that they no longer wished to be working in a union shop because unions discriminated against good employees, and 6 stated in employment interviews that they did not wish to be represented by the Union. Additionally, two employees, including Sanders, a former union shop steward, expressed the hope to Supervisor Reidenhauer that the employees would not get the Union back, and one employee, Charles Harker, a former member of the Union's negotiating committee, expressed the view to Reidenhauer that a majority of employees, including himself, did not want the Union.

The record also shows that Robert Thayer, a former union vice president and trustee, testified that sometime after he was hired on 16 April, he spoke to between 30–45 employees who did not want the Union and approximately 15 employees who indicated that the Union might be better than "nothing." Thayer conveyed these sentiments to the Respondent sometime in late April or early May (after 17 April but before the 20 July poll).

The foregoing demonstrates that as of 17 April, the day on which the Respondent withdrew recognition from the Union, the evidence of employee dissaffection with the Union known to the Respondent consisted of the statements of approximately 15 employees.[6] We find these 15 cited instances of employee sentiment, without more, and representing the views of less than 20 percent of the complement of 83 employees, insufficient to support the Respondent's claim of a reasonably based doubt of the Union's majority status.[7] Thus, we find that the Respondent's refusal to bargain with the Union as of the time of the Union's request on 17 April to be unlawful.[8]

The judge also found that the 20 July poll was lawfully predicated upon an objective basis for doubting the Union's majority status. In light of the foregoing, however, we find that the Respondent's unlawful refusal to bargain on 17 April undermined any objective basis that it otherwise might have had to conduct the 20 July poll of its employees. Accordingly, we find that the poll violated Section 8(a)(1) of the Act.[9]

ORDER

The National Labor Relations Board orders that the Respondent, Louisiana Pacific Corporation, Chico, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Millmen's Local No. 1495, United Brotherhood of Carpenters and Joiners of America, as the exclusive representative of the employees in the following appropriate bargaining unit:

> All production and maintenance employees employed by Respondent at its Chico, California facility, excluding clerical employees, guards and supervisors as defined in the Act.

(b) Polling or otherwise interrogating its employees to ascertain their union views in the absence of

---

employees who made unsolicited comments about their desire not to be represented by the Union. He named 6 employees, 3 of whom were already included in Peruman's total of 12. Thus, a total of 15 different employees were named by the Respondent.

[6] With respect to the statement of employee Harker purporting to represent the views of other employees, we find that little weight can be accorded to such a statement. Otherwise, "a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority." *Golden State Habilitation Convalescent Center*, supra at 1619–1620.

The Respondent contends that evidentiary weight should also be given to 27 April reports of a lack of employee support from the Union's president Holm, relying on *J & J Drainage Products Co.*, 269 NLRB 1163 (1984). Holm's statements to management regarding the degree of employee support for the Union were made at a meeting on 27 April, some 10 days after the Respondent refused to recognize the Union. It is well settled that an employer is not entitled to rely on reports of employee disaffection with the union to support a claim of reasonable doubt as to the union's *majority* after it has withdrawn recognition. See, e.g., *First Food Ventures*, 229 NLRB 1228, 1230 (1977). Further, to the extent that the Respondent relies on *J & J Drainage Products* to suggest that the testimony regarding employee disaffection with the Union from former Union Officials Harker and Sanders likewise warrants greater weight, we find no merit to this contention. In *J & J Drainage Products*, the Board found that statements by a union officer that most of the unit employees did not want the union were entitled to greater weight where the report came from one of two current shop stewards in a relatively small unit of 32 employees. Here, the individuals making the reports were a former negotiating committee member and a former union shop steward whose term expired approximately 3 years before the events in issue. We see no reason to impute special knowledge regarding current employee union sentiment to these two individuals because of their former positions.

[7] See, e.g., *Cornell of California*, 222 NLRB 303, 306 (1976), enfd. 577 F.2d 513 (9th Cir. 1978).

In reaching a contrary conclusion, the judge relied on *Riverside Product Co.*, 242 NLRB 615 (1979); and *U-Save Food Warehouse*, 271 NLRB 710 (1984). We find these cases inapposite. In those cases, unlike here, the employer based its claim of a reasonably based doubt of the union's majority status on the views expressed by a clear majority of the employees.

We find that *Sofco*, 268 NLRB 159 (1983), also relied on by the judge, is inapposite. In *Sofco*, virtually all the employees told the plant manager that they desired to be rid of the union. Further, as noted in fn. 10 of *Sofco*, "testimony concerning conversations directly with the employees involved, as here, is much more reliable than testimony concerning merely a few employees ostensibly conveying the sentiments of their fellows. See *NLRB v. Middleboro Fire Apparatus*, 590 F.2d 4, enfg. 234 NLRB 888 (1978)." In the present case, the Respondent's impressions of employee sentiment, inferred from that of a few employees, does not rebut the presumption of continued majority status.

[8] The judge found that Thayer's testimony set forth above, although not directly related to evidence regarding the lack of union support before 17 April tended to corroborate the testimony of other witnesses who informed the Respondent of antiunion sentiment. Contrary to the judge, we find such evidence irrelevant to a determination of whether the Respondent had objective considerations sufficient to support a reasonably based doubt as to the continued majority status of the Union, where the evidence concerns conversations occurring after the Respondent had unlawfully failed to bargain and where the Respondent's action may have contributed to an erosion of employee support for the Union. See, e.g., *Orion Corp.*, 210 NLRB 633, 634 (1974), enfd. 515 F.2d 81 (7th Cir. 1975).

[9] We need not pass on the General Counsel's contention that the manner in which the poll was taken was unlawful.

objective considerations warranting a reasonable doubt of the Union's continuing status as the collective-bargaining representative of the majority of its employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by Respondent at its Chico, California facility, excluding clerical employees, guards and supervisors as defined in the Act.

(b) Post at its Chico, California facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN DOTSON, dissenting.

I agree with the judge that even assuming it was a successor employer the Respondent had on 17 April 1984 a sufficient objective basis for doubting the Union's majority status. Therefore, the Respondent did not act unlawfully when it refused to bargain with the Union. Accordingly, I would adopt the judge's recommendation that the complaint be dismissed.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Millmen's Local No. 1495, United Brotherhood of Carpenters and Joiners of America, as the exclusive representative of our employees in the bargaining unit found below.

WE WILL NOT poll our employees or otherwise ask them about their union views, in the absence of objective considerations warranting a reasonable doubt of the Union's continuing status as the collective-bargaining representative of the majority of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All production and maintenance employees employed by us at our Chico, California facility, excluding clerical employees, guards and supervisors as defined in the Act.

LOUISIANA-PACIFIC CORPORATION

Sally Spencer, Esq., for the General Counsel.
Charles S. Loughran, Esq., of Walnut Creek, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Chico, California, on 10

January 1985,[1] pursuant to a complaint issued by the Regional Director for Region 20 on 30 August 1984, and is based on a charge filed by Millmen's Local No. 1495, United Brotherhood of Carpenters and Joiners of America (the Union) on 20 June. The complaint alleges that Louisiana Pacific Corporation (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act.

Issues

(1) Whether Respondent is a successor to Diamond International Corporation and is therefore legally required under the Act to recognize and bargain with the Union, the designated exclusive bargaining representative of a production and maintenance unit at Diamond.

(2) Whether, at all times relevant, Respondent possessed a good-faith doubt that the Union represents a majority of unit employees.

(3) Whether Respondent violated the Act by taking a poll of unit employees about 20 July.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observeration of the witnesses and their demeanor, I make the following

Findings of Fact

I. Respondent's Business

Respondent admits that it is a Delaware corporation engaged in the processing and wholesale distributing of lumber and related products and having a plant located in Chico, California. It further admits that during the past year, in the course and conduct of its business it has purchased and received products, goods, and materials valued in excess of $50,000 from suppliers outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

Millmen's Local No. 1495, United Brotherhood of Carpenters and Joiners of America is a labor organization within the meaning of Section 2(5) of the Act.[2]

III. The Alleged Unfair Labor Practices

A. *The Facts*

About 12 March, Respondent purchased the assets of Diamond International Corporation (Diamond) wood remanufacturing plant located at Chico. Prior to the sale, Diamond had a collective-bargaining relationship with the Union for a production and maintenance unit extending back several decades. The Union was certified as the collective-bargaining representative of Diamond employees in 1937. The last collective-bargaining agreement executed on 12 July 1983, ran from 1983 to 1985 (G.C. Exh. 2).

The first and only witness for the General Counsel was Karl Holm, president and business representative for the Union for the past 5-1/2 years. Before his present position and that of union organizer for 6 months, Holm worked for Diamond in its Chico plant for 10 years. Holm held various jobs in the plant including setup man, millworker, and box factory employee. Between his jobs with the Union and for Diamond in the plant, Holm was familar with the various employee classifications in the plant.

Regarding the plant itself, the parties stipulated to the operations contained therein under Diamond and the number of employees employed in each:

(1) National wholesale sales—three hourly employees represented by the Union under a separate contract covering that operation.

(2) Apiary supply (provided beekeeping supplies)—three hourly employees represented by the Union under a separate contract covering the operation.

(3) Trucking operation—13 employees under a separate collective-bargaining agreement with the Teamsters Union.

(4) Prefinished plant facility—18 employees under a separate collective-bargaining agreement with the Teamsters Union.

(5) Remanufacturing plant (the process of reprocessing finished lumber into higher valued products such as window frames, door jambs, etc.)—approximately 150-160 employees represented by the Union pursuant to General Counsel's Exhibit 2.

It is further stipulated that Respondent did not carry on the operations described in paragraphs 1–4 above, and therefore it did not hire any employees in those categories (R. Br. 134–135).

About 1 month before the sale, Holm began to hear rumors about it. The first hard news did not reach Holm until Saturday, 10 March, when Holm met with a company official named Cummings, who was vice president of industrial relations for Diamond. The latter informed Holm that the 130–150 unit employees then working in the plant could complete their shift for the day and work normal shift the following day. On Monday, 12 March, Cummings said the men would report as usual, be paid for 2 hours showup time, and then be laid off by Diamond. This is exactly what happened.

Almost immediately after the sale of assets, and possibly even before, Respondent began its hiring process of new employees. The selection of new employees was done by Nathan Peruman, who was as of 12 March Respondent's plant manager and a witness at hearing. Before assuming his present job, Peruman was production sales coordinator at Respondent's Red Bluff plant, located about 40 miles from Chico. Peruman also previously worked for Diamond in the Chico plant for a period of 5 years until November 1978, when he left to work for Respondent.

[1] All dates refer to 1984 unless otherwise indicated.

[2] See *Diamond International Corp.*, 271 NLRB 1051 (1984).

During the first 3 weeks after Respondent purchased the assets of Diamond, Peruman personally interviewed every applicant for employment spending about 15 minutes with each applicant. Advertisements for openings had been placed in local radio and newspapers. Because Respondent desired to hire experienced employees, most persons hired were former Diamond employees. Peruman made a point of speaking to former Diamond supervisors to inquire about the job applicants who had worked at Diamond and ascertain who was the most competent. During the interviews, Peruman explained the differences between the new operation and the old and asked each applicant about his prior background and experience. Although Peruman never mentioned the subject of unions, several applicants made negative comments about unions in general or Charging Party in particular. More about the conversations during the job interviews will be provided below.

The parties agreed that as of 16 April, out of 83 unit employees, 78 were former Diamond employees and members of the bargaining unit represented by the Union and were members of the Union (R. Br. 8–9). By 17 April Peruman had interviewed about 110 applicants. It was also agreed that as of 20 July, out of 97 employees, 83 were former bargaining unit employees.[3]

Concerning supervisors, the parties agreed that the plant manager under Diamond was changed. However, four out of five supervisors of production and maintenance under Diamond were hired by Respondent (R. Br. 10–11). The four were Ron Bolton, Gerald Sharp, Virgil Schlect, and Bill Reidenhauer.

Regarding the plant operation, the location stayed the same under both Diamond and Respondent. Certain changes were made by Respondent, however, in the product mix and in the customers serviced. These changes will be discussed in detail below.

After the changeover began, Holm and other union officials contacted the membership by telephone, to ensure that they submitted applications for new employment. According to Holm, he attended to other details as well, such as on 16 April, engaging in a telephone call with Don Gritz, Respondent's personnel manager at the Red Bluff plant. Allegedly, Holm followed the prior instructions of union attorneys and told Gritz that because Respondent was a successorship, the Union was demanding bargaining as it represented a majority of Respondent's unit employees at Chico. Holm testified that Gritz responded by agreeing with him, saying that by law, Respondent did have a duty to bargain with the Union. Gritz promised to consult with Peruman to arrange a meeting and get back to Holm.

On 17 April, Holm wrote a letter to Peruman that read as follows:

> Louisiana-Pacific Corporation
> Sierra Division - Chico Operations
> West 16th Street
> Chico, CA 95926
>
> ATTN: Nathan Peruman, Plant Manager
>
> Dear Mr. Peruman:
>
> Millmen's Union Local 1495, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, represents a majority of the employees who have been hired at the Chico facility. This majority is composed of former employees of Diamond International Corporation which sold the facility to your Company. As a successor employer you are obligated to recognize and bargain with Local No. 1495 over the terms and conditions of employment of these employees
>
> Please contact the undersigned at once in order to arrange a meeting for the purpose of Collective Bargaining.
>
> Very truly yours,
> /s/ Karl L. Holm

I note that this letter makes no reference to the alleged conversation with Gritz 1 day earlier. Nor is it clear why Holm wrote the letter because he supposedly had agreement from Gritz that the Union's position was valid. Holm testified on cross-examination that he never mentioned to Gritz later, nor to anyone else from Respondent, the alleged concession from Gritz on 16 April. Holm volunteered on cross that a union business agent assigned to Respondent's Red Bluff plant. John Smith, had told Holm that Gritz had made the same statement to Smith. Smith was never called as a witness.

Respondent, however, called Gritz as a witness. He denied making the statements attributed to Holm and even denied talking to Holm on 16 April,[4] Gritz did admit that he spoke to Holm on or about 23 April and agreed to meet with Holm and other union officials in order to discuss the union position, but not to negotiate. On 25 April, Gritz wrote a letter to Holm confirming their conversation 2 days before. The letter reads as follows:

> Mr. Karl L. Holm
> Business Representative
> Millmen's Local Union No. 1495, A.F.of L.
> P.O. Box 3069
> Chico, CA 95927
>
> Dear Mr. Holm:
>
> This will confirm my telephone discussion with you on Monday, April 23, 1984 and Mr. Peruman's later telephone call to you, agreeing to a general discussion meeting to be held in the conference room of Louisiana-Pacific's Remanufacturing Plant, Chico, California on Friday, April 27, 1984 at 9:00 A.M.
>
> In the event any of the above does not correctly reflect your understanding please contact me at once.
>
> Very truly yours,
> /s/ Donald L. Gritz

[3] These figures compare to 115 production and maintenance unit employees that had been employed by Diamond.

[4] Gritz also denied the alleged similar conversation with Smith.

I credit Gritz here and find that on this major point and one other to be discussed immediately below, Holm was not truthful. Essentially Holm's testimony was not only uncorroborated, but significantly impeached by his own conduct and the testimony of Respondent's witnesses. I find that the Union's first demand for bargaining was contained in Holm's 17 April letter above.

If Holm was merely incredible above, his other testimony, to which I now turn, was totally preposterous. On 27 April a meeting was held in Respondent's conference room in Chico. For the Union, there was Holm and a man named Haskell, who never testified because he was allegedly in the hospital.[5] For Respondent, there was Gritz, a company official named Merlow, who did not testify, Peruman, and Respondent's counsel at hearing, Charles S. Loughran. According to Holm, Peruman began by expressing serious doubts whether the Union represented a majority of Respondent's unit employees at Chico. Peruman explained that in the course of interviewing applicants for employment and while in the plant, several employees had expressed unsolicited negative comments regarding the Union. Holm stated he was not surprised at this because he had told several persons who were applying for jobs with Respondent, to say anything during the interview that might help get the job, including that the person did not like the Union. At this meeting, Holm again claimed to represent a majority of Respondent's Chico employees and demanded to bargain with Respondent over a new contract. According to Holm, Attorney Loughran in the presence of three company officials, then told Holm that he had a choice: First, the Union could agree to an expedited NLRB election by stipulation without having to solicit authorization cards; or, the Union could file charges with the NLRB claiming Respondent was a successorship. Loughran allegedly added that while the Union would probably win under option two, it would take 6 months down the road.

Loughran denied the latter part of Holm's testimony, testifying that he never suggested that the Union had a good case or that it would win before the Board. Loughran did agree that he discussed an expedited Board election. To this proposal, Holm replied that he would have to discuss it with union attorney, Mike Roger. Roger was not present at hearing and was never called to testify. Loughran testified further that about 18 May, Roger called him at which time the election proposal was again discussed. Roger was noncommital.

Loughran concluded his testimony by describing his association with Respondent. He provides industrial relations and labor law advice to Respondent that has 40–50 operations located on the West Coast. About 25 of these facilities have contracts with various unions. However, six plants are currently experiencing strikes. Both Gritz and Peruman also denied in their testimony that Loughran stated the Union would probably win an unfair labor practice case before the Board.

[5] No one ever requested a continuance of the case due to the unavailability of Haskell, Smith, or anyone else. Nor was the affidavit of any witness ever offered.

As indicated above, I credit Loughran on this point. Not only was he corroborated while Holm was not, but also it is beyond common sense that a company attorney would purport to give legal advise to a union, contrary to the best interests of the Company—while company officials were present.

I turn now to decide the various issues in the case.

B. *Analysis and Conclusions*

1. Was Respondent a successor to Diamond International and, if so, what duty did Respondent owe to the Union?

In *Contee Sand & Gravel Co.*, 274 NLRB 574, 584–585 (1985), the Board approved a statement of the administrative law judge about the legal test for a successorship:[6]

> In determining whether an employer is a successor of another employer, the Board has used the following criteria: (1) whether there has been a substantial continuity of the same busines operations; (2) whether the new employer uses the same facilities; (3) whether the new employer has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether the alleged successor employs the same supervisors; (6) whether the same machinery, equipment, and processes are used; and (7) whether the same product or services are offered. *J-P Mfg.*, 194 NLRB 965, 968 (1972); *Miami Industrial Trucks*, 221 NLRB 1223, 1224 (1975). The Board does not require that all of these factors be present to find successorship, but only enough to warrant a finding that no basic change has occurred in the employing industry. *Lincoln Private Police*, 189 NLRB 717, 720 (1971). Nor does the Board require that the entire business of the predecessor be taken over by the successor, it being sufficient if a part of the old operation survives in the successor. *Miami Industrial Trucks*, supra; *Avenue Meat Center*, 184 NLRB 826 (1970).

In evaluating the above-listed factors to determine whether a successorship has occurred, the Board does not accord these factors equal weight. In *Airport Bus Service*, 273 NLRB 561, 562 (1984), the Board stated:

> Although all the circumstances are considered, the key factor in making a successorship determination is whether a majority of the new employer's bargaining unit employees were members of the predecessor's unit work force at or near the time it ceased operations.

At page 12 of its brief, Respondent appears to concede this central point.[7] Professor Gorman opines that it is

[6] See also *Premium Foods*, 260 NLRB 708, 714 (1982), enfd. 709 F.2d 623 (9th Cir. 1983).

[7] At a footnote on p. 12, Respondent attempts to qualify its concession by stating it does not concede that a representative complement of em-

Continued

possible to read the case of *NLRB v. Burns Security Services*, 406 U.S 272 (1972), to hold that such a "successor majority" (regardless of work similarity) is sufficient in itself to find a duty to bargain.[8] In this case it is unnecessary to consider whether this interpretation of *Burns* is correct because a host of other factors supports a finding of sucessorship.[9] I turn to consider these, beginning with a second concession from Respondent.

In its brief (Br. 12), Respondent admits that the business location remained the same. To these two concessions, I add findings of my own. First, Respondent has substantially the same supervisory staff—four out of five line supervisors. Next, Respondent uses essentially the same machinery, equipment, and processes. I also find that there has been a substantial continuity of business operations.[10] Before turning to still other factors that on balance also support successorship, but are more difficult to ascertain on this record, I merely note that a compelling case for sucessorship has been established up to this point.[11]

In reviewing the record, I note that no representative of Diamond testified. Although Peruman formerly worked for Diamond and made periodic visits to the Diamond plant at Chico while he worked for Respondent at Red Bluff, his knowledge of the Diamond operation was to a degree limited. On the other hand, while Holm may have had greater contact with Diamond in his role as a union leader, I nevertheless find his credibility to be generally suspect.

As noted in section III,A, above, Respondent continued only one out of five of the Diamond operations in Chico. These discontinued operations accounted for approximately 37 employees compared to the 150–160 employees for the remanufacturing plant that was continued. It is doubtful whether these facts are even relevant to the question of successorship because the four discontinued operations had employees represented under separate contracts and in two cases with an entirely different union. Accordingly, they are entitled to little or no weight in deciding successorship. Furthermore, as noted above, it is sufficient if a part of the old operation survives in the successor.

Prior to Diamond's sale of assets to Respondent, it had experienced poor financial conditions. In fact, it had closed or substantially reduced operations for up to a year in the early 1980s. During this time many unit employees were laid off. Accordingly, when Respondent took over, it was aware that certain changes were necessary to increase the chances of success. One of these changes was to change the product mix. Although the raw material, lumber, remained essentially the same and most of the machines and the skills required to operate them remained the same, the final product varied. Thus, Diamond manufactured window frame parts, molding and millwork, and solid lineal moldings. Diamond sold many products to a few customers.

By contrast, Respondent is now manufacturing industrial cut stock that involves taking the lumber (a different type of lumber than usually used by Diamond) and cutting the lumber up into different widths and lengths to specified orders. In addition, Respondent uses wood planks that are fabricated for other manufactures. Finally Respondent manufactures carpenters moldings and millwork. Respondent also discontinued the operation of a box factory that was staffed by a few unit employees under Diamond.

With the change in product mix, Respondent's marketing of necessity changed. It did not purchase a customer list from Diamond and currently sells a few items to many customers. Out of 1900 customers listed on a 1980 Respondent customer list only about 10–15 were customers of Diamond prior to the sale.

Respondent's evidence also showed some minor differences in work schedules.

Holm described certain machines used by Diamond employees, and Peruman admitted their use by Respondent employees in the same premises: finger joint machine, resaw, molder, cutoff saw, multirip saw, forklift. Other machines used by Diamond were not used by Respondent: the band-rip machine, back corner machine, boring machine, the dry kiln, the diptank, and belt and tieup machines.[12] The employees who worked on these latter machines under Diamond were apparently assigned to other machines under Respondent that were used in the processing of the final products.

After considering the totality of the evidence, I must conclude that the General Counsel has established a successorship under the *Burns* case by a preponderance of the evidence.[13]

---

ployees was employed when the union demanded bargaining. Respondent does not elaborate nor indicate what result would follow from his assertion, if true. Contrary to Respondent, I find that as of 17 April, a representative complement was employed by Respondent. That is, 78 out of 83 unit employees working for Respondent at Chico had been employed by Diamond. By 20 July Respondent had hired 97 employees, of whom 83 were former Diamond unit employees. See *Pre-Engineered Building Products*, 228 NLRB 841 fn. 1 (1977), enf. denied 603 F.2d 134 (10th Cir. 1979). *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 467 (9th Cir. 1985).

[8] R. Gorman, *Labor Law*, p. 121 (1977).

[9] Of course, an employer has no general obligation to hire its predecessor's employees. *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249, 262 (1974). It did so in this case because it required the skills possessed by the former Diamond unit employees. Of those few not rehired, there is no claim by the General Counsel of any discriminatory motivation.

[10] Thus a hiatus between the operations of the former employer and the purchaser is a significant factor because, as it lengthens, employees expectations of hire by the purchaser diminish. *Mondovi Food Corp.*, 235 NLRB 1080, 1082 (1978). The record is not clear exactly when production under Respondent began. However, if there was a break it was not more than 1–2 weeks. When the Diamond employees were laid off, they had every expectation of employment with Respondent because they were "experienced." Cf., *Radiant Fashions*, 202 NLRB 938 (1973); *Norton Precision*, 199 NLRB 1003 (1972).

[11] See *New London Convalescent Home*, 274 NLRB 1442 (1985); *NLRB v. Jeffries Lithograph Co.*, supra, 752 F.2d 459.

[12] In those few instances in which the record contains a description of the function of these various machines, I omit it here on the grounds that such description does not really contribute to an understanding of the legal issues presented in the case.

[13] I find that the changes in the employing industry during the transfer from Diamond to Respondent have not been substantial and material. See *Mondovi Foods Corp.*, supra, 235 NLRB at 1082; see also *NLRB v. Jeffries Lithograph Co.*, supra, 752 F.2d 459.

2. Did Respondent have a good-faith doubt of the Union's majority status based on objective considerations and, if so, when?[14]

Although it is clear to me that based on established law of the Board and courts Respondent is a successor, there is still an additional issue presented by the case concerning the union's majority support and Respondent's view of it.[15]

To begin, I accept the General Counsel's statement of the law that, having established a successor, the General Counsel is entitled to rely on a rebuttable presumption that the Union enjoys continued majority support.[16] I also agree with the General Counsel that Respondent must show a good-faith doubt by clear and convincing proof.[17] Not only must Respondent show sufficient credible evidence to establish a doubt of the Union's majority status, but such evidence must exist in a context free of unfair labor practices.[18]

I find here that Respondent's evidence was acquired under circumstances free of unfair labor practices. To put this in another way, I find that at all times relevant on or before 17 April, Respondent acted in good faith. Although the General Counsel alleged that the taking of a poll about 20 July violated Section 8(a)(1) of the Act, this can be considered only after the threshhold question of what Respondent knew on or before 17 April.[19] By that time Peruman had interviewed approximately 12 employees.

Peruman testified that during his interviews of prior Diamond employees applying for jobs at Respondent, many made unsolicited negative comments regarding the Union. Their remarks appear to fall into two categories:

(1) Employees who told Peruman that they did not care to work in a union shop because unions discriminated against good employees; Buzz Madden, Bob Heidinger, Donna McVey, Rodney Sharp, Dan Duggins, and Ron Coleman.

(2) Employees who told Peruman that they did not care to be represented by Local 1495; Larry Schlecht, Larry Wellert, Lee German, Rocky Comfort, Richard Estrada, and Jerry Sanders.

I find that the conversations referred to above by Plant Manager Peruman are "objective identifiable acts on which the Respondent was entitled to rely and they can form the basis for employer's doubts."[20] These statements are especially reliable here when considered in light of other evidence tending to corroborate the employees' apparent disaffection with the Union.

a. *Respondent's employee witnesses*

In *Sofco, Inc.*, fn. 9 above, the Board made clear that the respondent there as here was not required to elicit, directly from employees, the comments about the union made to the plant manager.[21] Nevertheless, Respondent called several employee witnesses to corroborate the testimony of Peruman. From group 1, Respondent called Madden, McVey, and Heidinger; all three fully corroborate Peruman's testimony regarding the antiunion sentiments expressed to him during the interview process.

From group 2, Respondent called Wellert and Sanders as witnesses. They also corroborated Peruman's testimony.[22] I credit all of Respondent's witnesses referred to above.

b. *Supervisory testimony regarding employee union sentiment*

Respondent called Supervisor William Reidenhauer, who was hired by Peruman on 12 March. He testified that after the sale, many employees made unsolicited comments to him regarding their desire not to have the Union represent them. He named Heidinger, Harker, Thompson, Comfort, German, and Thayer. Prior to 17 April, the witness reported these negative comments to Peruman on about six occasions and Peruman relied on these reports as part of the basis for an objective doubt of the Union's majority status.

As a general rule, supervisory impressions of employee sentiment are not viewed with favor by the Board and courts.[23] In this case, however, Respondent also called some additional employee witnesses who had talked to Reidenbauer. For example, Charles Harker, a former member of the union negotiating committee, expressed the view that a majority of employees including himself did not want the Union. Donald Thompson, Reidenhauer's brother-in-law for 18 years, also told him that he hoped the employees would not get the Union back. Third, Jerry Sanders, a shop steward between 1975 through 1981, testified that within a week after he was hired by Peruman on 2 April, he asked his supervisor Reidenhauer if the Union was going to come back in. When Reidenhauer replied that he did not know, Sanders stated that he hoped it did not come back because the Union did not treat people fairly and did not back him up over grievances.

---

[14] Respondent does not purport to show loss in fact of union majority status, but only its good-faith doubt.

[15] In *Harley-Davidson Co.*, 273 NLRB 1531 (1985), the Board recently held that even if the successor recognizes a union certified for a year or more, the union enjoys a rebuttal presumption of majority status only. In making its ruling, the Board overruled prior authority to equate the rights of successors who never recognized the union as in the instant case, with the rights of successors who did recognize the union. Both may withdraw recognition if the successor can show union loss of majority status in fact, or merely a good-faith doubt of union majority status.

[16] *Barrington Plaza*, 185 NLRB 962, 963 (1970), enf. denied on other grounds sub nom. *NLRB v. Tragniew, Inc.*, 470 F.2d 669 (9th Cir. 1972); *Grico Corp.*, 265 NLRB 1344, 1345 (1982), enfd. mem. 730 F.2d 767 (9th Cir. 1984).

[17] *Hutchinson-Hayes International*, 264 NLRB 1300, 1304 (1982); *Distribution Services West*, 262 NLRB 764, 772 (1982).

[18] *Choctawhatchee Electric*, 274 NLRB 595 (1985).

[19] It is not sufficient if the Respondent learned of the evidence regarding the Union's majority status after it refused to recognize and bargain with the Union. To be effective, the evidence must be known at the time of the refusal. See *Orion Corp. v. NLRB*, 515 F.2d 81 (7th Cir. 1975).

[20] *Sofco, Inc.*, 268 NLRB 159, 160 (1983).

[21] See *Naylor, Type & Mats*, 233 NLRB 105, 107–108 (1977).

[22] Peruman did not specifically mention Sander's name as someone who talked to him. However, he said there were some employees who talked against the Union whose names he could not recall. I credit Sander's testimony that he spoke to Peruman on 2 April, when he was hired regarding his thoughts on the Union.

[23] See *Valley Nitrogen Producers*, 207 NLRB 208, 214 (1973); *NLRB v. Cornell of California*, 577 F.2d 513, 516 (9th Cir. 1978).

The final witness who testified in the case was Robert Thayer, a former vice president of the Union for 3 years and former union trustee for 6 years. He testified that he was hired on 16 April. Sometime after that, he testified that he spoke to between 30–45 employees and they did not want the Union. Approximately 15 employees said the Union might be better than nothing. Thayer conveyed these sentiments to Peruman and Reidenhauer sometime in late April or May, before the poll was taken.[24]

c. *Lack of credibility of the General Counsel's single witness*

I have detailed in section III,A two instances when Holm was not truthful in his testimony. I now turn to two other instances. According to Holm, the negative comments about the Union by union members during job interviews were part of a ploy suggested by Holm to enhance the applicant's chances of getting hired. Not a single person was called by the General Counsel to corroborate this testimony. Respondent's witnesses consisting of several union members and former union officials, who were hired by Respondent, all denied that Holm had made such a statement to them. I further discredit this testimony because there is no bargaining history or other evidence to explain why Holm believed that making negative comments about the Union at Respondent's job interviews would enhance the chances of a union member being hired.

By contrast, the record does show why the employees no longer desired to be represented by the Union. During 1982–1983, Diamond was experiencing economic problems and all or most union employees were laid off, some up to a year. When recalled, many of the employees lost their seniority, and there was a pervasive feeling that the Union was responsible.

Another instance of Holm's lack of credibility concerns a second representation he made at the 27 April meeting attended by Peruman, Loughran, and Gritz and further described above. In his testimony at hearing, after referring to Loughran's offer to participate in an expediated Board election, Holm said:

> I said that I had already started signing cards. I believe I said I had about 30. I didn't quite have that many. It was quite a bit less than that, in fact, about 19 [R. Br. 34].

Later Holm attributed this misrepresentation to a simple mistake. In his testimony, Peruman recalled that Holm stated at the meeting that he had cards signed by 40 percent of the membership. In either version of Holm's representation, Holm was not credible and all of his testimony should be carefully scrutinized as I have done.

d. *Failure of the General Counsel to call any rebuttal witnesses*[25]

All of these circumstances tend to make Respondent's witnesses very credible.

In conclusion, as the Board stated in *Safco, Inc.*, supra, 268 NLRB at 159–160:

> even when a particular factor considered alone would be insufficient to support a good-faith doubt of a union's majority status, the "cumulative force of the combination of factors" may be adequate to support such a doubt. In this regard, we note that a *respondent does not bear the burden of proving that an actual numerical majority opposes the union.* However, it must demonstrate that it had objective reasons for doubting the union's majority status. [Emphasis added.]

Based on the totality of the evidence as reflected in the above discussion, I find that as of 17 April, Respondent did have good-faith doubt of the Union's majority status based on objective factors.[26]

3. Did Respondent's poll of unit employees about 20 July violate Section 8(a)(1)?

On 20 July a poll of Respondent's unit employees at Chico was conducted by Arthur Anderson & Co. Employees were asked, "Do you wish to be represented by Millmen's Local Union No. 1495 for purposes of collective bargaining." The results of the poll indicated 21 votes in support of the Union and 75 votes opposed to the Union (R. Exh. 4). In this case, the General Counsel alleges that the taking of the poll per se violated Section 8(a)(1) of the Act.

To decide this question, I must consider some additional brief background. Between 17 April, the date of the Union's demand for bargaining, and the date of the poll, Peruman continued to receive antiunion reports from employees directly, and indirectly through supervisors, who were contacted by employees and told that substantial numbers of employees did not wish to be represented by the Union. For example, Peruman talked to Supervisors Ron Bolton, Virgil Schlecht, Bill Ridenhauer, and Gerald Shire. Talking to Ridenhauer was Thayer as reported above, Harker, Sanders, Thompson, Heidinger, and McVey. Harker also talked to Bolton, who did not testify. Peruman was contacted three different times in May by a leadman in shipping named Scott Elliott, who reported that he and people he talked to had no interest in the Union. Elliott did not testify, but Peruman testified that the name of Sanders was mentioned by Elliott as someone who did not want the Union. Peruman also spoke directly to Willert regarding the latter's lack of interest in the Union.

[24] Technically Thayer's testimony does not directly relate to the lack of union support on or before 17 April, because he was not hired until 16 April. However, I include it here because it tends to corroborate the testimony of other witnesses who informed Peruman and Reidenhauer of antiunion sentiment and on which Respondent bases its good-faith doubt.

[25] *Orion Corp. v. NLRB*, supra, 515 F.2d at 84–85.

[26] See *Riverside Produce Co.*, 242 NLRB 615 (1979); *Glosser Bros.*, 271 NLRB 710 (1984). Compare *First Food Ventures*, 229 NLRB 1228, 1230 (1977), in which sum total of evidence of employee disaffection available to Respondent was discovered after Respondent's initial refusal to bargain.

About 29 June, Peruman held a group employee meeting for the purpose of planning a Fourth of July celebration. After the meeting, Thayer and two nontestifying employees named Glenda Burks and Gary Scott made antiunion comments to Peruman. Thayer told Peruman at this time that he had taken a personal poll of employees and found very little support for the Union.

Based on the several employee and supervisory reports received, and based on the Union's refusal to agree to a Board-conducted election, Respondent decided to arrange for a poll to be taken.

Before a poll like that in issue in this case can be lawful, an employer must have an objective basis for doubting the union's majority status.[27] This is the same test used for determining the lawfulness of an employer's withdrawal of recognition from an incumbent union after the expiration of a collective-bargaining agreement.[28] I assume without finding that it is also the same test used to determine the lawfulness of a successor employer's refusal to recognize and bargain with a union that was never certified to represent unit employees in the successor's employ. At Diamond the last certification occurred in 1937.

I find based on the evidence in this case that Respondent did have an objective basis for doubting the Union's majority status sufficient to justify the taking of the poll. The evidence regarding union majority status that existed on or before 17 April and summarized in the preceding section increased between 17 April and 20 July. When the employer causes a lawful poll of employees to be taken and the union does not win a majority, the result may, in an appropriate context, serve as support for an employer's refusal to recognize and to bargain.[29]

In this case, I have found above that Respondent also had a reasonable basis as of 17 April to doubt the Union's majority status. Because there is no evidence that Respondent committed any unfair labor practices prior to 20 July, the date of the poll, the results of the poll serve two purposes:

(1) They relate back to 17 April to corroborate with even additional evidence my finding regarding the Respondent's reasonable basis to doubt the union's majority status.[30]

(2) If it is found on review that Respondent did not have a reasonable basis to doubt the Union's majority status as of 17 April, then clearly by 20 June Respondent did have a reasonable basis. Although an unfair labor practice would have been committed, Respondent would nevertheless be free to withdraw recognition and refuse to bargain from 20 June forward.

In conclusion I turn to the case of *Struksnes Construction Co.*, 165 NLRB 1062 (1967). The General Counsel contends that for an employer-conducted poll to be lawful, it must meet certain procedural safeguards contained in that case (G.C. Br. 28). The General Counsel further argues that Respondent did not meet these standards.

The Board, however, has not expressly extended its precertification poll standards enumerated in *Struksnes* to polls taken in refusal to recognize situations. Nor can I find, contrary to the General Counsel's claim, Board authority requiring an employer to give the union advance notice of the time and place of the poll. Accordingly, it is unnecessary to decide whether Respondent met the standards of *Struksnes* when it was not required to do so.

For all the reasons stated above, I will recommend to the Board that this case be dismissed.[31]

CONCLUSIONS OF LAW

1. The Respondent, Louisiana-Pacific Corporation, is an employer within the meaning of Section 2(2) of the Act, engaging in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

---

[27] *Hutchison-Hayes International*, supra, 264 NLRB at 1304–1308.

[28] Id. at fn. 9. It should be noted, however, that three circuit courts of appeals have disagreed with the Board and have held that the objective evidence, while it must be substantial, need not meet the high standard necessary to justify a withdrawal of recognition. *Forbidden City Restaurant v. NLRB*, 736 F.2d 1295 (9th Cir. 1984); *NLRB v. A. W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981); *Thomas Industries v. NLRB*, 687 F.2d 863 (6th Cir. 1982).

[29] See *Tafi Broadcasting*, 201 NLRB 801 (1973).

[30] In refusing to enforce the Board's decision in *Forbidden City Restaurant*, supra at 1297, the court stated the following:

> The Board relied on *Montgomery Ward & Co., Inc.*, 210 N.L.R.B. 717, (1974), in which an employer was found to have violated the Act by conducting a poll without sufficient objective considerations to warrant a reasonable doubt of the union's majority status. Sufficient objective considerations for a private poll, concluded the Board, must be such as would occasion the grant of an employer's petition for a Board election. *Montgomery Ward*, 210 N.L.R.B. at 724. The criteria for a Board election are the same as those that determine whether the employer may withhold recognition from an incumbent union. *Id.* Thus, under the *Montgomery Ward* rule, the same evidentiary standard applies to an employer's conducting its own poll, successfully petitioning the Board for an election, or withdrawing recognition from the union. By the Board's reasoning, an employer in doubt of the union's majority status would be allowed to take a poll only when it had no actual need to do so, that is, when it already has sufficient objective evidence to justify withdrawal of recognition.

The unusual situation described by the court in its final sentence quoted above is exactly what happened here. Respondent took a poll on 20 June, when it already had, as of 17 April, sufficient objective evidence to justify refusal to recognize the Union. Thus under either the Board decision or the court's, Respondent must be held not to have violated the Act by taking the poll.

[31] In light of this decision, it is unnecessary to consider Respondent's argument (R. Br. 27–28) that assuming Respondent's bargaining obligation, the Union may have waived or forestalled its bargaining demand by considering Respondent's proposal to stipulate to a Board-conducted election.

Electronic and Space Technicians Local 1553 *and* Hughes Aircraft Company *and* International Brotherhood of Electrical Workers, Local Union No. 2295, AFL–CIO, CLC. Case 31–CD–295

26 May 1987

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS BABSON, STEPHENS, AND CRACRAFT

The charge in this Section 10(k) proceeding was filed 11 February 1987[1] by the Employer, alleging that Electronic and Space Technicians Local 1553 (EAST) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Brotherhood of Electrical Workers, Local Union No. 2295, AFL–CIO, CLC (IBEW). The hearing was held 16 March 1987 before Hearing Officer Helen M. Spence.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Hughes Aircraft Company, a Delaware corporation, manufactures aerospace and related equipment at its Hawthorne, California facility, where it sells and ships goods valued in excess of $50,000 directly to customers located outside the State of California. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that EAST and the IBEW are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Since 1977 the Employer's Radar Systems Group advanced manufacturing technology section has used two types of mechanized assembly equipment to make electronic modules for radar sets: the HPS 300 and the ALCAS. Employees represented by EAST and the IBEW perform maintenance work on both machines.[2]

In 1985 the Employer began designing the MCAS, another mechanized assembly machine. Unlike HPS 300 and ALCAS, the MCAS has a series of computers, has better optical capability, uses a programmable robotic arm rather than fixed automation, and "has a few other devices . . . such as [an] automatic fluxing system, and it also has a much more sophisticated component verification system."

The Employer's engineers maintained the MCAS equipment from 1985 to February 1987.[3] In 1987 the Employer's engineers trained an unrepresented employee "hired from the outside" to maintain the MCAS.

During negotiations between the Employer and IBEW for a successor to their collective-bargaining agreement, which expired 17 January, the IBEW requested that the contract's "certification be expanded" to include employees working on all "automated equipment including robotics equipment," which covered the MCAS machine.

On 30 January EAST wrote the Employer that it had learned the IBEW had filed two grievances claiming the MCAS work and demanded the work in its current negotiations. EAST stated the assignment of such work to IBEW-represented employees would be inappropriate because the work was already covered in various EAST classifications. It further told the Employer it would establish picket lines if the work was assigned to the IBEW-represented employees. The Employer then filed the 8(b)(4)(D) charge which gave rise to the instant proceeding.

B. *Work in Dispute*

The work in dispute involves the maintenance of the MCAS at the Employer's Radar Systems Group, El Segundo, California facility.

C. *Contentions of the Parties*

The Employer[4] contends that reasonable cause exists to believe that EAST violated Section 8(b)(4)(D). It contends that the work in dispute should be awarded to the unrepresented employee currently performing the work. In the event the work in dispute is awarded to bargaining unit employees, however, the Employer prefers that it be awarded to employees represented by EAST based

[1] All dates are in 1987 unless otherwise indicated.

[2] Manager Mark Weber testified that each machine has "3 functions that are performed by EAST [mechanics, plumbers, and computer maintenance] and 1 by IBEW [electricians]."

[3] The engineers were not represented by EAST, IBEW, or any other union.

[4] The Employer and the IBEW did not file briefs in this proceeding.

on its collective-bargaining agreement, employer preference, relative skills, and Board certification. The Employer further requests that any award of the disputed work by the Board should be extended to cover "equipment that is similar to MCAS or incorporates the technology used in the MCAS machine . . . ."[5]

The IBEW and EAST argue that employees they represent should be awarded the disputed work.[6]

D. *Applicability of the Statute*

It is undisputed that EAST's representative Robert Davis in a letter dated 30 January threatened to establish picket lines if the Employer assigned the disputed work to employees represented by the IBEW.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. No party contends that there is an agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications

The employee currently performing the disputed work is not a member of any bargaining unit certified by the Board. On 31 March 1949 the Board certified the IBEW to represent all "maintenance and construction electricians, including helpers, designated as Electricians 'A,' 'B,' and 'C,'" and also certified Local 1553, United Brotherhood of Carpenters and Joiners of America, AFL, now EAST, to represent all remaining production and maintenance employees. Certification is not a helpful factor in determining this dispute.

2. Collective-bargaining agreements

EAST and the IBEW have long-established collective-bargaining relationships with the Employer. The collective-bargaining agreement that expired 17 January between the IBEW and the Employer states that the IBEW is the sole and exclusive bargaining agent for the following classifications: industrial electronics electrician journeyman; electrician maintenance journeyman; electronic maintenance journeyman; electrician maintenance man; electrician; maintenance working leader and fixture cleaner.[7] As noted, the IBEW withdrew from the hearing and presented no evidence in support of its claim for the disputed work.

The Employer's collective-bargaining agreement with EAST expiring 5 November 1988 sets forth EAST's jurisdiction as "all production [and] maintenance" employees, including, among other classifications, maintenance mechanic A, plumber maintenance B, mechanic numerical controls, electromechanical technician A, and electronic service technician senior.

The employee currently performing the work is not a member of any bargaining unit represented by a union having a collective-bargaining agreement with the Employer. Weber testified that in designing the disputed work's job description, "automated equipment technician," he reviewed 20–30 existing job classifications in both the IBEW and EAST collective-bargaining agreements. According to Weber, the closest job description was EAST's "electromechanical technician A," which played the "largest role" in drafting the new job description. Glen Hunter, the Employer's head of compensation for the Radar Systems Group, further testified that the Employer primarily used seven different job classifications: five EAST (maintenance mechanic A, plumber maintenance B, mechanic numerical controls, electromechanical technician A, and electronic service technician senior); one IBEW (industrial electronics electrician journeyman); and a nonbargaining unit "computer systems" classification. Hunter stated the Employer found "deficiencies" in the old classifications and decided it was necessary to create a new classification that "incorporated all of the requirements that the new machinery required from a maintenance standpoint."

[5] Weber testified that two MCAS machines are currently in production, that another machine will be operating "within the next few days or a week," and that a fourth MCAS machine "is a month behind it." Weber further testified that three more MCAS machines "are budgeted, or planned to be budgeted" in the future.

[6] The IBEW withdrew from the hearing but did not disclaim interest in the work in dispute. EAST seeks all maintenance work on the MCAS to be awarded to employees it represents.

[7] Kenneth King, the Employer's manager of labor relations, testified that although the contract with the IBEW expired 17 January, the parties have extended it on a day-to-day basis since that date.

Finally, in addition to the job classifications discussed above, EAST also entered into the record job descriptions of several other classifications it argues cover the disputed work: instrument technician A, instrument technician senior, optomechanical technician senior, optomechancial technician A, test equipment fabrication technician senior, test equipment fabrication technician A, test technician micro circuit senior, test technician micro circuit A, and machinist maintenance.

This evidence indicates that while the IBEW contract may cover part of the work in dispute, the description of EAST's jurisdiction in its collective-bargaining agreement covers most, if not all, of the work in dispute. In these circumstances, we find that the factor of collective-bargaining agreements favors an award to the employees EAST represents.

3. Employer preference

Since February 1987 the Employer has assigned the disputed work to a nonbargaining unit employee and concededly prefers to maintain such an assignment. The Employer at the hearing, however, stated that if the Board believes the work should be awarded to employees represented by either EAST or IBEW, it would prefer that the disputed work be assigned to employees represented by EAST as they are "more qualified." Although the Employer favors assignment of the disputed work to the nonbargaining unit employee, we do not find this controlling. The Employer by alternatively requesting that employees represented by EAST be assigned the work implies that this assignment would not adversely affect its operations. *Valley Plate Glass Co.*, 196 NLRB 1140, 1142 (1972).

4. Employer past practice

The testimony indicates that the MCAS' integrated assembly system is one of the latest technological advancements of its kind and that the Employer has not had a long-standing or consistent past practice in assigning maintenance of this system to a particular group of employees. We therefore find this factor does not favor an award to any particular group of employees.

5. Employee skills

Employees who perform the tasks involved in maintaining the MCAS must possess considerable skills. The record, however, fails to show that any group of employees is unqualified to perform the work. Accordingly, this factor is inconclusive.

6. Economy and efficiency of operation

As noted above, Weber testified that a nonbargaining unit employee "hired from the outside" is currently performing the disputed work. The Employer's project manager Jeffrey Strong further testified that having only one employee maintaining the machine would reduce the Employer's cost, as there would be no need "to have all this other interface [between different unions] and have the machine down, waiting."[8]

Weber also testified that the Employer plans to add at least seven more MCAS machines. Therefore, if the Employer utilizes new employees, it will continue to hire, and train, additional employees to perform the disputed work.

On the other hand, the Employer admits that EAST employees could be trained to perform all of the maintenance work, and no party seeking the disputed work has requested a composite crew perform the work.[9] Thus, rather than increasing the size of its work force, the Employer could more economically train its existing employees to perform the disputed work. We therefore find the factor of economy and efficiency of operation favors an award to employees represented by EAST.

Conclusions

After considering all the relevant factors, we conclude that employees represented by EAST are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's collective-bargaining agreement with EAST, and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by EAST, not to that Union or its members.

Scope of the Determination

The Employer requests that the Board issue a broad work order award applicable to the maintenance of all "robotic and other integrated" electronic equipment. The Employer argues such an award is necessary because the MCAS is merely the first of a projected long line of equipment incorporating this "new type of technology." Be-

---

[8] Weber and Strong both testified that the maintenance on the HPS 300 and ALCAs required two or three technicians because of "different technologies" in each machine. As a result, when a machine has a problem, an engineer would investigate, determine the problem, and then assign responsibility for its repair. Weber testified this maintenance arrangement affected the machine's "down time" and slowed repair. Strong further testified that of a machine's 80 percent maintenance downtime, 50 percent was due to union jurisdictional assignment problems.

[9] Although Weber and Strong testified to employee "interface" on the HPS 300 and ALCAS, no evidence was presented on the employee "interface," if any, on the MCAS.

cause the technology will be improving "year by year," the Employer claims a broad award is necessary to avoid further jurisdictional disputes in the future.

We find that a broad work order award is unwarranted. The work in dispute only concerns the MCAS' maintenance and the Employer is seeking a broad award of work that does not yet exist. Further, no group claiming the work has made a continuing demand for future similar work, and we have found that employees represented by the charged Union are entitled to perform the work in dispute. Therefore, we find a broad order is not warranted and limit our present determination to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute. Employees of Hughes Aircraft Company represented by Electronic and Space Technicians Local 1553 are entitled to maintain the MCAS machine in the Radar Systems Group, El Segundo, California.

Fibreboard Corporation, a wholly-owned subsidiary of Louisiana-Pacific Corporation *and* Lumber & Sawmill Workers, Local Union 2652, Lumber, Production & Industrial Workers Union, AFL–CIO

Fibreboard Corporation, a wholly-owned subsidiary of Louisiana-Pacific Corporation *and* David Hanreich and Lumber & Sawmill Workers, Local Union 2652, Lumber Production & Industrial Workers Union, AFL–CIO. Cases 32–CA–6848 and 32–RD–608

26 May 1987

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 28 January 1986 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to adopt the recommended Order, and to certify the results of the election.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Lumber & Sawmill Workers, Local Union 2652, Lumber, Production & Industrial Workers Union, AFL–CIO, and that it is not the exclusive representative of these bargaining unit employees.

Patricia Milowicki, Esq., for the General Counsel.
Robert G. Hulteng, Esq. and *Thomas Dowd, Esq. (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco, California, for the Respondent.
Russell Richeda, Esq. (Bunch & Andrews), of San Francisco, California, for the Charging Party.
Harlan Bernstein, Esq. (Jolles, Sokol & Bernstein, PC), of Portland, Oregon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Sonora, California, on 29 and 30 April; 1, 2, 3, 20, 21, and 22 May; 10, 11, 12, 24, 25 June and 16 July 1985. The initial charge was filed on 18 October 1984 by Lumber & Sawmill Workers, Local Union 2652, Lumber, Production & Industrial Workers Union, AFL–CIO (Union). Thereafter, on 21 December 1984 the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing alleging a violation by Fibreboard Corporation, a wholly-owned subsidiary of Louisiana-Pacific Corporation (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act. On 15 February 1985 the Regional Director issued an amended complaint, adding additional alleged discriminatees.

Pursuant to a decertification petition filed on 24 July 1984 by David Hanreich, an individual, in Case 32–RD–608, an election by secret ballot was conducted on 14 September 1984. The tally of ballots reflects that of approximately 271 eligible voters, 18 employees cast ballots for the Union and 95 cast ballots against the Union. Additionally, there were 149 challenged ballots. Thereafter the Union filed timely objections to the election, which objections were overruled by a Decision, Direction, and Order of the Board, dated 12 March 1985. Further, the Board directed a hearing on the challenged ballots. On 17 April 1985 the Regional Director issued an order consolidating cases and notice of hearing, consolidating both the unfair labor practice case and representation case for purposes of a hearing before an administrative law judge.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for Respondent, and counsel for the Charging Party.

---

[1] The General Counsel and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that *Community Motor Bus Co.*, 180 NLRB 677 (1970), enf. denied 439 F.2d 965 (4th Cir. 1971), on which the General Counsel relied in arguing that the Respondent had generally condoned strike misconduct, is distinguishable on its facts from the present case. In *Community Motor Bus*, an agent of the employer had offered reinstatement to all 18 striking employees who blocked entrance to the plant in a single incident of mass picketing. Notwithstanding that offer, the employer later discharged 12 strikers for their involvement in that same incident. On these facts the Board found that the employer had condoned the mass picketing incident and could not thereafter lawfully discharge strikers for it. In the present case, by contrast, a series of different incidents were involved, and the agents of the Respondent who allowed strikers Joice, Houck, and Metcalfe to return reasonably believed that they lacked sufficient evidence of participation in serious misconduct to bar their reinstatement when they offered to return.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, with an office and place of business in Standard, California, has been engaged in the milling and wholesale distribution of lumber. In the course and conduct of its business operations, Respondent annually sells and ships goods or provides services in excess of $50,000 directly to customers located outside the State of California.

It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleadings is whether the Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to reinstate and by discharging employees accused of strike-related misconduct, following their unconditional application to return to work on the termination of the strike.

B. *The Facts*

The strike commenced on 24 June 1983 following a breakdown of bargaining negotiations. Some 19 of Respondent's facilities were struck. There was significant and extensive violence during the strike, including fire bombings of plant premises and an attempt to blow up an electrical substation. The two plants directly involved, the Standard plant, then managed by Jim Costello, and the Keystone plant, then managed by Mel Barber, are located some 20 miles apart. The Standard plant was among the two or three locations where the misconduct was most widespread. The strike resulted in the complete shutdown of both plants.

On 29 June 1983 Respondent obtained a temporary restraining order in the Tuolumne County Superior Court against the Union and various individuals. Thereafter a preliminary injunction was issued, followed by the entry of a consent contempt decree against the Union and various individuals because of continued violation of the court's order.

During this period, Charles Loughran, director of corporate industrial relations, advised the various plant managers that individuals who had been involved in substantial misconduct or some aspects of violence would be ineligible for reinstatement, but that specific discharge action should not be taken until the Respondent was faced with offers to return to work. Meanwhile, the Respondent compiled available information, including reports and newspaper articles, regarding the misconduct of specific employees.

The Keystone facility was one of the first plants to resume operation during the strike, opening in late September 1983. In October, Plant Manager Barber[1] hired Peter Joice, who had previously worked at the Standard facility. Don Gritz, personnel industrial relations manager for the Sierra Division of Louisiana Pacific, testified that Barber alone made the decision to hire Joice, prior to any correspondence or communication with Gritz. There is no evidence that Barber was aware of Joice's strike misconduct. Sometime thereafter, Gritz learned that Joice had been hired at Keystone and advised that an investigation should be made.

Joice was interviewed by Mel Barber and Emma Lackey, personnel assistant, apparently on 13 October 1983. Lackey prepared a detailed typewritten summary of the interview and submitted it to Gritz.

On 2 November 1983 Gritz directed the following memo to various management representatives:

> In order to assure that we implement a consistent policy towards employees participating in acts of misconduct, violation of court orders and other unacceptable actions since June 24, it is requested that you compile and forward to my attention a list of employees involved in misconduct, a brief summary of their involvement, and if any court or legal action has occurred or is scheduled relative to their misconduct. Of course, add any comments you believe to be appropriate.

On 5 January 1984, on completing the investigation of Joice, and after consultation with other corporate representatives, Gritz issued the following report:

> Disciplinary action—Peter B. Joice
>
> Information:
>
> On 08–08–83 Pete was on picket duty at the plywood gate, Standard Plant. Mickey Metcalfe was also there. Sheriffs verbal information and APS written reports indicate Pete had been drinking. He was arrested by the Tuolumne County Sheriff Department for trespassing and verbally hassling law enforcement personnel. Later after being released from jail but during the same "picket shift" he was arrested for throwing rocks at and hitting an APS[2] guard. He was not immediately released this time. While in jail he was charged with grand theft of a portable radio. It was the property of APS and disappeared during the time Pete was on picket duty. Pete was later released from jail and after three court appearances he entered a guilty plea to three reduced charges. He was fined $1500 and served or is serving 45 days on a work furlough program.

[1] Barber is on long-term disability retirement due to a heart condition, and was represented to be unable to testify in this proceeding.

[2] American Protective Services, a private agency hired by Respondent during the strike.

Comments:

Pete, by his own statements, APS reports and sheriff comments was a voluntary participant in activities considered misconduct while on picket duty. Review of the events leading to the decision noted below include a statement by Pete, APS incident reports, discussion with representatives of the Tuolumne County Sheriff's department, management personnel of Louisiana-Pacific and news articles. The acts of hostility and misconduct by Pete were not directed against L-P employees, L-P rolling stock, equipment or material being shipped or received. His activities were not at the L-P plant where he is presently working. However, his actions cannot be overlooked or condoned.

Decision:

After receiving input from numerous sources and evaluating the impact and significance of all information received, it is the opinion of L-P management that Pete Joice has committed acts of misconduct for which disciplinary action is appropriate. Furthermore it is management's opinion that his acts were not gross misconduct for which termination would be the appropriate remedy. Mr. Joice shall be suspended, without pay, for ten (10) working days. In addition Mr. Joice shall participate in a meeting where management shall explain its position and reasons for this disciplinary decision, the alternatives which were considered, and our sincere desire to make it clear that his actions were serious and unacceptable. Mr. Joice shall be afforded an opportunity to offer any comments and statements he wishes.

A copy of this report shall be placed in Mr. Joice's personnel file.

On the same day, 5 January 1984, Joice was called into the office and met with Barber, Lackey, and two additional supervisors. He was handed a warning notice to read and sign, and was advised of his 10-day suspension. At this meeting Lackey told him that "The decision . . . was a result of much discussion and his work record and his desire to work played a big part in the decision made."

At the hearing Gritz testified that there were several reasons for suspending, rather than terminating Joice: He had been very candid and forthright and did not deny his involvement in the misconduct; there appeared to have been some provocation by the guard;[3] he had been drinking and his actions did not appear "premeditated"; they were not taken against employees who were trying to go to and from work nor was there an attempt to impede materials and supplies; and, an important additional reason was to prevent a possible morale problem with the plant manager who was "attempting to get an operation going under very difficult circumstances. I was very aware of the importance attached to support of the managers that have to make decisions."

In early November 1983, during the strike, employee James Houck approached Standard Plant Manager Costello and offered to return to work. Costello was aware of Houck's alleged misconduct—striking and injuring a security guard with a rock—and advised Houck that he would have to evaluate the evidence regarding the matter. Houck denied that he had thrown the rock.

On 14 July 1983, in the aforementioned contempt proceeding, Costello signed a declaration stating, inter alia, as follows:

> On July 8, 1983, at approximately 7:45 a.m., a picket threw a rock which hit Plaintiff's security guard Jack Zickert on the head causing serious injury. I did not personally witness this incident, but I am informed and believe on that basis, that the picket who threw the rock is James Houck. This conduct, for which James Houck is personally responsible, violates paragraphs c and h of the temporary restraining order.
>
> On July 8, 1983, at approximately 8:00 a.m., security guard Ramirez was physically restrained by the picket who threw the rock causing injury to security agent Zickert. The picket threatened to take the life of security guard Ramirez. Other pickets threatened Ramirez' life at that time as well. These actions violate paragraphs c, d and h of the temporary restraining order.

Costello was present during the contempt hearing, on 12 August 1983, and heard Ramirez testify with respect to the Houck incident.[4] Zickert was not available for the contempt hearing, and Ramirez testified, according to Costello, that he had not personally witnessed the rock-throwing incident by Houck. After Zickert was hit, however, he called to Ramirez and pointed to Houck. Ramirez pursued and attempted to arrest Houck, and said, "When are you going, buddy?" Houck replied, according to Ramirez, "I'm going to kill you, motherfucker."[5]

On Houck's request to return to work, Costello telephoned the district attorney's office regarding the matter, and visited the sheriff's office to discover any additional information. Costello believed that he had no conclusive evidence that Houck did throw the rock as Houck's guilt had not been established in the court proceeding, and testified that Houck's apparent sincerity impressed him. Houck was reinstated on 11 November 1983. Thereafter, Loughran and Gritz instructed Costello to conduct a more thorough investigation. As a result, on 14 November 1983, Costello sent the following letter to Houck:

> You were called back to work based upon your signing of an "Unconditional Offer to Return to

[3] Lackey's aforementioned 13 October report of the interview with Joice contains the following: "The second time he was arrested as a result of 'getting into it' with a security guard. . . . Pete said the security guard called his mother some bad names, i.e., 'whore.'"

[4] The contempt proceeding did not result in a court resolution of contested issues as the parties, prior to the completion of testimony, entered into a consent contempt order.

[5] Costello testified that he did not recall Ramirez' testimony regarding this threat.

> Work" and by virtue of the fact that you are the senior qualified person for the work available.
>
> I am obligated to inform you that a strike related incident allegedly involving yourself is still under investigation and that the outcome of that investigation may result in disciplinary action, from suspension to and including termination. You should, therefore, consider yourself a probationary employee.

On 17 November 1983 Costello received calls from two employees who had been near Houck, along with six or seven other employees, during the rock-throwing incident. They told him that they did not see Houck throw a rock. On 18 November, another employee phoned Costello and advised him that he was also present, and confirmed that Houck was leaving the area to move his vehicle off the road pursuant to instructions of sheriffs' deputies, rather than in an effort to escape being apprehended for throwing a rock.

Also on 17 November 1983, Costello, Gritz, and Walt Hanson, Costello's superior, flew to San Jose, California, in a company jet for the purpose of interviewing the two guards, Zickert and Ramirez. The interview lasted 2 hours, and Respondent's officials became convinced from Zickert's inconsistent recollection that Zickert did not observe who threw the rock at him.

Thereafter, on 22 November 1983, Costello wrote the following memo:

> The allegation is that Houck threw a rock at Security officer Zickert on July 8, 1983 at the L-P log truck gate.
>
> The only witness testifying that Houck threw the rock is Zickert. His description of the incident is a little inconsistent in that he says he was hit—then turned and saw Houck. Later in his testimony he says he saw Houck throw the rock and then attempt to leave the scene. His testimony certainly incriminates Houck as one of 7 or 8 people in the area, but does not provide anything conclusive. Furthermore, we had several difficulties with the Royal Investigation Security employees during that week—enough to cause some concern for the credibility of their testimony.
>
> I have received evidence from three witnesses; Hank Hix, John Bettanini and Todd Cozort who will testify that Houck did not throw the rock.
>
> The sheriff department filled out a report and forwarded it to the D.A.'s office. The D.A.'s office investigated the incident and found insufficient evidence to pursue a charge against Houck.
>
> When Houck was interviewed he flatly and convincingly denied having thrown the rock. He did admit being on the scene when it happened and did go to his truck when asked by the sheriff's office to do so. He denied having left the scene to get away.
>
> I interviewed two members of the sheriff office present on that day. Neither witnessed the incident but they did confirm that Houck was asked to move his vehicle, thus explaining Houck's actions described by Zickert as "attempting to leave the scene."
>
> Based on evidence and testimony, it is my recommendation that no disciplinary action be taken against Houck. Furthermore, it would be inconsistent to continue to pursue the Houck incident in the T.R.O. contempt hearings. It may even weaken the rest of the case if we leave it in. Therefore, I also recommend the allegations be dropped with respect to Houck.[6]

The Respondent had collected and retained various newspaper articles regarding the strike activity, and was in possession of a newspaper article naming Mickey Metcalfe as having been arrested for interfering with the arrest of Peter Joice, supra, by challenging the arresting officer to a fight. The criminal charges against Metcalfe brought by a deputy sheriff were dismissed, and Respondent had no independent evidence of Metcalfe's alleged misconduct. The decision to reinstate Metcalfe was made by Lumber Superintendent Richard Davis rather than by Plant Manager Costello, who was not at that time involved in the hiring process as he had tendered his resignation prior thereto. Davis testified that he rehired Metcalfe and several other employees at the same time, about 12 December 1983, and was not aware that Metcalfe had been arrested or accused of misconduct. Costello, who had tendered his resignation to Respondent on 29 November 1983, testified that he does not recollect whether he had become aware of Metcalfe's reinstatement prior to the time he actually left Respondent's employ.

On 24 July 1984 a decertification petition was filed in Case 32–RD–608 involving the Standard collective-bargaining unit. On 31 July 1984 the Union made an unconditional application for reinstatement on behalf of all the striking employees. On 20 August 1984 a Stipulation for Certification upon Consent Election was approved by the Regional Director. Shortly thereafter, Charles Loughran instructed then Standard Plant Manager Dave Vculek to discharge former strikers regarding whom there was adequate evidence of strike-related misconduct. The purpose of this instruction was to ensure that the ballots of those employees could be challenged should they decide to vote. See *Connecticut Foundry Co.*, 247 NLRB 1514 (1980); *Servomation of Columbus*, 219 NLRB 504 (1975). Vculek, who had no personal knowledge of the employees or their involvement in strike misconduct as he did not become plant manager until mid-January 1984, made the decision to discharge the remaining employees. He based his decision on documents that had previously been compiled, including guards' incident reports, employees' reports, newspaper articles, and conversations with staff. Thereafter he sent letters to each of the employees, dated 16 August 1984, outlining the reason for their respective terminations. Only one of these employees, Floyd De Anda, responded to Vculek's letter. De Anda maintained that he was innocent of

[6] There is no further evidence in the record regarding Houck's threat to security officer Ramirez, on being arrested. Presumably, as Respondent's representative believed that Houck did not throw the rock, his spontaneous outburst on being wrongly apprehended was deemed excusable.

throwing any rocks. Vculek did not contact any of the employees whose names had been furnished by De Anda as witnesses in support of his assertion that at the time in question De Anda had not thrown any rocks. Rather, Vculek elected not to believe De Anda's claim of innocence and relied on the information available to him, including the arresting officer's report.

The letters of termination specify the following reasons for termination:

> Melvin J. Slate—terrorizing a salaried L-P employee and doing physical damage to his vehicle on 19 July 1983.
>
> Jim Schawnego—being accused by APS security of throwing nails on the Keystone driveway during the Keystone start-up of 26 September 1983.
>
> Robert J. Williams—being arrested by Tuolumne County Sheriff deputies for violating a court order and for throwing rocks at L-P employees as they left the Keystone Mill on 26 September 1983.
>
> Steve C. Serrano—being arrested by Tuolumne County Sheriff deputies on charges of violating a court order on 26 September 1983.
>
> Galen A. Sawyers—being accused by APS security of throwing nails on Keystone driveway during the Keystone start-up on 26 September 1983.
>
> Wyatt L. Park—violating a court order on 26 September 1983 and miscellaneous other incidents of misconduct.
>
> Nacho C. Padilla—being arrested by Tuolumne County Sheriff deputies for violating a court order and for throwing rocks at L-P employees as they left the Keystone Mill on 26 September 1983.
>
> Thomas Norris—being accused by APS security of throwing nails on Keystone driveway during the start-up of 26 September 1983 and miscellaneous other incidents of misconduct.
>
> David L. Munson—harassment of an employee. On 8 February 1984 as an employee was leaving the Standard plant, you struck the employee's vehicle, stepped in front of it and forced the employee to stop; a fight ensued.
>
> James L. Hackett—being arrested by the Tuolumne County Sheriff deputies for hitting a peace officer during the Keystone start-up on 26 September 1983.
>
> Robert E. Hamilton—being accused by APS security of throwing nails on the Keystone driveway during the Keystone start-up of 26 September 1983 and miscellaneous other incidents of misconduct.
>
> Gerald R. Gutierrez—fighting with an L-P employee as the employee was leaving the plant area on 8 February 1984, and miscellaneous other incidents of misconduct.
>
> Richard E. Engle—being arrested by Tuolumne County Sheriff deputies for violating a court order, throwing rocks at returning workers during the Keystone start-up, and for having thrown a bottle at the car of an arriving L-P employee during the Keystone start-up of 26 September 1983.
>
> Harley E. Engle—being arrested by Tuolumne County Sheriff deputies for throwing a rock at a train on Tuesday, 17 July 1983, and miscellaneous other incidents.
>
> Floyd De Anda—being arrested by Tuolumne County Sheriff deputies for violating a court order and for throwing rocks at L-P employees as they left the Keystone Mill on 26 September 1983.
>
> Ray E. Clayton—being arrested by Tuolumne County Sheriff deputies on charges of violating a court order on 26 September 1983.
>
> Thomas Barajas, Jr.—being arrested for allegedly hitting a truck with your picket sign while it moved through L-P gates on 19 July 1983.

C. *Analysis and Conclusions*

The General Counsel argues that the Respondent, by its reinstatement of the aforementioned employees, Joice Houck and Metcalfe, during the strike, condoned the strike-related misconduct of any and all employees, and that therefore Respondent's discharge of the employees who may have engaged in similar misconduct, but who continued to support the strike until it was ended by the Union, is violative of Section 8(a)(1) and (3) of the Act. Further, the General Counsel argues that by its aforementioned disparate treatment of the employees, the Respondent has evidenced an intent to discriminate against those employees who did not elect to return to work during the strike.

In support of her position the General Counsel cites as the "controlling decision" *Community Motor Bus Co.*, 180 NLRB 677 (1970), enf. denied 439 F.2d 965 (4th Cir. 1971). In that case some 18 employees engaged in alleged strike-related misconduct consisting of mass picketing and blocking the use of the employer's entrance and exits at the outset of the strike. Thereafter, one of the employer's officials specifically advised the union that the men were not being fired for such misconduct, but rather were needed and that the employer wanted them back. Later, on the termination of the strike, the employer reinstated 6 of the 18 employees, but refused to reinstate the remaining 12 because of the aforementioned misconduct. The Board found that under these circumstances the employer condoned any unprotected strike activity, and violated the Act by refusing reinstatement to the remaining 12 employees. The Fourth Circuit, however, specifically reversed this decision, finding that the reassurances made by the employer were made primarily to keep the peace during a time when emotions were dangerously high, and fell short of condonation as they did not constitute a clear willingness to "wipe the slate clean." The court then stated at 439 F.2d at 968, regarding the employer's failure to treat all the strikers equally:

> Although we accept as supported by substantial evidence the Board's findings concerning the conduct of the 18 employees, we believe its conclusion overlooks the distinction drawn by *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 259, 59 S.Ct. 490, 83 L.Ed. 627 (1939), between what an employer may do and what it must do. In *Fansteel*, the Court held illegal strike activity absolved the employer of any duty to reemploy, but the company "was nevertheless free to consider the exigencies of

its business and to offer reemployment if it chose. In so doing it was simply exercising its normal right to select its employees." 306 U.S. at 259, 59 S.Ct. at 498.

The same is true here. The company was free to discharge or rehire any or all of the strikers whose misconduct forfeited reinstatement rights. Any other rule, especially in the absence of anti-union animus, would confront the employer with an all-or-none rehiring choice, which is not required by the Act or by the doctrine of condonation. *Kohler Co.*, 128 NLRB 1062, 1105 (1960), enf'd in part and remanded sub nom. *Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. NLRB*, 112 U.S. App. D.C. 107, 300 F.2d 699, cert. denied, 370 U.S. 911, 82 S.Ct. 1258, 8 L.Ed.2d 405 (1962).

In *Longview Furniture Co.*, 100 NLRB 301, 306 (1952), the Board, citing *Fansteel*, supra, stated as follows:

> In our opinion the reinstatement of Harold Clampitt by the Respondent does not indicate condonation, as suggested by the Trial Examiner. For, assuming that the Respondent may have believed that Clampitt had engaged in conduct like that attributed to the 13 here involved, it is settled that where serious acts of misconduct are involved, an employer does not waive or condone the misconduct of all participants when it rehires some of them.[13] For the same reason no inference of condonation may be drawn from the fact that the Respondent retained in its employ certain nonstrikers who may have been guilty of serious misconduct during the strike.

[13] See, for example, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240; *Precision Castings Company, Inc.*, 48 NLRB 870.

The law is clear that condonation of unprotected activity is not to be readily inferred, but rather must be based on clear, convincing, and positive evidence that the employer has agreed to forgive such misconduct and desires to continue the employer-employee relationship as though no misconduct had occurred. *Marquette Cement Mfg. Co.*, 219 NLRB 549, 553 (1975); *NLRB v. Marshall Car Wheel Co.*, 218 F.2d 409, 414 (5th Cir. 1955).

The General Counsel asserts that Respondent's rehiring of the three aforementioned employees constitutes condonation of the other employees' misconduct. I conclude that this contention is without merit. The employees who were rehired were never told that whatever misconduct in which they may have engaged had been forgiven. In fact the Respondent's probation of Houck while the investigation of his alleged misconduct was being undertaken, and the disciplinary suspension of Joice, together with the warning letter advising that Houck's misconduct was deemed serious and unacceptable, conclusively demonstrates, in my opinion, that Respondent was not willing to extend carte blanche forgiveness to the remaining employees, an indispensable element in any theory of condonation. Rather, Respondent's approach to the reinstatement of those employees, in conducting an investigation into their alleged wrongdoing even after they had commenced working, demonstrates that it was not willing to "wipe the slate clean" with regard to the misconduct of any employees. Therefore, I find that the record does not contain the necessary clear and convincing evidence to support the General Counsel's condonation theory.

The General Counsel asserts, and the complaint alleges, that the Respondent engaged in disparate treatment of the employees for discriminatory reasons. Thus, according to the General Counsel, the Respondent, on rehiring Joice and Houck during the strike, took extensive measures to investigate their alleged wrongdoing in order to discover or contrive reasons for exculpating or forgiving such misconduct; in contrast, it discharged in a perfunctory manner those employees who elected to continue exercising their protected right to strike.

I credit the testimony of Respondent's witnesses and find that Houck was reinstated by Standard Plant Manager Costello, and Joice was hired by Keystone Plant Manager Barber without the knowledge of higher management officials. Indeed, the fact that the officials, on learning of the reemployment of these individuals, required the respective plant managers to conduct an extensive investigation into the employees' alleged misconduct provides convincing evidence of this. Further, such a sequence of events, I find, clearly shows that the plant managers possessed and exercised a substantial degree of authority and autonomy, as Respondent maintains. It seems clear that the ensuing investigations, mandated by Respondent's officials, were undertaken to determine whether these individuals, once rehired, should be retained. Thereafter, personal interviews with these individuals and, in the case of Houck, his accusers, resulted in their continued employment, for the various reasons set forth above. I credit Don Gritz, Sierra Division personnel/industrial relations manager, who appeared to be a very forthright individual and find that Respondent's various reasons for suspending rather than discharging Joice were based on an honest evaluation of the circumstances rather than, as the General Counsel suggests, a contrived effort to reward an employee for abandoning the Union. Further, I credit Plant Manager Costello and Gritz, and find that after a laborious investigation of the matter, Respondent simply believed that Houck was innocent of any wrongdoing.[7]

The discharge of the remaining employees in August 1984, some 8 to 10 months following the reinstatement of Joice, Houck, and Metcalfe, was undertaken by a new plant manager, Vculek, who had played no part in the reinstatement of the aforementioned employees. The record clearly shows that Vculek, pursuant to instructions and in a routine and fairly mechanical manner, discharged the employees in question, basing his determination only on various documents that had been compiled. Thereafter, only one of these employees, De Anda, pro-

[7] It appears that Metcalfe's reinstatement simply did not come to the attention of higher management representatives, and therefore no investigation of his alleged misconduct was initiated.

tested his discharge. Vculek perfunctorily chose to disbelieve his claim of innocence, and did not pursue any investigation of the matter.

The record evidence establishes that the Respondent, from the outset, regarded any type of strike misconduct as impermissible and engaged in significant efforts to identify the wrongdoers. Further, in this endeavor, it compiled and maintained whatever material existed to document and support its belief that certain employees were culpable, obviously for the purpose of supporting whatever disciplinary measures it should later decide to invoke. On the rehire of Joice, and later of Houck, it undertook an extensive investigation into their alleged misconduct. As a result, it exonerated Houck and found mitigating circumstances that warranted only a suspension of Joice.

It seems apparent that had Joice and Houck not been rehired during the strike, they would have been among those later discharged. However, the evidence, in my opinion, does not support the General Counsel's contention that they were reinstated as a result of a conscious effort on the part of Respondent to forgive employees who abandoned the strike. Rather, it appears that their reinstatement was the direct result of a series of fortuitous circumstances, particularly Respondent's thorough investigation of their alleged misconduct. Moreover, Joice's situation was unique for the various reasons that the Respondent in good faith deemed to be mitigating circumstances, including Joice's sincerity and his confession of guilt, the fact that he was provoked by the security guard, and the difficult situation that Respondent was then experiencing in starting up its Keystone operations.

On the termination of the strike and the filing of the decertification petition, the Respondent decided to rely on the information then available to it and summarily discharged the remaining employees. In this determination the Respondent elected to take the position that if in fact its information was incorrect, and any particular employee was not guilty of misconduct, for whatever reason, subsequent Board proceedings which the Union or the employees would undoubtedly attempt to institute could resolve the matter. *Rubin Bros. Footwear*, 99 NLRB 610 (1952); *Crown Zellerbach Corp.*, 266 NLRB 1231, 1237 (1983). The fact that the Respondent undertook an investigation of Joice and Houck on their being rehired does not, in my opinion, mandate that the Respondent has thereby committed itself to embark on an extensive investigation into the circumstances surrounding the misconduct of each accused employee in an effort to discover possible mitigating circumstances. The General Counsel has cited no cases warranting such a rule, and it appears that to require an employer to adhere to such a requirement would have an inhibiting effect on an employer's decision to reinstate employees who had been accused of misconduct during a strike. Moreover, anything other than a most cursory investigation could not have been accomplished within the short time between the Union's request for reinstatement and the date of the election; and Board law would have precluded Respondent from challenging the ballot of any employee who had not been discharged prior to the election date. *Connecticut Foundry Co.*, supra at 1520, and cases cited therein.

The record includes extensive evidence regarding the culpability of each of the terminated employees involved in this proceeding. The General Counsel has not maintained, with the exception of employee De Anda, that in fact any particular employee did not engage in the misconduct attributed to him, nor does she maintain that such misconduct was not sufficiently egregious, under applicable Board precedent, to warrant termination. Therefore it appears unnecessary to recount the record evidence regarding the misconduct of the discharged employees.

Regarding the case of De Anda, the only employee who has disputed any involvement in wrongdoing, I credit the testimony of Thomas Lee Kaufman, an investigator with the Tuolumne County sheriff's department, who appeared to have an accurate recollection of the events in question. Kaufman convincingly testified that on 26 September 1983, during strike activity, he observed an individual throw a rock approximately 2 inches in diameter, large enough to shatter a windshield or cause damage to vehicles that were exiting the plant. He at all times thereafter kept his attention directed on the individual, who was a large man, distinctively dressed with rainbow-colored suspenders over a white T-shirt. He then arrested the individual, De Anda. I do not credit the testimony of any witnesses to the extent that such testimony may differ with that of Kaufman. I find that De Anda did in fact engage in unprotected conduct and that he was therefore lawfully discharged.

On the basis of the foregoing, I find that the evidence is insufficient to show that the discharge of the strikers who did, in fact, engage in misconduct warranting termination was motivated by unlawful considerations. I shall therefore dismiss the complaint.

IV. THE REPRESENTATION CASE

A. *Underlying Issues*

The Union's primary argument regarding the great majority of ballots that were challenged by the Respondent on the basis that the employees had been permanently replaced or that their jobs had been eliminated, involves the status of the sawmill on the date of the election, 14 September 1984. Prior to the strike the sawmill operated with 48 employees. The sawmill has not operated since the strike and at the time of the hearing was undergoing extensive modification.

Shortly prior to the election the Respondent prepared manning tables for each job classification that would exist in the new sawmill. The projection indicated that the new sawmill would operate with a total of 27 employees, and would produce approximately the same daily number of board feet as the former sawmill.

The Union takes the position that as of the date of the election the plans for the new sawmill had not been finalized nor had construction begun. Therefore, according to the Union, at the time of the election the Respondent could have decided to reopen its existing plant that had formerly operated with a complement of 48 em-

ployees. From this premise the Union argues that at the time of the election there would have been no way of determining whether any particular employee, in any department, had actually been permanently replaced during the strike because, under the Respondent's seniority system, the 48 sawmill positions could have been filled by any striker regardless of whether he or she had formerly worked in the sawmill. Stated another way, the Union maintains that although there were some 125 strikers who wanted to return to work at the end of the strike and only a limited number of available positions, it would be impossible to determine which specific strikers had been permanently replaced, in any department, until Respondent had either hired or commenced operating with a complete complement of employees in all departments, including the sawmill. Therefore, the Union apparently contends each of Respondent's challenges must be overruled on the basis that each challenged ballot was cast by an employee who, potentially, could have occupied a position in the sawmill[8] until such time as the employee had been offered, and declined, such a position.

I find the Union's argument to be without merit. Voluminous testimonial and documentary evidence, which need not be set forth herein, conclusively demonstrates that the Respondent had engaged in exhaustive research, both prior to and during the strike, in an effort to determine which type of sawmill would best suit Respondent's changing business needs. At the time of the election the proposal for the construction of the new sawmill had been completed to the extent that Respondent's officials were in a position to specify with certainty the number of employees and job classifications needed to operate it. Although, as the Union argues, the final proposal was not officially adopted by the Respondent's board of directors until late October 1984, a month and a half after the election, nevertheless the record shows that on the date of the election, 14 September 1984, the reopening of the sawmill as it then existed was not under consideration, and the plans for the new sawmill had been in essentially final form since late July 1984. Moreover, at the time of the hearing the construction of the new sawmill was progressing as planned, and there have been no modifications in its staffing requirements. Thus I conclude, and the record abundantly demonstrates, that the Respondent's projections as of the date of the election conclusively establish that the new sawmill, when it becomes operative, will be staffed by only 27 employees. Moreover, the identity of each individual who would fill one of the 27 sawmill positions was ascertainable as of the election date, infra.

The Union also contends that certain employees who worked at Respondent's Keystone plant but voted in the Standard election were not eligible voters. The record shows that certain Standard sawmill employees who requested to return to work during the strike were given various jobs at the Keystone plant pending the reopening of the new Standard sawmill. Indeed, although these employees were placed on the eligibility list for the Keystone election on the basis that they had an interest in the outcome of the election, the Union challenged their ballots during the Keystone election on the basis that they were Standard, not Keystone, employees. I do not credit the testimony of various witnesses for the Union who stated or implied that at the Keystone preelection conference the Respondent represented that these particular employees were permanent Keystone employees and had forfeited their seniority at Standard. Rather, I credit Respondent's witnesses who testified that these employees specifically opted to work at Keystone pending the completion of the new Standard sawmill, and that they were assured of positions and the retaining of their seniority at the Standard sawmill when it reopened. I further find that the Respondent's representative said nothing to the contrary at the Keystone preelection conference.

During the strike the Respondent eliminated certain positions or classifications in various departments without prior notification to the Union. The Union maintains that such unilateral elimination of unit positions constituted, in effect, unlawful conduct violative of Section 8(a)(5) of the Act, precluding the Respondent's challenge to the ballots of various employees on the basis of job elimination. Respondent presented evidence that it had historically taken the position that it was not required to bargain about such matters, and that its position in this regard had been, in effect, sustained in various arbitration determinations between the parties.

The record herein shows that the elimination of jobs or job classifications prior to and during the strike was, in all instances, economically motivated. Most importantly, there is no complaint allegation that such job eliminations are unlawful. Absent any contention in the unfair labor practice proceeding that Respondent's elimination of various jobs was violative of the Act, such job elimination must be presumed to be lawful. Accordingly, I find the Union's argument to be without merit. See *Spray Sales & Sierra Rollers*, 225 NLRB 1089 (1976); *Texas Meat Packers*, 130 NLRB 279 (1961).

B. *The Challenged Ballots*

1. Department 1 (sawmill)

The sawmill did not operate during the strike. Rather, the Respondent discontinued its sawmill operations, and engaged in extensive plans to build a new sawmill that would incorporate recent technology. At the time of the election the plans for the redesigned sawmill were sufficiently finalized to the extent that the number of employees needed to staff its operations had been accurately determined. The old sawmill had operated with a total of 48 employees. As noted above, extensive and convincing record evidence clearly demonstrates that the new sawmill will operate with a total of 27 employees.

The following 11 employees offered to return to work at the sawmill prior to the Union's general unconditional offer. Because the sawmill had not reopened, these individuals were put to work either in other departments at Standard, or at the Keystone sawmill, pending reopening of the Standard sawmill:

[8] It appears that positions in all departments other than the sawmill had been filled, many with permanent replacements, at the time of the election.

Salvador Gamez	Tim Alvarez
James Marr	James Lane
Bill Adcock	Roger Edwards
Lucio De La Torre	Bob Kiar
Genera Martinez	Miguel Cisneros
Carl Hix	

The remaining 16 employees whom I find would have occupied positions in the sawmill, at the time of the election, were:

Tom Riuz	Roy Higgins
Robert Icenogle	George Spraggins
Donald Higuera[9]	Benny Tarango
James Campbell	Ronald Barton
John Bettanini	Daniel Espinosa
Michael Emerald[10]	Stephen Norris[11]
Jesus Ramirez	James Fernandez
Gary Hodges	Mark Mutzner[12]

I sustain the challenge to the ballots of the following former sawmill employees on the basis that their jobs have been eliminated and they had no reasonable expectation of future employment:

John Morris	James E. Lane Jr.
Tony Treto	Ronald Neri
Charles Belemecich	Riley Hamilton

The following former sawmill employees were lawfully discharged due to strike-related misconduct, as determined in the unfair labor practice proceeding. The challenges to their ballots are sustained:

Nacho C. Padilla	Robert E. Hamilton
Galen A. Sawyers	Robert J. Williams

The challenge to the ballot of Robert A. Williams is sustained by agreement of the parties.

2. Department 2 (lumber department)

The lumber department will operate with a total of approximately 22 employees. At the time of the election this department was fully staffed with 24 individuals.

The challenges to the ballots of the following individuals are sustained as the record shows that their jobs had been eliminated or they were permanently replaced and had no reasonable expectation of future employment at the time of the election:

Clifford Dunbar	Cristobal F. Robles
Vernon Shaw	Clifford R. Knowles
Leon S. Casas	Jesus T. Garcia
Joe Petro	Guido L. Guissi
Antonio Bettanini	Anthony Da Gama
Andrew S. Artzer	Norean L. Martin
Louis W. Capuccini	James R. Morris
William Camire	John J. Holderman
Clyde V. Foote	

The challenges to the ballots of the following employees are sustained as the employees were lawfully discharged due to strike-related misconduct:

Steve Serrano	Claudia Grimes
Floyd De Anda	David L. Munson
Dennis H. Ponder	Thomas Norris
Gerald Gutierrez	

The challenge to the ballot of John D. Gonzales is sustained as he advised Respondent of his retirement prior to the election, and it is clear that he had no intention of returning to work.

2. Department 3 (transportation)

All jobs in this department were eliminated prior to the election. Therefore, the challenge to the ballots of the following employees who were formerly employed in the transportation department, are sustained: Stanley R. York and Donald York

4. Department 5 (machine shop)[13]

The decision to eliminate the machine shop was made prior to the election. Accordingly, the challenge to the ballot of Vernon C. Wyllie, former machine shop employee, is sustained.

5. Department 6 (powerhouse)

The powerhouse will apparently operate with a total of nine employees. At the time of the election the powerhouse was operating with a full complement of employees, including permanent replacements.

The Respondent's challenge to the ballots of the following employees, who were permanently replaced during the strike and had no reasonable expectation of employment at the time of the election, are therefore sustained:

James R. Hembree	John Kinest
William E. Tolar	Norman F. Pangracs
William B Stevens	James L. Pierce

6. Department 7 (electrical department)

The record establishes that three sawmill electricians will sufficiently staff this department.

The Respondent's challenge to the ballot of Jewell Kelley is sustained, as his job has been eliminated. The Respondent's challenge to the ballot of Jim Hockett is sustained, as he was lawfully discharged due to strike-related misconduct.

[9] Respondent's challenge to Higuera's ballot is overruled, as the record shows that his interim employment at lower wage and with lesser benefit at Hateler Enterprise was not substantially equivalent to his intention to abandon his position with the Respondent.

[10] Respondent's challenge to the ballot of Emerald, who had interim employment with Snider Lumber Company, but at lower wages and with fewer fringe benefits, is overruled.

[11] I credit Norris' testimony that he would have returned to Respondent's employ at the time of the election, particularly due to his seniority with Respondent's despite contrary statements he made to the plant manager of Snider Lumber Company, his interim employer. The Respondent's challenge to his ballot is overruled.

[12] I credit Mutzner's testimony that he would have returned to work for Respondent at the time of the election. His wages and fringe benefits were inferior to those of the Respondent. The challenge to his ballot is overruled.

[13] Department 4 does not exist.

7. Department 8 (yard shops)

The record shows that former yard shop employees, Raymond Antonini and Gregory Long, were permanently replaced during the strike. The Respondent's challenges to their ballots are sustained.

8. Department 9 (plywood department)

The record establishes that the plywood department has operated with 68 employees during the strike and that as of the date of the election there was no reasonable expectation of future employment for the former plywood department employees who had been permanently replaced. Therefore, the Respondent's challenges to the ballots of the following former employees are sustained:

Ray Esparza	Charles L. Belemecich
Walter Strong, Jr.	Valdemar Vega
William McPherson	Edward Neri
Duane Montgomery	Efren Meza
Stanley Painter	Gary Grazioli
Wayne Ratliff	Marvin Icenogle
Lloyd Beaty, Jr.	Donna Johnson
Robert Tarango	Jeri Wagner
Juan Ramirez	Robert Griffiths
Dennis White	Daniel Babbit

The challenges to the ballots of the following employees, who were lawfully discharged due to strike-related misconduct, are sustained:

Jimmie E. Shawnego	Roy E. Clayton
Harley E. Engle	Melvin J. Slate
Richard E. Engle	Thomas A. Barajas, Jr.
Wyatt L. Parke	

The Respondent's challenges to the following ballots are sustained for the reasons indicated: Thomas H. Cooper—Agreement of the parties.

Ben Flores—The record shows that Flores' disability precluded his reemployment.

Brandon Babbitt—The record shows that Babbitt submitted an application for early retirement prior to the election, and that there was no reasonable basis for believing that he would return to work.

9. Department 10 (log deck)

The Respondent's challenges to the ballots of the following employees are sustained for the reasons indicated: Clarence C. Ladley—Job eliminated; and Ralph A. Applequist—Permanently replaced

The Union's challenge to the ballot of Robert P. Zion is sustainedby agreement of the parties.

10. Department 11 (road construction crew)

The road construction crew was eliminated during the strike. The Respondent's challenges to the ballots of the following employees are sustained, as their jobs have been eliminated:

James E. Martinelli	Brady Brown
Richard P. Gladysz	Gerald J. Longeway
William A. Tirey	

C. *Summary*

The tally of ballots served on the parties at the conclusion of the election shows that 18 ballots were cast for and 95 ballots were cast against the Union. A total of 149 ballots were challenged. As noted above, I have sustained, for the reasons indicated, various challenges as follows:

Sawmill	11
Lumber	25
Transportation	2
Machine Shop	1
Powerhouse	6
Electrical	2
Yard Shops	2
Plywood	30
Log Deck	3
Road Construction Crew	5
Total	87

As 87 challenges have been sustained, the remaining 62 challenges are insufficient in number to affect the results of the election. Therefore, it is recommended that the Board certify the results of the election.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed in its entirety.

IT IS FURTHER RECOMMENDED that the Board remand the representation proceeding to the Regional Director for Region 32 for the purpose of certifying the results of the election.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

California Portland Cement Division, Calmat Co. *and* Cement, Lime, Gypsum & Allied Workers, Division of the Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge D89. Case 31–CA–15662

26 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 3 October 1986 Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the exceptions. The Respondent also filed cross-exceptions and a supporting brief, and the General Counsel filed an answering brief to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Raymond M. Norton, Esq., for the General Counsel.
James A. Zapp, Esq. and *Sally R. Levine, Esq. (Paul, Hastings, Janofsky & Walker)*, of Santa Monica, California, for the Respondent.
Michael J. Stapp, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Los Angeles, California, on June 23, 1986. Based on an unfair labor practice charge filed on March 17, 1986, by Cement, Lime, Gypsum & Allied Workers, Division of the Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge D89 (the Union), the Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing on May 1 against California Portland Cement Division, Calmat Co. (Respondent). The complaint alleges in substance that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, by refusing to furnish the Union with certain requested information allegedly relevant to the Union's performance of its duties as collective-bargaining representative of a unit of Respondent's employees.

All parties were given full opportunity to appear, to introduce relevant evidence and cross-examine witnesses, to argue orally, and to file briefs. Based on the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent, a California corporation, has an office and principal place of business located in Los Angeles, California, and production facilities located at El Monte, Colton, Mojave, and Tehachapi, California, where it is engaged in the manufacture of cement. Respondent, in the normal course and conduct of its business operations, annually purchases and receives goods valued in excess of $50,000 directly from suppliers located outside the State of California.

Respondent admits, and I find that it is, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Since at least 1981, the Union has been the exclusive representative for purposes of collective bargaining of Respondent's employees at the Colton, California facility, the only facility involved in this case. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

As mentioned above, Respondent produces and manufactures cement at its Colton, California facility. Since at least 1981, the Union has represented Respondent's employees at Colton. The Union and Respondent were parties to a collective-bargaining agreement that was effective by its terms from May 1, 1981, through April 30, 1984. No successor contract has been reached.

On June 20, 1984, Respondent implemented its final contract offer unilaterally, after impasse was reached in its negotiations with the Union. Since June 20, 1984, Respondent has been operating as if its final contract offer had been accepted by the Union and has been treating its unilaterally imposed offer as a collective-bargaining agreement. Respondent has accepted and processed grievances under the implemented proposal in spite of the fact that the Union has not agreed to the contract.

The instant case arose out of the Union's request in October 1985 for information allegedly relevant to a grievance filed by Darryll Herndon, an employee at Respondent's Colton facility. About October 9, Herndon filed a grievance against Respondent alleging racial discrimination in that he "wasn't given a chance to prove

that [he was] qualified for the position for powderman." On October 23, and on at least two subsequent occasions, the Union requested information regarding the hours and the rate of pay being paid to the person performing the powderman position instead of Herndon. Herndon had been offered the powderman position before Respondent decided to utilize a former employee to perform the work. The former employee was engaged through a temporary employment service. Respondent maintains the work being performed by the former employee is the same work that it offered to Herndon. Herndon turned down the work because Respondent refused to either pay him 30 cents an hour more than the contract rate or to give him more job security (in the form of a full-time position or a supervisory position).

Although I am not concerned with whether the grievance has merit in order to determine the issue of whether the rate of pay paid by Respondent to the temporary labor service is relevant and necessary, I must examine the underlying grievance.

Darryll Herndon has been employed by Respondent for approximately 12 years. In September or October 1985, Herndon was working for Respondent as a laborer, labor grade 1. In late September, Respondent learned that its current powderman at its Colton facility, Andy Garcia, did not have sufficient experience to qualify for a California state blaster's license. Respondent had only three state licensed individuals among its employees: Dominic Chiaro, quarry supervisor; Joaquin Granado, assistant safety supervisor; and Herndon. Chiaro determined that neither Granado nor himself had the time to be present with Garcia at the time blasting was done. Therefore, Chiaro offered Herndon the opportunity to work with Garcia on a part-time, temporary basis as a powderman, labor grade 15.

It is undisputed that Chiaro offered Herndon powderman work, on a temporary basis of approximately 3 days a week, 3 weeks a month. Chiaro explained to Herndon that Respondent needed Herndon's state license present at the blasting site to conform to state law and to give Garcia the opportunity to obtain a needed year of experience for Garcia to obtain his license. Herndon rejected Chiaro's offer and attempted to negotiate a better deal for himself. Herndon wanted a full-time position as powderman, a supervisory position, or a higher rate of pay. Herndon sought 30 cents an hour above the powderman rate on the basis that he was overseeing the powderman. Chiaro would not agree to Herndon's counterproposal.

Chiaro reported to Gary Thornberry, plant superintendent, that Herndon did not accept the powderman job on a temporary basis. Rather than force Herndon to perform the job, Thornberry and Chiaro decided to offer the work to Tony Perez, a retired employee who possessed the necessary state license.

On October 9, prior to the filing of Herndon's grievance, Respondent notified the Union that it intended to subcontract the powderman work because Herndon had turned it down. The Union proposed that Respondent give Herndon a full-time position as powderman or pay him 30 cents per hour more than the powderman rate, on a part-time basis. Respondent refused to do so. Respondent contended that it had recently agreed with the Union to raise the powderman rate because that employee had to oversee other employees and it would not again increase that rate. Further, Respondent had no need for a powderman in addition to Garcia, it only needed an employee with a license, on a part-time basis, when actual blasting was being done.

Shortly after the Respondent-Union meeting of October 9, Herndon filed his grievance alleging that he was not given a chance to prove that he was qualified for the position of powderman or foreman.

On October 23, Respondent and the Union met and discussed Herndon's grievance. The Union requested the hours and rates of pay that Tony Perez was receiving for performance of the powderman duties. Respondent refused to provide this information. On November 13, the Union requested Perez' hours worked and his rate of pay so it could "thoroughly investigate and properly address the grievance." Respondent offered to provide Perez' hours to demonstrate that the subcontracted work was the same temporary, as-needed work that Herndon had rejected. The Union refused to accept Respondent's offer. The company position was that Herndon was qualified for the position of powderman, but that it would not pay Herndon 30 cents per hour over the agreed-on wage rate.

The next meeting was held on January 8, 1986. At this meeting, the Union told Respondent that its refusal to provide the information regarding Perez was "hindering [its] grievance procedure to address the issues." Respondent offered to provide Perez' hours of work to demonstrate that the subcontracted work was the same work Herndon had refused, but Respondent refused to provide the information regarding Perez' wages. At this meeting, Respondent told the Union that Perez was working through Manpower, Inc., an outside labor contractor. The Company maintained that Perez was doing the work that Herndon had previously refused.

The final meeting regarding Herndon's grievance occurred on January 22, 1986. The Union reiterated its request for information on Perez' wages and stated that it would file unfair labor practice charges based on the Company's refusal to provide the information. Respondent again offered to provide information regarding Perez' hours, but not the wage information requested by the Union. Thereafter, on March 17, the Union filed the instant charge with Region 31 of the Board.

Mauricio "Max" Rubio, president of the Union, testified that he believed that the wage rate paid Perez for his subcontract work was essential to the Union's determination of whether Respondent had violated the contract. However, Rubio testified that Respondent violated the implemented proposal whether Perez was paid more or less than Herndon.[1] Rubio filed two grievances

[1] Rubio relies on the following contract language:

All production and maintenance work customarily performed by the Company in its own plants and quarries and/or mines and with its own employees shall continue to be performed by the Company with its own employees except when, in the exclusive judgment of the management, it is more efficient or economically advantageous to contract the work or when the Company does not have the necessary equipment or qualified employees available on straight time to

Continued

against Respondent for its failure to provide the information regarding Herndon's grievance. The first grievance was filed on November 27, 1985, and alleged that Respondent had committed an unfair labor practice by failing to provide the Union with Perez' wages so that the Union could process Herndon's grievance. Respondent refused to accept this grievance. Thereafter, on July 29, 1986, Rubio filed a second grievance asserting that Respondent had forfeited Herndon's grievance because Respondent had failed to give the Union the requested information. Respondent again refused to accept the grievance on the ground that the information was not subject to the grievance procedure.

At no time prior to the hearing did Rubio or the Union give any reason for requesting Perez' wages other than to process Herndon's grievance. For the first time, during closing argument of this case, counsel for the General Counsel and for the Union contested that the information was relevant for bargaining over the subject of subcontracting. There is no contract between the Union and Respondent at the present time. Finally, there is no evidence that the Union and Respondent have engaged in bargaining since June 1984.

B. *Analysis and Conclusions*

It is well settled that an employer has a statutory obligation to provide a union, on request, with relevant information the union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In determining whether an employer is obligated to supply particular information, the question is only whether there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, supra at 437. The Supreme Court has characterized the standard to be applied in determining the union's right to information as "a broad discovery type standard," permitting the union access to a broad scope of information potentially useful for the purpose of effectuating the bargaining process. *NLRB v. Acme Industrial*, supra at 437 and fn. 6.

A union's right to relevant information is not limited to the period during which the employer and the union are engaged in negotiations for a collective-bargaining agreement. The union is equally entitled to relevant information during the contract's terms, in order to evaluate or process grievances and to take whatever other bona fide actions are necessary to administer the collective-bargaining agreement. *Electrical Workers IBEW v. NLRB*, 648 F.2d 18, 25 (D.C. Cir. 1980); *J. I. Case Co. v. NLRB*, 253 F.2d 149, 153 (7th Cir. 1958). The failure of either an employer or a union to give the other information necessary to enable the requesting party intelligently to evaluate its contract rights may constitute an unfair labor practice. *NLRB v. Acme Industrial*, supra at 435–436; *NLRB v. Safeway Stores*, 622 F.2d 425, 429 (9th Cir. 1980), cert. denied 450 U.S. 913 (1981). Where the union's request deals with information pertaining to employees in the unit, which goes to the core of the employer-employee relationship, the information is "presumptively relevant." *Shell Development Co.*, 441 F.2d 880 (9th Cir. 1971). Where the information is presumptively relevant, the employer has the burden of proving the lack of relevance. *Prudential Insurance Co.*, 412 F.2d 77 (2d Cir. 1969). "But where the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower . . . and relevance is required to be somewhat more precise. . . . The obligation is not unlimited. Thus, where the information is plainly irrelevant to any dispute there is no duty to provide it." *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. mem. 531 F.2d 1381 (6th Cir. 1976); *Doubarn Sheet Metal*, 243 NLRB 821, 823 (1979). Where the requested information deals with matters outside the bargaining unit, the union must establish the relevancy and necessity of its request for information. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977).

A union should not be forced to process a grievance without the "opportunity to evaluate the merits of the claim." See *NLRB v. Acme Industrial*, supra at 438. On the other hand, "the bare assertion that information is needed to process a grievance does not obligate the party from whom it is requested to turn it over." See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979). *NLRB v. Electrical Workers IBEW Local 497*, 795 F.2d 836 (9th Cir. 1986).

The Union asserts that the information is necessary for processing the Herndon grievance, but that assertion does not withstand scrutiny. Herndon was seeking to bargain directly with Respondent to obtain a deal better than that provided for in the imposed proposal. Respondent was under no obligation to pay Herndon a wage higher than that agreed to with the Union nor was it obligated to create a full-time position for Herndon. By necessity, the Union had to change the theory of Herndon's grievance to have a viable case.

Here, the Union contended that Respondent violated the subcontracting clause *if* the wages paid to Perez were higher than that offered to Herndon. However, Respondent never justified its subcontracting on the basis of cost, but rather on the fact that Herndon had refused the job. The wage rate paid to Herndon appears irrelevant to a grievance based on such a theory. Moreover, Rubio admitted that if the wages paid to Perez were lower than that paid to Herndon, he would still contend that the very same subcontracting provisions were violated because Herndon was available to do the work. Respondent's position, obviously, is that Herndon was not available to do the work because he had flatly refused to perform the very work in question. For purposes of analysis, I treat the case as if the Union needs the information to determine whether to process the grievance to arbitration.

The question then becomes whether a grievance regarding subcontracting is arbitrable. The contract states Respondent may call in a subcontractor when, in the

perform the work in the time required. [The emphasis is in the original and signifies a change from the expired collective-bargaining agreement.]

Company's "exclusive judgment," it is more efficient or economically advantageous to do so. Respondent contends that it has the exclusive judgment to decide whether to use a subcontractor and therefore the issue of subcontracting is not grievable.

The implemented proposal is not a bargaining agreement. The Union has not accepted the agreement and apparently has given no consideration for the arbitration clause. Although Respondent has accepted grievances and apparently will arbitrate disputes under the implemented agreement, there appears to be no way the Union can compel Respondent to arbitrate the issue of subcontracting. The General Counsel argues that under *AT&T Technologies*,[2] the question is "whether the parties agreed to submit disputes over the meaning of the language in question to arbitration." The answer to that question is no. The Union never agreed to arbitrate anything because it never agreed to the contract and Respondent never agreed to arbitrate over subcontracting when it unilaterally placed subcontracting in its exclusive jurisdiction.

Similarly, in another context, the Board in *Arizona Portland Cement Co.*, 281 NLRB 304 fn. 2 (1986), found that there was no contract in existence between this same Respondent and Union, "under which the parties are mutually bound by an agreed-upon grievance-arbitration procedure."

At the hearing, the General Counsel and Union argued for the first time that the information was relevant to bargain about subcontracting. At no time relevant to this case did the Union urge that the information was to be used for those purposes nor is there any evidence that the Union is pursuing bargaining over subcontracting or any other purpose. I, therefore, find no violation of the Act based on this belated argument. See *Bohemia, Inc.*, 272 NLRB 1128 (1984), in which the Board dismissed a refusal-to-bargain charge based in part on the union's failure to indicate to the employer which contract provision was alleged to have been violated. Here, the Union repeatedly sought the information for processing a grievance that was not arbitrable—a reason the employer could reject—and never indicated a valid reason for requesting the information. The recent basis urged by counsel was not presented to the employer during the time period that was the subject of the instant litigation.[3]

For the foregoing reasons, I find that Respondent did not violate Section 8(a)(5) and (1) of the Act, as alleged, when it refused to furnish information regarding the wages paid to Perez or Manpower for the powderman work.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

It having been found and concluded that the Respondent, California Portland Cement Division, Calmat Co., Colton, California, has not engaged in unfair labor practices, the complaint is dismissed in its entirety.

---

[2] *AT&T Technologies v. Communications Workers*, 121 LRRM 3329 (1986).

[3] In its posttrial brief, the Union argued for the first time that the information was relevant to a determination of whether Respondent committed an unfair labor practice under the Act. No specific unfair labor practice was mentioned. For the reasons stated above, I reject this argument as well.

[4] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

American Thoro-Clean, Ltd. and Unico, Ltd.[1] ***and*** **United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, Local Union No. 11 of Chicago, Illinois, International Union of Roofers, Waterproofers and Allied Workers, AFL–CIO.** Case 13–CA–21389

26 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 14 December 1982 Administrative Law Judge Robert Giannasi issued the attached decision. The Respondent, the Charging Party, and the General Counsel all filed exceptions and supporting briefs. The Respondent filed a brief in reply to the exceptions of the Charging Party and the General Counsel, and the General Counsel filed a brief in reply to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified.

The issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by failing to comply with certain terms of its collective-bargaining agreement with the Union. More specifically, the Respondent is alleged to have violated the Act by (1) failing to make contractually mandated fringe benefit contributions on behalf of all of its employees; (2) failing to pay its employees the contractual wage rates; and (3) supplying nonunion employees with the union membership cards of other employees in order to deceive the Union into believing that the Respondent was complying with the contractual union-security provisions. For the reasons discussed below, we find that the Respondent has violated the Act as alleged.

I. FACTS

At the outset of the time material (1977–1982), the Union had a collective-bargaining agreement with the Chicago Roofing Contractors' Association (CRCA), a multiemployer association which, inter alia, negotiated collective-bargaining agreements on behalf of its members.

The Respondent is a roof cleaner in the construction industry. The Respondent has a stable work force and does not hire on a project-by-project basis. The Respondent was not, at the outset, a member of the CRCA. In August 1977 the Respondent and the Union entered into a "Supplemental Agreement" which incorporated by reference the terms of the Union's collective-bargaining agreement with CRCA, provided that the Respondent was now a party to that agreement, and extended the period of the agreement through 31 May 1978. The Union-CRCA collective-bargaining agreement to which the Respondent had become a party contained a union-security clause that required all employees to be union members or to become members within 7 days of being hired or of the effective date of the agreement. The contract also established wage rates, and required employers to make contributions (or, in one respect, deductions from wages) to specified benefit funds,[3] in a contractually established amount per hour for each hour worked by each employee during each month. Thus, the Respondent was required to list all unit employees on the monthly reporting forms used to make contributions to the fringe benefit funds. The Union-CRCA collective-bargaining agreement also provided that it would continue in force and effect from year to year following 31 May 1978, unless either party desired a change and served notice in writing of that desired change on the other party at least 90 days prior to any anniversary date of the agreement (i.e., at least 90 days prior to 31 May of years subsequent to 1978).

In 1978 and 1980 the Respondent entered into subsequent supplemental agreements with the Union, in each case incorporating by reference the terms of the current master agreement between the Union and CRCA, and particularly renewing the Respondent's contractual obligations in the areas of union security, wages, and contributions to fringe benefit funds. In February 1980 the Respondent joined the CRCA, and remained a member throughout the remainder of the time period in question here.

On 1 June 1981 the Union and the CRCA (of which the Respondent was by then a member) entered into a supplemental agreement to their collective-bargaining agreement. This supplemental agreement increased wage rates and employer con-

[1] The caption is amended to include Unico, Ltd. as a party Respondent, based on the Respondent's admission at the hearing that American Thoro-Clean, Ltd. and Unico, Ltd. are a single or joint employer. Both parties are jointly referred to as the Respondent.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The fringe benefit funds are the Roofers' Unions Welfare Trust Fund, Roofers' Pension Fund, Roofers' Reserve Fund, the Chicago Roofers' Apprenticeship and Training Fund, and the Roofers' Industry Advancement and Research Fund.

tributions to fringe benefit funds. It also provided that all provisions of the collective-bargaining agreement would be in force and effect from 1 June 1981 through 31 May 1982, and would continue in force and effect from year to year thereafter, unless either party served notice in writing to the other party of any desired changes at least 90 days prior to any anniversary date.[4]

The Respondent regularly filed monthly fringe benefit fund contribution reports, ostensibly reporting all the hours worked by all the Respondent's unit employees. During this time, the Respondent also kept in force a contractually required $5000 (later $10,000) wage and fringe benefit surety bond, under the terms of which the Respondent acknowledged that it was operating under a collective-bargaining agreement and that it had agreed to pay the contractual wage and fringe benefit fund contributions for all unit employees. As early as July 1978, the Union had received information that the Respondent was not paying contractual wage rates at all times and that some of the Respondent's employees had not become union members. On 4 August 1981 the Union filed the unfair labor practice charge in the instant case.

The Respondent concedes that it did not pay contractually required wages; that it did not report all its employees, and all their work hours each month, on the fringe benefit fund contribution reports; that it did not comply with the contractual union-security clause requiring unit employees to be or become union members; and that instead it paid for the union membership of some of its employees and then distributed their union membership cards among other unit employees who were not union members.

II. ANALYSIS AND CONCLUSIONS

In defending itself against the allegations of unlawful activity arising from its failure to comply with contractual wage, fringe benefit, and union-security provisions, the Respondent contended that it was not obligated to bargain with the Union about these matters because, inter alia, (1) the Union did not represent a majority of the Respondent's employees, and (2) each of its contracts with the Union were prehire agreements under Section 8(f) of the Act, and the Respondent was therefore privileged to repudiate those contracts at any time prior to the achievement of majority status by the Union (that the Respondent contends the Union did not achieve in this case).

The judge rejected these defenses.[5] He found (1) that the successive collective-bargaining agreements between the Respondent and the Union, starting in August 1977 and continuing throughout the time material herein, raised a dual presumption of initial and continuing union majority status, which presumption the Respondent had not rebutted, and (2) that, assuming the successive collective-bargaining agreements between the Respondent and the Union were prehire agreements authorized under Section 8(f) of the Act, the record nevertheless establishes that the Union achieved majority status in the appropriate unit in September 1977, thus converting the parties' collective-bargaining relationship from one permitted by Section 8(f) to one cognizable under Section 9(a) of the Act, and one therefore governed by the provisions of Section 8(a)(5). Accordingly, the judge found that the Respondent had violated Section 8(a)(5) of the Act as alleged in all respects.

We agree with the results reached by the judge, for the reasons discussed below.

Recently—and subsequent to the judge's issuance of his decision—the Board issued its decision in *John Deklewa & Sons*,[6] in which we decided that we would no longer apply the conversion doctrine, relied on by the judge in the instant case, to collective-bargaining agreements/relationships permitted under Section 8(f) of the Act.[7] In doing away with the conversion doctrine, as applied to collective-bargaining agreements permitted under Section 8(f), we held in *Deklewa* that in light of the legislative history of Section 8(f), and the prevailing practice in the construction industry, the party to an 8(f) relationship that asserts the existence of a collective-bargaining relationship under Section 9(a) of the Act would have the burden of affirmatively proving the existence of such a relationship, through either (1) a Board-conducted representa-

[4] The complaint alleges that this collective-bargaining agreement is effective by its terms for the period 1 June 1981 through 31 May 1982.

[5] The Respondent also contended that it was not bound by the terms of its successive contracts with the Union, on the grounds that (1) the original contract, in August 1977, was obtained through coercion, and that (2) an oral understanding between the Respondent's secretary Brian Flanagan and the Union's business representative Joseph Miller, at the time of signing of the Respondent's initial (August 1977) agreement with the Union, relieved the Respondent of its obligations under the literal terms of the contract in the areas in which the Respondent is alleged to have breached the contract in this case.

The judge also rejected these contentions, on the grounds that (1) the Respondent's allegation of coercive inducement is timebarred by Sec. 10(b); that (2), in any event, the credible evidence fails to support this contention; and (3) Flanagan's testimony about the existence and extent of an oral modification of the contract was not credible. (The judge credited Miller's denial of any such oral agreement.) We agree with and affirm the judge's disposition of these matters.

[6] 282 NLRB 1374 (1987).

[7] Under the conversion doctrine, a collective-bargaining relationship/agreement permitted under Sec. 8(f) could convert into one cognizable under Sec. 9(a) simply on the basis of a showing that during a relevant period the union enjoyed the support of a majority of the employer's employees in an appropriate unit.

tion election or (2) a union's express demand for, and an employer's voluntary grant of, recognition to the union as bargaining representative, based on a showing of support for the union among a majority of the employees in an appropriate unit.[8] As a corollary to our abandonment of the conversion doctrine, as applied to collective-bargaining agreements/relationships permitted by Section 8(f), however, we held in *Deklewa* that a union signatory to an agreement permitted by Section 8(f) acquires *limited* status as a representative under Section 9(a), to the extent that the 8(f) agreement may not be unilaterally repudiated during its term, and may be enforced during its term under the provisions of Sections 8(a)(5) and 8(b)(3).[9]

No party has excepted to the judge's finding that the Respondent is an employer in the construction industry. The record establishes that the parties entered into their initial agreement in August 1977 without regard to whether the Union had the support of a majority of the Respondent's employees. Further, in the instant case, there is no contention, nor is there any evidence, that a Board election was held or that there was a demand for and voluntary grant of recognition to the Union at any time premised on a showing of support for the Union among a majority of the Respondent's employees. Also, the initial agreement and the successive agreements between the parties required, as a condition of employment, that employees had to become members of the Union within 7 days of being hired. In light of these facts, we find that under the circumstances at all times material the Respondent and the Union were parties to successive collective-bargaining agreements permitted under Section 8(f) of the Act. We further find that the Respondent substantially repudiated its 1981–1982 collective-bargaining agreement with the Union during the term of that agreement by failing to pay contractual wage rates; failing to make contractually required fringe benefit contributions on behalf of all employees; and supplying nonunion employees with the union membership cards of other employees in order to deceive the Union and circumvent the contractual union-security provisions. Accordingly, we conclude that the Respondent has violated Section 8(a)(5) and (1) of the Act as alleged.[10]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist, and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to comply with the terms of its collective-bargaining agreement with the Union from 4 February 1981[11] through the expiration of the agreement on 31 May 1982. Also, we shall order the Respondent to make the employees and the Union whole for any losses they may have suffered as a result of the Respondent's failure to comply with the collective-bargaining agreement from 4 February 1981 through its expiration on 31 May 1982. The Union and the employees shall be made whole for their losses in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest, as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See also *Pacific Intercom Co.*, 255 NLRB 184 fn. 6 (1981). Additionally, we shall order the Respondent to make the appropriate fringe benefit funds whole for losses suffered as a result of the Respondent's delinquencies in failing to make contractually required contributions to these funds. We note, however, that one of the fringe benefit funds in question is the Roofers' Industry Advancement and Research Fund. Inasmuch as industry advancement funds are permissive, nonmandatory subjects of bargaining, it is not an unfair labor practice for an employer unilaterally to discontinue its contributions to such funds. See *F.M.L. Supply*, 258 NLRB 604 fn. 3 (1981); *Finger Lakes Plumbing Co.*, 254 NLRB 1399 (1981). Accordingly, the Respondent is not required as a part of the remedy in this case to make delinquent payments to the Roofers' Industry Advancement and Research Fund.

We also note that the applicable collective-bargaining agreements in this case provide that all delinquent contributions to the fringe benefit funds are subject to a mandatory liquidated damage assessment of an additional amount equal to 10 percent of the delinquent amount required to be submitted. Accordingly, we shall order the Respondent to pay into each of the contractually specified fringe benefit funds, except the Roofers' Industry Advancement and Research Fund, as liquidated damages, an additional sum amounting to 10 percent of the delinquent contributions due those

[8] 282 NLRB 1374, 1384–1385.

[9] Id. 1386.

[10] *John Deklewa & Sons*, supra. Chairman Dotson agrees with his colleagues that the Respondent substantially repudiated the collective-bargaining agreement and violated Sec. 8(a)(5) and (1) of the Act by its overall course of conduct. Accordingly, Chairman Dotson finds it unnecessary to pass on the question of whether a failure to make contractually required fringe benefit contributions, standing alone, would be an unfair labor practice. See Chairman Dotson's dissenting opinion in *Rapid Fur Dressing*, 278 NLRB 905 (1986). The Chairman also notes the judge's discussion in fn. 16 of the latter's attached decision in the instant case.

[11] We affirm the judge's resolution of the 10(b) issue raised by the General Counsel, as discussed in sec. III,B,3 of the attached decision. Chairman Dotson accepts the judge's resolution of this matter, in the absence of exceptions to the judge's failure to find that the complaint is barred in its entirety under the provisions of Sec. 10(b).

funds. See *F.M.L. Supply*, supra; *Finger Lakes Plumbing Co.*, 253 NLRB 406 (1980).

ORDER

The National Labor Relations Board orders that the Respondent, American Thoro-Clean, Ltd. and Unico, Ltd., Mokena, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating its collective-bargaining agreement with the Union during the term of that agreement by failing to pay contractual wage rates; failing to make contractually required contributions to fringe benefit funds on behalf of all employees; and supplying nonunion employees with the union membership cards of other employees in order to circumvent contractual union-security provisions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the above-described employees, the Union, and fringe benefit funds, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent's failure to adhere to the contract from 4 February 1981 through 31 May 1982.

(b) Pay into the specified fringe benefit funds (except the Roofers' Industry Advancement and Research Fund) an additional sum amounting to 10 percent of the delinquent contributions due those funds.

(c) Comply with the terms and conditions of the above-described collective-bargaining agreement from 4 February 1981 through 31 May 1982.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Mokena, Illinois office copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by the Union, if willing, in conspicuous places where notices to employees and members are customarily posted.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT repudiate our collective-bargaining agreement with United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, Local Union No. 11 of Chicago, Illinois, International Union of Roofers, Waterproofers and Allied Workers, AFL–CIO, during the term of that agreement.

WE WILL NOT fail to pay wage rates established in a collective-bargaining agreement between us and the Union.

WE WILL NOT fail to make contractually required contributions to fringe benefit funds on behalf of all our employees covered by a collective-bargaining agreement between us and the Union.

WE WILL NOT provide nonunion employees with the union membership cards of other employees in order to circumvent the union-security provisions of a collective-bargaining agreement between us and the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole our employees, the Union, and the fringe benefit funds for any losses they may have suffered as a result of our failure to comply with our collective-bargaining agreement with the Union, from 4 February 1981 until the expiration of the agreement on 31 May 1982.

WE WILL pay into the specified fringe benefit funds (except the Roofers' Industry Advancement

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and Research Fund) an additional sum amounting to 10 percent of the delinquent contributions due those funds.

WE WILL comply with the terms of our collective-bargaining agreement with the Union from 4 February 1981 until 31 May 1982.

AMERICAN THORO-CLEAN, LTD. AND UNICO, LTD.

Mel Basan, Esq., for the General Counsel.
Gerard C. Smetana, Esq., of Chicago, Illinois, for the Respondent.
Margo R. Newman, Esq. (Asher, Goodstein, Pavalon, Gittler, Greenfield & Segall, Ltd.), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Chicago, Illinois, for 5 days in April and May 1982. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes in the middle of its existing agreement with the Charging Party Union, more specifically, by failing to make fringe benefit contributions for all its employees as required by the agreement, by failing to pay its employees the contractual wage rates, and by supplying nonunion employees with union cards of other employees "to hide its employment of non-Union employees from the Union." Respondent denied the essential allegations of the complaint. All parties filed briefs that I have read and considered.

On the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following[1]

[1] After the close of the hearing, I was presented with three technical matters that I dispose of as follows:

(1) Respondent's counsel sent me directly copies of exhibits that were properly removed from the formal exhibit file and reproduced. I have no way of knowing, however, whether these are accurate reproductions of the exhibits produced at trial. The proper course would have been to return the copied documents to the official reporter. Neither the General Counsel nor the Charging Party has objected to the reproductions. Therefore, I shall include them as part of the official record in this case.

(2) The General Counsel has filed a motion to correct transcript in certain respects. The motion is not complete because this transcript is replete with errors to a degree unmatched in my experience. I believe, however, that the substance of what transpired was not significantly distorted. The General Counsel's motion was unopposed and no other party focused on correction of the transcript. I therefore grant the motion and reproduce the corrections as Appendix B to this decision. [Omitted from publication.]

(3) The Respondent attached to its brief two letters that were purportedly sent to the Union and the Chicago Roofing Contractor's Association after the commencement of this hearing. Presumably, Respondent wants these letters to be placed in evidence. The General Counsel and the Charging Party have not responded to this attempt to augment the record. My view is that the record is already sufficiently developed on this matter and the letters add nothing of value to an issue that was not the subject of a complaint allegation and may be litigated, if necessary, in compliance proceedings. I will therefore leave the letters where they are.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, American Thoro-Clean, Ltd., an Illinois corporation, is engaged in the operation of the industrial vacuuming and cleaning of roofs. Its main office is located at 8110 West 185th Street, Mokena, Illinois. In the past year, Respondent provided services valued in excess of $50,000 for other enterprises within the State of Illinois, which enterprises were themselves engaged in interstate commerce and which enterprises meet the Board's jurisdictional standards other than the indirect inflow or indirect outflow standards. The Respondent admitted the above in its answer. Accordingly, I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

It is also admitted that Respondent Unico, Ltd., which was added as a party Respondent in an amendment to the complaint on motion granted during the last day of the trial, constitutes, with American Thoro-Clean, Ltd., a single and/or joint employer. Both companies will be referred to jointly as Respondent.

II. THE LABOR ORGANIZATION

The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. *The Facts*

Respondent's employees normally work in teams of two employees assigned to one vacuuming machine. Respondent's secretary, Brian Flanagan, testified that, at times, Respondent had a third employee on jobs when there was an "extreme amount of shoveling" to be performed. Supervisor Gary Carlson, who was hired in 1978, testified that Respondent utilized three men per machine at that time, but he was apparently referring to situations when "we needed safety men on the ground."

In August 1977, Respondent operated two vacuuming machines, according to Brian Flanagan. There is some dispute concerning the number of individuals employed by Respondent at this time. In any event, the work force remained relatively constant until October or November 1977 when, according to Flanagan, it expanded somewhat. However, Respondent continued to utilize two vacuuming machines until the spring of 1978 when it added one machine.

Respondent's work force suffers some turnover of employees, but the number of positions is relatively constant. Most employees are hired for an indefinite period and not on a project-by-project basis. They continue working throughout the season, which begins in the spring and peaks in the fall, and they "often" continue working "through subsequent years," according to Flanagan.

On August 23, 1977, Respondent and the Union entered into a supplemental agreement that incorporated by reference the terms of the Union's standard working agreement that became effective June 1, 1974. The standard agreement provides for recognition of the Union in a

unit description essentially composed of "all employees" engaged in the application and installation of roofing material "and all other work in connection with or incidental thereto." The standard agreement also includes a union-security clause that provides that employees are to become members of the Union within 7 days following the commencement of their employment or the effective date of the agreement. The standard agreement also provides for the payment of certain wage rates and for payments on behalf of all employees covered by the agreement to union trust funds for various fringe benefits, such as pensions, welfare, and training funds.

The supplemental agreement signed by Respondent provided that it became party to the standard agreement but made certain modifications in the matter of wages, fringe benefit contributions, and dues withholding payments. The supplemental agreement provided that it was to remain in full force and effect until May 31, 1978, and from year to year thereafter unless timely notice of change was given at least 90 days before the expiration date. It also provided that all other terms of the standard agreement were to remain in force until May 31, 1978.

After execution of the agreement, Respondent was supplied with fringe benefit reporting forms and filed reports and made payments for employees each month from September 1977 through at least March 1982. On occasion Respondent paid additional sums as penalties for late payment in accordance with provisions in the standard agreement and on the forms themselves. Instructions on the monthly reports state that all hours for foremen, journeymen, and apprentices "must be reported regardless of the kind of duties performed."

The standard agreement in effect when the August 23, 1977 agreement of the parties was signed had been negotiated between the Union and the Chicago Roofing Contractors' Association (CRCA), one of whose purposes, according to its bylaws, is to negotiate bargaining agreements with labor organizations. CRCA and the Union signed a new standard agreement in 1978 to extend through May 31, 1980.

On August 2, 1978, Respondent and the Union entered into another supplemental agreement, effective retroactively to June 1, 1978, incorporating modifications negotiated in the new standard agreement and readopting the original standard agreement. This supplemental agreement was to remain in full force and effect until May 31, 1980.

In 1980, the Union negotiated a supplemental agreement with CRCA modifying the earlier standard agreement. Respondent executed a similar supplemental agreement dated June 9, 1980. This supplemental agreement, which was signed by Respondent's president, John Flanagan, was to expire on May 31, 1981, and continue in full force and effect from year to year thereafter unless timely written notice of change was given at least 90 days prior to the anniversary date.

In February 1980, Respondent applied for membership in CRCA and was admitted. Respondent made an initial dues payment on February 1, 1980, and continued to pay dues and remained a member in good standing of CRCA until April 1982.[2]

The Union thereafter negotiated another supplemental agreement with CRCA that was effective June 1, 1981, and extended through May 31, 1982, and from year to year thereafter unless timely notice of change is given at least 90 days prior to the anniversary date. At this point, Respondent was included as an employer member of CRCA. The Association listed Respondent as a member in a list sent to the Union prior to the commencement of negotiations. CRCA routinely sends letters to its members notifying them that it intends to negotiate with certain unions for them unless a member gives timely notice of its desire to withdraw. CRCA sent such a letter to all its members, including Respondent, on December 17, 1980. There is no evidence that Respondent elected to withdraw from multiemployer bargaining. Nor is there any evidence that Respondent sought to alter the 1980 supplemental agreement it signed with the Union that renewed itself by its terms each year.

In addition to filing monthly fringe benefit reports, Respondent signed and kept in force throughout the period from September 1977 to April 1982, except for brief lapses, a wage and fringe benefit bond. The first bond, which replaced a $5000 check deposited with the Union at the time of the execution of the August 23, 1977 agreement, was dated September 12, 1977. The bond acknowledged that Respondent was operating under a collective-bargaining agreement with the Union and had agreed to pay the wages and fringe benefit contributions for all union members "or other employees" working pursuant to the Union's bargaining agreement. If Respondent failed to do so, the American Druggist Insurance Company agreed to be liable for the amounts.

It is conceded that Respondent did not fully report to the union trust funds all the hours of all the employees who worked for it. It is also conceded that Respondent did not pay the contractual wage rate to its employees. It is also conceded that Respondent did not require all its employees to become union members, but instead paid for the cards of some union members and distributed them to different employees who were not union members.

It is further conceded that, at all material times, Respondent paid its employees with paychecks either from the American Thoro-Clean account or the Unico account, depending on which company had available funds at the time.

As early as July 12, 1978, the Union, through one of its representatives, John Martini, learned that Respondent was not paying the contractual wage rate and that some of its employees were not union members. Apparently, as a result of this or other reports of noncompliance, the Union filed a grievance against Respondent and, on September 8, 1978, the Joint Adjustment Board,

[2] In April 1982 after the hearing in this case opened, Respondent withdrew from CRCA and also withdrew recognition from the Union. The issues that may be presented by these actions are not the subject of this case because the complaint was not amended to address such issues. To the extent such conduct could be thought to limit Respondent's liability in this case, the matter may be considered in compliance proceedings.

convened under the standard working agreement, considered the grievance that alleged that Respondent had not paid wages or fringe benefits in accordance with the contract and had not deducted union dues for its employees and forwarded them to the Union as required by the contract. The Union apparently caused an investigation and an audit to be made to ascertain Respondent's compliance with the contract that by this time had been renewed in August 1978.

On September 6, 1978, Respondent, in a letter written by Brian Flanagan to a trust fund auditor or official, addressed the dispute. Flanagan listed several categories of employees and stated his position about whether they were covered under the agreement of the parties. The first was a list of employees taken from Respondent's September 30, 1977 quarterly tax report that he alleged were "employed by our firm prior to the executions of our binding agreement with the union" and thus were exempt from dues and payments. The second category of employees included those who allegedly worked on maintenance of the machinery and thus exempt from coverage. The third group allegedly worked outside the jurisdiction and the fourth included employees listed as union members and which, according to Flanagan, were covered under the agreement.

The dispute over compliance continued in 1979 because, on February 20, 1979, Flanagan sent another letter to trust fund officials.[3] He repeated the arguments set forth in his September 6, 1978 letter, although the named employees were different in some respects from those listed in the earlier letter. He also added a new category of employees that he asserted were exempt from coverage because they worked less than 7 days, an apparent reference to the union-security provisions of the applicable agreement. The letter apparently dealt with the same timeframe as the earlier letter, namely, the period immediately following the execution of the August 23, 1977 agreement.[4]

[3] Union officials also serve as union trustees to the trust funds and therefore communications with the trust funds undoubtedly came to the attention of the Union.

[4] Respondent objected to the admissibility into evidence of the Flanagan letters on the grounds that they were addressed to trust fund officials who were not parties to these proceedings and because they were sent in the course of settlement discussions. I reaffirm the admissibility of these letters. First of all, the letters were introduced after Respondent had introduced into evidence a September 1979 letter from a union official to its attorney advising him to file a breach of contract suit against Respondent. Secondly, the Flanagan letters revealed an inconsistency with his testimony that suggested a very limited bargaining relationship with the Union. Third, although it appears that a lawsuit was filed as a result of the contractual dispute between the Union and Respondent, Flanagan was unable to specify when it was filed. The record contains no elaboration on this point. Fourth, the letters themselves do not amount to an offer of compromise. They state Respondent's position concerning the employment of certain categories of employees at different times and in different circumstances. They thus set forth specific facts. Accordingly, I do not believe that the letters are inadmissible as evidence of compromise or offers of compromise.

Rule 408 of the Federal Rules of Evidence supports my ruling. The rule excepts from its scope "evidence otherwise discoverable" and evidence relating to the credibility of a witness. Moreover, the advisory note accompanying the rule makes clear that "evidence of unqualified factual assertions is admissible." I perceive no policy considerations—and none have been cited to me in brief—that require the exclusion of these highly relevant letters, particularly in view of Flanagan's testimony in this case.

About September 25, 1979, Union Representative Martini checked another of Respondent's jobs and found two nonunion employees working on the job. They said they had been working for Respondent for about 2 weeks and that they were earning less than the contractual wage rate then in effect. Martini told them "this is the second or third time that I have caught you here with non-union people on the job" and he asked the employees to have a management official call the Union.

On September 26, Martini wrote a letter to the Union's attorney notifying him of the above job check. He named the two individuals working for Respondent by name, including David Majestic, and stated that they did not have union identification and that they had been working at less than the contract rate. He ended the letter by stating, "The Union received no calls concerning these two men. We wish to file a breach of contract against this firm. The firm has done this on many occasions."

In March 1980 one of the employees who was checked by Martini, David Majestic, was working at another jobsite when a union representative approached him and Supervisor Gary Carlson while they were repairing a vacuuming machine. He asked if Majestic had a union card and Carlson replied that Majestic was a company mechanic on a service call. Majestic actually performed vacuuming work and, after completing the repairs on the vacuuming machine, Majestic went back to his normal work duties. After Majestic returned to the office that night, Majestic was issued a union card with the name David Sobut on it and he was told by Carlson to carry it at all times and to show it to union officials who checked the jobsites. Sobut was a salesman for Respondent and was not performing roofing work at this time.

The next day, Majestic was checked by union officials. He showed them Sobut's card. At this time, two of Respondent's employees were removed from the job because they did not have union cards. After the union representatives left, the two employees returned to work. Later the union representatives returned and the employees were again removed from the jobsite.

Majestic continued to be issued a union card under another person's name, either by Carlson or Brian Flanagan. He showed the cards to union officials who checked for them at various jobsites. Other employees were also issued cards by Carlson. Gary Carlson acknowledged that he gave Majestic and other employees the union cards of other individuals, including his own.

The minutes of a November 25, 1980 meeting of the Joint Adjustment Board reveal that the Union once again filed a grievance against Respondent for violation of the union-security and bonding provisions of the contract.

On July 16, 1981, shortly after he quit Respondent's employ, Majestic wrote a letter to the Union notifying it of Respondent's issuance to him of union cards of other employees. He also confirmed that he did not earn the contractual wage rate and stated that hours and wage rates were not written on his check stubs after October 1979. Thereafter, the Union continued to check Respondent's jobs and determined that nonunion employees

were carrying the fully paid union cards of other employees.

On August 4, 1981, the Union filed the unfair labor practice charge that spawned this case.

The complaint issued on September 15, 1981, and, on September 30, 1981, Respondent filed its original answer. The answer admitted certain allegations, including allegations that it was a member of CRCA and that CRCA was authorized to bargain on its behalf. The answer also admitted that since "at least on or about June 1, 1978 and at all times material herein, the Union has been the designated exclusive collective bargaining representative of the Respondent's employees" although it questioned whether its employees were included in the complaint's unit description.

On April 1, 1982, the first day of hearing in this case, Respondent appeared through a new counsel who moved to postpone the hearing in this case. I granted the motion. Respondent was also permitted, over the objections of the General Counsel, to file a new and amended answer that altered the earlier answer and denied the allegations set forth above that had been admitted. Respondent also denied other allegations that had previously been admitted and was permitted to interpose affirmative defenses not pleaded in the original answer.

At the hearing, Respondent's counsel also announced that Respondent was withdrawing from CRCA and notified the Union that it was terminating "the present agreement to the extent we may have one." Respondent apparently served CRCA with written notification that it was withdrawing from the Association. Minutes of a CRCA meeting dated April 15, 1982, show that CRCA viewed such notification, which was served on April 1, as tardy and determined that Respondent "fall[s] under the Agreement as signed."

B. *Discussion and Analysis*

1. The Union's status as bargaining representative

As shown in the factual statement, Respondent, at all times material, was party to collective-bargaining agreements with the Union. Respondent nevertheless argues that the Union did not have representative status and that, consequently, Respondent had no obligation to bargain. I reject these contentions.

It is well settled that "the existence of a prior contract, lawful on its face, raises a dual presumption of majority—a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract." *Barrington Plaza & Tragniew*, 185 NLRB 962, 963 (1970), enf. granted in part and denied in part 470 F.2d 669 (9th Cir. 1972). Moreover, a labor organization's continuing majority "may not be questioned during the term of a contract." Ibid. See also *Hexton Furniture Co.*, 111 NLRB 342 (1955).

In 1977, 1978, and 1980, Respondent signed agreements with the Union that contained valid union-security clauses. In June 1981 and thereafter, Respondent was bound by the agreement negotiated on its behalf by CRCA.[5]

Even if the CRCA agreements were not considered binding, Respondent was bound by the June 1980 agreement that had been renewed automatically for another year in June 1981 and would still have been operative at the time of the hearing. Respondent never sought to withdraw from the 1980 agreement. Nor at any time during the period from August 1977 until the commencement of the hearing in this case did Respondent seek to alter or terminate its existing collective-bargaining agreements with the Union or take the position that it was not bound by a collective-bargaining agreement. Indeed, quite the contrary is true. It continued to file fringe benefit reports and make fringe benefit payments and to carry a bond to guarantee such payments. It signed successive agreements and assumed, in its communications with the Union, that it had binding agreements with the Union.

Thus, under ordinary circumstances, Respondent would be precluded from asserting that it could, during the term of its agreements, question the Union's representative status.

Respondent seeks to avoid the effect of the 1978, 1980, and 1981 agreements by contending that the original August 23, 1977 contract was obtained through coercion and that it did not accurately reflect the agreement of the parties. These contentions are completely without merit.

First of all, the allegation that the original contract was secured by coercion is barred by the statute of limitations set forth in Section 10(b) of the Act. No unfair labor practice charge was filed at the time and Respondent is thus precluded from raising the issue at this late date. See *Pacific Intercom Co.*, 255 NLRB 184, 191 (1981), enf. granted 679 F.2d 900 (9th Cir. 1982). Nor does the record support such a finding in any event. Brian Flanagan testified that Union Representative Miller told him in August 1977 that Respondent was working on a union job and that if it did not sign an agreement, the Union would "picket us and other things." Miller denied making any such threat. I credit Miller who im-

[5] The overwhelming documentary and testimonial evidence supports this finding. As shown in the factual statement, Respondent became a member of CRCA whose bylaws made clear that it was bargaining on behalf of its members. CRCA sent letters to its members prior to the commencement of negotiations and gave them an opportunity to withdraw if they so desired. Respondent continued to pay CRCA dues and did not seek to withdraw from CRCA until the first day of the hearing in this case.

Flanagan's testimony to the effect that Respondent did not receive communications from CRCA and that he did not know that CRCA represented Respondent in negotiations is not only implausible but the product of an unreliable witness, as documented elsewhere in this decision. In addition, Flanagan's testimony is contradicted by the statement of his own attorney. Although I permitted Respondent to amend its answer after it engaged new counsel, the original answer filed by its counsel admits the allegation that it was a member of CRCA and that CRCA was authorized to bargain on its behalf. Thus, although it "cease[d] to be [a] conclusive judicial admission," the Respondent's original answer "still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible, like any other extra-judicial admission made by a party or his agent." *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1084 (7th Cir. 1981), quoting from established authorities.

pressed me as a candid, reliable, and disinterested witness who had been retired from the Union's employ for some 4-1/2 years at the time he testified. Flanagan, on the other hand, seemed to me to be tailoring his testimony to conform to a litigation theory. His testimony contradicted in some respects prior statements and letters and he seemed less forthcoming when questioned by the General Counsel than when questioned by his own counsel. His vague reference to "other things" hardly demonstrates reliability. Moreover, it falls far short of a threat. Flanagan's reference to picketing is likewise ambiguous because a union is certainly entitled to picket a jobsite either to protest the presence of nonunion contractors or to seek recognition so long as an election petition is filed within 30 days. In short, Respondent's coercion argument is unavailing.

Respondent's other argument, also based on Flanagan's testimony, is that Miller agreed with Flanagan that Respondent need only employ "some" union members and it need only employ union members on so-called union jobs. Miller also denied this aspect of Flanagan's testimony. I find that Flanagan's testimony in this respect is likewise not credible. First of all, the common sense parole evidence rule makes such evidence unreliable in refuting a clearly worded written agreement. See *Precision Anodizing & Plating*, 244 NLRB 846, 857 (1979). In the instant case, Flanagan's alleged understanding of the bargain—with the vague reference to "some" union members—is contradicted by the written agreement he signed on August 23, 1977, as well as by all the other documents he signed shortly thereafter and indeed throughout the next 4-1/2 years, including successive agreements, bonds, letters, and fringe benefit reports. Moreover, as I have indicated, I found Miller to be a more reliable witness than Flanagan. Flanagan's testimony is not only implausible but rampant with inconsistencies. For example, Flanagan testified that he and Miller never discussed rates of pay or benefits for employees. Yet he handed over a $5000 check and later secured a bond to ensure the payment of wages and benefits under the agreement. Flanagan also testified that after August of 1977 he unilaterally decided which employees would be required to become union members under the alleged agreement that "some" were to become union members. Why, if, as Flanagan testified, Miller coerced him into signing a contract, would he orally give Flanagan a break and agree to alter a written agreement and indeed to give Flanagan carte blanche to decide who would become union members? Why would Miller insist on a bond and why would Flanagan obtain a bond which clearly recognized that Respondent was covered by a collective-bargaining agreement for "all employees?" Why, if Miller had agreed that only "some" employees should be union members, did Respondent conceal its use of nonmembers by having the cards of union members used by other individuals who were not union members? Why would Flanagan write a letter to the union trust funds in 1978 acknowledging that he executed a "binding agreement" in August 1977? And why would an intelligent businessman sign a contract and a surety bond which directly contradict his so-called understanding of his relationship with the Union and, indeed, sign another contract a year later? Flanagan's testimony in this respect is beyond belief.

Respondent also contends that the initial agreement of the parties and each of the successive agreements were prehire agreements under Section 8(f) of the Act. It thus seeks to avail itself of the doctrine that an employer may cancel an 8(f) agreement at will during its term unless the union has achieved majority status. See *Iron Workers Local 103 (Higdon Contracting)*, 216 NLRB 45 (1975), enf. denied 535 F.2d 87 (D.C. Cir. 1976), reversed 434 U.S. 335 (1978); and see *R. J. Smith Construction Co.*, 191 NLRB 693, 695 (1971), reversed and remanded sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973).

There is precedential support for the proposition that the above doctrine applies only to initial 8(f) agreements and does not apply where successive agreements have governed the relationship of the parties. See *Bricklayers Local 3 (Eastern Washington AGC)*, 162 NLRB 476, 478–479 (1966), enf. granted 405 F.2d 469 (9th Cir. 1968); *Williams Enterprises*, 212 NLRB 880, 885 (1974), enf. granted 519 F.2d 1401 (4th Cir. 1975).[6] The Board has never explicitly overruled *Bricklayers*, but it has repeatedly sidestepped the case and, in effect, overruled it sub silentio by requiring an inquiry into majority status even where successive agreements have defined a long-term bargaining relationship. See *Precision Striping*, 245 NLRB 169 (1979); *Construction Erectors*, 252 NLRB 319, 324 (1980); *Haberman Construction Co.*, 236 NLRB 79 fn. 1 (1978); and *Carmichael Construction Co.*, 258 NLRB 226 fn. 1 (1981). See also The General Counsel's 1979 Guidelines for Handling Section 8(f) Cases reported in the 1979 BNA Labor Relations Yearbook at pp. 355–358 when the then General Counsel took the position that *Bricklayers* is no longer Board law. An orderly development of the law and proper guidance to litigants and the public demands that the Board independently analyze the General Counsel's position and either explicitly overrule *Bricklayers* or explain its continued validity.[7]

---

[6] As the Board stated in the *Bricklayers* case:

> It is apparent from the foregoing that the bargaining between AGC and the Union presents the situation of a continuing bargaining relationship; a situation quite different from that which Congress had in mind when enacting Section 8(f)(1), to wit, an initial attempt by a union and an employer in the construction industry to commence such a relationship. Thus, the entire legislative history of Section 8(f)(1) is couched in terms of "prehire agreements," a reference which can have no meaning in the situation where, as here, the parties are continuing an existing bargaining relationship under which employees have previously been hired. Particularly is this so where, as in this case, the previous agreement contained a lawful union-security provision. Additionally, one of the most frequently cited portions of the legislative history of Section 8(f) reveals that the Congress envisioned its prehire provisions as applying only to the situation where the parties were attempting to establish a bargaining relationship for the first time.
>
> . . . .
>
> In the instant case, of course, Respondent Union had for many years been the recognized bargaining agent of the employees of the employers comprising AGC. We hold, therefore, that the tests to be applied in determining the fulfillment of the bargaining obligations of the parties herein are those generally used under Section 8(a)(5) and 8(b)(3) and, therefore, it is unnecessary to pass upon the scope of bargaining obligations under Section 8(f).

[7] In neither *R. J. Smith* nor in *Higdon* did the Board discuss the *Bricklayers* case, although in *R. J. Smith* the trial judge did so. Nor did the

Continued

An inquiry into majority status is extremely difficult when, as here, it deals with events that have occurred some years before the alleged refusal to bargain. Nevertheless, I read the authorities to require such an inquiry in this case despite the unbroken string of agreements between the parties.

Assuming that the initial agreement of the parties on August 23, 1977, was an 8(f) agreement,[8] the available evidence shows that the Union attained majority status shortly after the agreement was signed.[9]

Pursuant to the August 1977 agreement, Respondent filed a fringe benefit report for its employees in September 1977. All the employees listed were union members, according to Brian Flanagan. This report is the best available evidence of the size of the unit. Respondent failed to provide its payroll records for the several months after the execution of the August 23, 1977 agreement because, according to Respondent, those records were unavailable. Two other pieces of evidence—quarterly tax reports and letters of Respondent attempting to explain its liability for the fringe benefit and dues payments—are less reliable in and of themselves, but offer some support for the finding when considered together with other evidence. Flanagan's testimony that attempts to reconstruct the employee complement some 5 years before is likewise unreliable, although parts of it support rather than detract from a finding of majority status.

Respondent's employee fringe benefit report for September 1977, signed by Brian Flanagan, lists four employees: Mueller, Frohlich, Ferek, and Bleuthner (Bleuthner's name is misspelled on the report). All four of these employees were union members. Documentary evidence shows that Ferek, Frohlich, and Mueller signed union application cards in September and that Bleuthner made an initial dues payment on October 4, 1977. Flanagan testified that all employees he reported on the fringe benefit forms were union members.[10] Both the collective-bargaining agreement and the Respondent's bond make clear that fringe benefit payments are to be paid on behalf of all employees. The instructions on the reverse of the fringe benefit forms also provide that all hours of all foremen, apprentices, and journeymen should be reported. In these circumstances, it is reasonable to conclude that the fringe benefit report was an accurate reflection of the employee work force and that all these employees were union members.[11]

Flanagan testified that in August 1977, when he signed the agreement with the Union, he had a work force of six employees, including Mueller whom he identified as a supervisor. However, other testimony by Flanagan suggests that Respondent only had four employees at this time. Thus, Flanagan testified that Respondent operated two machines with two employees each until a third machine was acquired in the spring of 1978. This would be consistent with the number of employees listed on the September 1977 fringe benefit report.[12]

An analysis of the other available evidence reinforces rather than refutes the finding of majority status.

Respondent submitted as evidence quarterly tax reports for the third quarter and for the fourth quarter of 1977. Those reports list the names of all employees who worked for Respondent in each quarter and the wages earned by them. The reports list 10 employees who worked in the third quarter and 21 who worked in the fourth quarter. There is no indication, however, concerning when each employee was hired or when he left Respondent's employ. Many of these individuals worked only a short period during the quarter. There is thus no way to compute, from these reports, the permanent employee complement at the end of September or at the end of October, or, indeed, at any particular point in time. The evidence is thus inconclusive, in and of itself, on the issue of how many employees were in the unit from which to compute majority status.[13]

Also in evidence are two letters—one written in September 1978 and another in February 1979—where Respondent, through Brian Flanagan, attempted to explain the quarterly tax reports to officials of the Union and the fringe benefit trust funds. Respondent's third quarter tax report, dated September 30, 1977, lists 10 employees who worked for wages at some point during the quarter. In Flanagan's September 1978 letter, Respondent stated that a group of named employees, all whom were listed in the September 30, 1977 tax report, were employed "prior to the executions of our agreement with the union."

Supreme Court do so in its decision in *Higdon* that basically approved the Board's *R. J. Smith* rationale. However, it is not clear to me that either of these cases is inconsistent with *Bricklayers*. In both cases there was a significant hiatus between previous contracts and those under consideration as 8(f) contracts. There was thus no continuous bargaining relationship based on an unbroken string of agreements as in *Bricklayers* (see 191 NLRB 693 and 216 NLRB 45).

[8] Respondent is clearly an employer in the construction industry and the parties signed the agreement without regard to whether the Union had a preexisting majority.

[9] The appropriate unit in this case is that alleged in the complaint and set forth in the applicable standard working agreements and the supplemental agreement of the parties. Respondent conceded at the hearing, and does not dispute, that an appropriate unit consists of all Respondent's employees engaged in work related to its roof vacuuming operation except supervisors, guards, and office clerical employees.

[10] In light of this concession, Respondent's contention that these individuals were not union members because they did not complete the payment of their initiation fees is specious. In any event, majority support need not be based on a strict finding of union membership. See *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir. 1970), cert. denied 398 U.S. 929.

[11] Respondent also contends that payments to the trust fund could not properly have been made prior to Bleuthner's becoming a member of the Union and that Bleuthner did not become a member until October 4, 1977. This contention is unavailing. The agreement of the parties provides for trust fund payments for all employees. The date that Bleuthner signed a union application card is unclear in the record; the record reveals he signed a dues payment card on October 4. However, Flanagan's testimony is that he reported only union members on the fringe benefit reports. In any event, even if Bleuthner is not counted, the three remaining individuals on the September fringe benefit report, including Mueller, whom Flanagan described as a supervisor, were clearly union members. All had signed cards in September 1977.

[12] At still another point Flanagan testified that he had five or six employees at this time and brought two or three down to the union hall to sign application cards. The documents in evidence shows that at least three individuals signed cards in September.

[13] I also note that the quarterly tax reports were introduced into evidence through Flanagan and not the accountant who purportedly compiled them. Flanagan testified they were prepared from canceled payroll checks and a list of employees supplied to the accountant by Respondent. It appears that the documents were limited to those of American Thoro-Clean and did not include documents of Unico whose checks were also used to pay employees.

Indeed, of the 10 employees listed on the tax report, 8 were alleged in the letter to have been employed prior to the execution of the August 23, 1977 contract. Of these 10 employees, only Dan Frohlich and Andrew Mueller were admittedly employed after August 23, according to Flanagan's letter. Both were, of course, union members and both were listed on the September fringe benefit report.

In his testimony, Flanagan attempted to identify Respondent's employees as of August 23, 1977. He referred to Respondent's quarterly tax report and named six people: Larry Bitter, Dean Buhlos, Joe Bonass, Jeff Cunningham, Andrew Mueller, and Dan Frohlich. He also testified that two individuals who were listed as having worked in September 1977 on the employee fringe benefit report, signed by Flanagan and sent to the trust funds, were not in fact employed in September. These individuals were Ferek and Bleuthner, whose names appear on the September fringe benefit report but do not appear on the September 30, 1977 quarterly tax report.

Flanagan's testimony in this respect is no more reliable than other aspects of his testimony that I have already rejected. First of all, his specific identification of employees employed as of August 23, 1977, seems to be contradicted by a letter sent by him to union and trust fund officials in September 1978 that stated that Bitter, Buhlos, Bonass (misspelled as Bannis), and Cunningham were employed "prior to the executions of our binding agreement with the union." In the February 1979 letter, Flanagan suggested that proof of this statement could be established by comparing "our August payroll register and our year end pay register." None of these individuals were listed in the September 1977 fringe benefit report or in any of the other fringe benefit reports thereafter filed in 1977. It is thus reasonable to infer that these individuals were not employed in September 1977.

Regarding Flanagan's testimony that Bleuthner and Ferek were not employed in September, this contradicts the September fringe benefit form that Flanagan himself signed. There is no reason to give that report less weight than the quarterly tax report that fails to list these employees. Independent documentary evidence shows that Ferek signed a union application card on September 16, 1977,the same date that Mueller and Frohlich signed similar cards. It is thus likelythat Ferek was employed in September, as reflected in the fringe benefit report. It would be unlikely that he would have signed a union card before being employed. And because Ferek's name was mistakenly left off the quarterly tax report for September, it is conceivable that Bleuthner's name was similarly omitted from that report. The September 1977 fringe benefit report that lists both men as employees is more reliable than Flanagan's own testimony, of course, because, in September 1977, he had no interest in disputing the Union's representative status. Moreover, the fringe benefit report signed by Flanagan has a certain inherent reliability because it would be unlikely that an employer would deliberately, or even mistakenly, make payments on behalf of people who were not employed at the time payments were required to be made.

Finally, as indicated above, the contract of the parties contained a union-security clause that required employees to become union members within 7 days after the contract was signed or after they became employed. Although there is evidence in this record that Respondent circumvented employed individuals who were not union members and later circumvented this very union-security clause, it is unlikely that the clause was violated in September 1977, the month after the contract was signed. Of the 10 employees listed in the September 1977 quarterly tax report, 8 were admittedly employed prior to the execution of the August 23, 1977 agreement and the other two were clearly union members. Moreover, the four employees listed on the September 1977 fringe benefit report were union members. Thus, it appears that the union-security clause was complied with at least through September 1977 and this offers further support to the finding that the Union attained majority status. See *Custom Sheet Metal & Service Co.*, 243 NLRB 1102, 1108 (1979), enf. denied on other grounds 666 F.2d 454 (10th Cir. 1981).

In sum, although the absence of relevant payroll records and the passage of time renders certainty elusive, an analysis of the available evidence leads to a fair conclusion that the Union attained majority status shortly after the execution of the August 23, 1977 agreement.[14]

Because the Union had attained majority status shortly after the signing of the August 1977 agreement, Respondent's subsequent membership in and authorization of CRCA to bargain on its behalf on a multiemployer basis operates to merge that unit into the larger unit. Accordingly, Respondent may not question the Union's representative status during the term of the 1981 CRCA agreement. See *Authorized Air Conditioning Co.*, 236 NLRB 131 (1978), enf. granted 606 F.2d 899 (9th Cir. 1979), cert. denied 445 U.S. 950 (1980).[15]

---

[14] The Respondent also contends that the Union must demonstrate its majority on each jobsite rather than on a companywide basis. This contention is without merit. It is clear that there is a distinction between those employers who hire their employees on a project-by-project basis and those who do not. When the employer hires a permanent and stable work force to work on a multisite basis, a union seeking to convert an 8(f) agreement into a 9(a) bargaining relationship needs only to show it achieved majority status in that work force and the employer is obligated to recognize the union at all subsequent jobsites. In contrast, where an employer hires on a project-by-project basis, with little or no carryover from site to site, the union must demonstrate its majority status at each jobsite. See *Hageman Underground Construction*, 253 NLRB 60, 62 (1980).

Here, it is clear that Respondent does not hire on a project-by-project basis. Flanagan's testimony was that he hired employees for an indefinite period and employees remained from season to season. These employees generally went from site to site since many of Respondent's jobs lasted only 2 or 3 days. Indeed, some jobs had only two employees on them since the evidence shows that Respondent only had two vacuuming machines at this time, each with two employees assigned to it. Respondent's relationship and contracts with the Union also confirms that it did not consider itself a project-by-project employer. There is absolutely no evidence that Respondent hired only on a project by project basis. Because the record is clear on this point, there is no need to consider the turnover of employees, as Respondent suggests, to divine the nature of Respondent's operation or to determine whether Respondent hired on a project-by-project basis. Accordingly, *Corrugated Structures*, 252 NLRB 523 (1980), cited by Respondent, is distinguishable on its facts. In any event, the asserted turnover occurred after the Union attained majority status in September 1977.

[15] Thus, the appropriate unit after June 1981 is as follows:

All employees employed by the employer members of the Chicago Roofing Contractor's Association who are engaged in roofing work

Continued

2. The violation

It is undisputed that Respondent did not pay its employees the contractual rate set forth in the collective-bargaining agreement. It is also undisputed that Respondent failed to make fringe benefit payments for all hours worked for all its employees. The applicable agreements clearly show that such payments were required. Respondent's conduct constitutes a unilateral change of existing agreements and is violative of Section 8(a)(5) and (1) of the Act. See *Merryweather Optical Co.*, 240 NLRB 1213 (1979); *Pacific Intercom Co.*, 255 NLRB 184 (1981); and *Sun Harbor Manor*, 228 NLRB 945, 946 (1977).

Respondent also does not dispute that it supplied its nonunion employees with the union cards of other employees. By such conduct Respondent attempted to circumvent the union-security provisions of the applicable agreement and further violated Section 8(a)(5) and (1) of the Act.[16]

3. The 10(b) problem

The charge herein was filed on August 4, 1981. Thus, under ordinary circumstances, application of Section 10(b) of the Act would preclude an unfair labor practice finding prior to February 4, 1981, 6 months before the filing of the charge. From February until June 1981, Respondent was bound by its 1980 contract signed by John Flanagan, president of Respondent. From June 1, 1981, and thereafter Respondent was bound by the contract signed on its behalf by CRCA. To the extent that Respondent did not comply with these agreements by not paying contract rates and fringe benefit payments and by having nonunion employees work under the cards of other individuals, in violation of the union-security clause, Respondent unilaterally changed existing agreements and in effect repudiated them in violation of Section 8(a)(5) and (1) of the Act.

The General Counsel requests an unfair labor practice finding and a remedy for the period beyond February 4, 1981, to the date of the initial agreement on August 23, 1977. The basis of his request is that Respondent allegedly fraudulently concealed its contractual noncompliance from the Union and that the Union did not fully understand the depth of Respondent's noncompliance until July 1981 when employee Majestic notified it of the use of union cards by nonmembers.

The General Counsel's attempt to reach beyond the 10(b) period and indeed to reach the expired and superseded agreements of 1977 and 1978 would ordinarily not be permitted. However, the General Counsel correctly points out that Section 10(b) does not begin to run until the aggrieved party "knew or should have known that his statutory rights were violated," quoting from *Wisconsin River Valley District Council (Skippy Enterprises) v. NLRB*, 532 F.2d 47, 53 (7th Cir. 1976). The General Counsel is also correct in his reference to the principle that fraudulent concealment operates to toll the statute of limitations, citing *Pacific Intercom*, supra.

The above principles do not apply in the instant case. The Union knew as early as July 1978 that Respondent was not paying the contractual wage rate to employees. Moreover, the Union knew throughout the period from 1978 to 1980 that Respondent was not fully complying with the fringe benefit provisions of the contract of the parties. It caused audits to be undertaken and there was apparently an exchange of communications on the extent of Respondent's fringe benefit responsibilities. The September 26, 1979 letter of Business Representative Martini suggests the filing of a lawsuit. In addition, that letter clearly shows that the Union was on notice of Respondent's failure to live up to the union-security provisions of the applicable agreement. Indeed, in his letters of September 1978 and February 1979, Flanagan alerted the Union of his position that union dues were not payable for certain employees. In these circumstances, I conclude that the Union did indeed know or should have known of Respondent's noncompliance with the contract. The equitable estoppel principles referred to in *Pacific Intercom* thus do not apply here.

No such widespread knowledge of Respondent's noncompliance was present in *Pacific Intercom*. The General Counsel's evidence of alleged concealment herein is insufficient to excuse the Union from filing charges earlier if it wanted to seek a Board remedy for pre-February 4, 1981 unfair labor practices. It is true, as the General Counsel points out, that Respondent paid its employees wages both from its American Thoro-Clean account and from its Unico account. But there is no further evidence on this point from which it could be concluded that these dual payments were used to conceal Respondent's noncompliance with the wage or fringe benefit provisions of the contract. The General Counsel did seek to subpoena Unico's records but none were submitted into evidence. It is difficult, in any event, to see how employee paychecks from different companies could have concealed Respondent's noncompliance because the Union clearly knew and focused on Respondent's noncompliance with the wage and fringe benefit provisions of the contract.

Nor did Majestic's July 1981 letter concerning the misuse of union cards reveal anything that would excuse the filing of an earlier charge. In September 1979, after Business Representative Martini checked one of Respondent's jobs, he mentioned Majestic's name to the Union's attorney as one who did not have a union card and who was not being paid the contractual wage rate. According to Majestic's testimony, the day after the first job check, he used Sobut's card and withstood another union job check. The Union clearly knew Majestic by name but it made no effort to seek his union affiliation or cure his failure to join the Union. The Union surely

---

or work incidental thereto, as described in the Chicago Roofing Contractor's Association contract with the Union, excluding guards, supervisors and clerical employees.

[16] Respondent's contention that the Board should stay its hand and leave the parties to their contractual remedies is without merit. The allegations herein do not simply involve a difference in interpretation of contract. They go to the very heart of the bargaining relationship, and, if true, demonstrate a repudiation of that relationship, conduct which the Act proscribes. See *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enf. granted 505 F.2d 1302 (5th Cir. 1974). Thus, even though the Union may have a right to enforce its agreements in district court, the Board retains jurisdiction to enforce the bargaining obligations of the Act. See *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428–430 (1967); cf. *Smith v. Evening News Assn.*, 371 U.S. 195, 197 (1962).

cannot argue that it did not know Majestic was not Sobut. In any event, Majestic's letter did not deal with the wage rate and fringe benefit issues that had been in dispute continuously since 1978. Insofar as the letter referred to Respondent's noncompliance with the union-security provisions of the contract, the Union knew of this as well since 1978 and indeed knew of Majestic's failure to join the Union in September 1979.

In these circumstances, I find that the General Counsel may not reach beyond the 10(b) period and may not resuscitate expired or superseded agreements in order to litigate and remedy unfair labor practices that have lapsed. My findings and remedies will thus be limited to the period after February 4, 1981.

CONCLUSIONS OF LAW

1. By failing to make fringe benefit contributions for all its employees, by failing to pay contractual wage rates and by supplying nonunion employees with union cards of other employees since February 4, 1981, Respondent has unilaterally altered the terms of the collective-bargaining agreements in effect between it and the Union, in violation of Section 8(a)(5) and (1) of the Act.

2. The above violations are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(5) and (1) of the Act after February 4, 1981, I shall order Respondent to cease and desist therefrom and to take certain affirmative action that is designed to effectuate the policies of the Act. Respondent shall be ordered to comply with the terms of the agreements in effect on and after February 4, 1981, until such time as it has given timely notice of withdrawal from said agreements. Employees and the Union shall be made whole for the losses they have incurred as a result of Respondent's failure to abide by the terms of said agreements. See *Pacific Intercom Co.*, supra, 255 NLRB at 185 and fn. 6 at 184–185. Backpay is to be computed in a manner consistent with the Board's policy as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). Additionally, Respondent is required to make the appropriate trust funds whole for losses suffered as a result of Respondent's failure to adhere to the fringe benefit provisions of the agreements set forth above. See *Pacific Intercom*, supra, and *Pullman Building Co.*, 251 NLRB 1048 (1980).

[Recommended Order omitted from publication.]

American Thoro-Clean, Ltd. and Unico, Ltd. *and* United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, Local Union No. 11 of Chicago, Illinois, International Union of Roofers, Waterproofers and Allied Workers, AFL–CIO. Case 13–CA–22573

26 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 19 December 1983 Administrative Law Judge David S. Davidson issued the attached decision. The Respondent filed exceptions and a supporting brief and a motion that the Board consider a related case involving these same parties (Case 13–CA–21389) and the instant case, Case 13–CA–22573, together before the same Board panel. The General Counsel and the Charging Party each filed briefs in response to the Respondent's exceptions and each filed motions to strike certain portions of the Respodent's exceptions and brief. The General Counsel also filed a response in opposition to the Respondent's motion, and the Charging Party also filed a motion that the Board impose sanctions against the Respondent's counsel. The Respondent filed a response in opposition to the motions of the General Counsel and the Charging Party. The Charging Party filed a motion to strike the Respondent's response in opposition to the motions of the General Counsel and the Charging Party.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating its collective-bargaining agreement with, and withdrawing recognition from, the Union; failing to pay contractually required wages; and failing to make contractually required contributions to various fringe benefit funds.

I. FACTS

This case is a sequel to *American Thoro-Clean, Ltd.*, 283 NLRB 1107 issued today (*American Thoro-Clean I*), involving the instant parties. In *American Thoro-Clean I*, the Board applied its recent decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), and found that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating its 8(f) collective-bargaining agreement with the Union, by substantial noncompliance with that contract during its term. Some of the facts established in *American Thoro-Clean I* are material to the resolution of the instant case.

As found in *American Thoro-Clean I*, beginning in 1977 the Respondent and the Union entered into a series of collective-bargaining agreements permitted under Section 8(f) of the Act. In February 1980, the Respondent became a member of the Chicago Roofing Contractors' Association (CRCA), a multiemployer association which, inter alia, negotiated collective-bargaining agreements on behalf of its members. On 1 June 1981 the CRCA (of which the Respondent was then a member) and the Union entered into a collective-bargaining agreement for the period 1 June 1981 thru 31 May 1982. As found

[1] Inasmuch as the instant case is being considered by the same three-member panel that considered Case 13–CA–21389, we find it unnecessary to rule on the Respondent's motion.

Following the hearing, the Respondent attached a posthearing affidavit and three exhibits (two of them dated posthearing) to its brief to the administrative law judge. One of the exhibits had been ruled inadmissable at the hearing and placed in the rejected exhibits file. In fn. 3 of the attached decision, the judge granted the joint motion of the General Counsel and the Charging Party to strike these attachments from the Respondent's brief to the judge. The Respondent has attached the same affidavit and three exhibits to its brief to the Board in support of exceptions to the judge's decision. The General Counsel and the Charging Party have filed motions to strike these attachments from the Respondent's brief to the Board. We affirm the judge's ruling striking this posthearing affidavit and exhibits from the Respondent's brief to the judge, and we render that same ruling here: the motions of the General Counsel and the Charging Party to strike the attachments to the Respondent's brief in support of exceptions are granted. We note, in any event, that consideration of the stricken material would not have led us to a different result than that which we reach in this case.

The General Counsel and the Charging Party also filed motions to strike certain portions of the Respondent's exceptions and brief to the Board in support of exceptions. In this regard, the General Counsel and/or the Charging Party contend that the Respondent, in its exceptions and supporting brief, has improperly attempted to reopen argument on the issues addressed in earlier Case 13–CA–21389; improperly argued that the Charging Party acted unlawfully in filing the instant unfair labor practice charges against the Respondent; filed frivolous exceptions; failed to comply with the Board's procedural requirements for materiality, specificity, conciseness, and clarity of grounds for exceptions; and misstated or mischaracterized the judge's decision or record evidence. The motions to strike are denied; however, consideration of the challenged portions of the Respondent's exceptions and supporting brief has not affected the result we reach in this case.

The Charging Party has also moved the Board to impose sanctions against the Respondent's counsel for alleged procedural improprieties in his litigation of this case. More specifically, the Charging Party requests that the Respondent or its counsel be ordered to compensate the Charging Party for the assertedly excessive costs, expenses, and attorneys' fees incurred by the Charging Party as a result of the Respondent's allegedly dilatory, frivolous, and bad-faith tactics. Although we do not endorse all the litigation tactics employed by the Respondent's counsel, we nevertheless, do not find that these tactics reached the level of bad-faith litigation and willful abuse of judicial process to warrant imposition of such sanctions as requested by the Charging Party. See generally *Roadway Express v. Piper*, 447 U.S. 752 (1980). Accordingly, the Charging Party's motion for the imposition of sanctions is denied.

Finally, the Charging Party filed a motion to strike the Respondent's responses in opposition to the earlier motions of the General Counsel and the Charging Party. This motion is denied.

in *American Thoro-Clean I*, this, too, was an 8(f) agreement.

On 1 April 1982,[2] at the hearing in *American Thoro-Clean I*, the Respondent, through its attorney, stated its position that the successive collective-bargaining agreements between the Respondent and the Union were prehire agreements (i.e., permitted under Sec. 8(f) of the Act); that at no time since the inception of those agreements had the Union ever achieved the support of a majority of the employees in the unit; and that, therefore, in accordance with the Respondent's view of the law, the 1 June 1981 thru 31 May 1982 contract was voidable. The Respondent's attorney then gave oral notice to the Union that the Respondent intended to "cancel and terminate" its existing 1 June 1981 thru 31 May 1982 collective-bargaining agreement with the Union; withdraw recognition from the Union; and withdraw from membership in the CRCA.[3] The same day, 1 April, the Respondent gave written notification to the Union and to the CRCA that the Respondent was withdrawing its recognition of the former and its membership in the latter.

After 31 May the Respondent neither paid the wage rates required by the expired collective-bargaining agreement nor made contributions to the various fringe benefit funds, as specified in the expired contract. In July, the Respondent modified the employees' health insurance.

II. ANALYSIS AND CONCLUSION

As we found in *American Thoro-Clean I*, the 1 June 1981 thru 31 May 1982 contract in effect between the parties was a collective-bargaining agreement permitted under Section 8(f) of the Act. In *Deklewa*, supra, we held that although a collective-bargaining relationship permitted by Section 8(f) may not be unilaterally repudiated *during* its term, and may be enforced during its term under the provisions of Sections 8(a)(5) and 8(b)(3), such an 8(f) relationship may lawfully be unilaterally repudiated by either party upon the *expiration* of its term.[4] Thus, the Respondent's failure to pay contractual wages and to make contractually required contributions to fringe benefit funds since 1 June (i.e., following the 31 May expiration of the contract) and its modification of health insurance coverage in July are not unlawful under *Deklewa*.

However, the Respondent's 1 April repudiation of the collective-bargaining agreement and withdrawal of recognition of the Union were prior to the 31 May expiration of this 8(f) collective-bargaining agreement and were therefore in violation of Section 8(a)(5) and (1) of the Act.[5]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.[6]

ORDER

The National Labor Relations Board orders that the Respondent, American Thoro-Clean, Ltd. and Unico, Ltd., Mokena, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating its 1 June 1981 thru 31 May 1982 collective-bargaining agreement with the Union and withdrawing recognition of the Union as the exclusive collective-bargaining representative of the Respondent's employees covered by that agreement, during the term of that agreement, through 31 May 1982.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Mokena, Illinois office copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

---

[2] All subsequent dates are 1982 unless otherwise indicated.

[3] There is no allegation that the Respondent's notifications of intent to cancel the contract and withdraw from the CRCA were untimely.

[4] 282 NLRB at 1375, 1376, 1382.

[5] *John Deklewa & Sons*, supra.

[6] As part of our remedy for the Respondent's unfair labor practices in *American Thoro-Clean I*, we have ordered the Respondent to comply with the terms of its 1 June 1981 thru 31 May 1982 collective-bargaining agreement for the duration of its term and to make employees whole for any losses they may have suffered as a result of the Respondent's failure to comply with the agreement until it expired. Inasmuch as that is the same obligation that we would impose on the Respondent as a remedy for its 1 April repudiation of the contract and withdrawal of recognition in the instant case, we shall not require a make-whole remedy or compliance with the contract in this case.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by the Union, if willing, in conspicuous places where notices to employees and members are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from, or repudiate our collective-bargaining agreement with, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, Local Union No. 11 of Chicago, Illinois, International Union of Roofers, Waterproofers and Allied Workers, AFL–CIO, during the 1 June 1981 thru 31 May 1982 term of that agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

AMERICAN THORO-CLEAN, LTD. AND UNICO, LTD.

Melvyn Baran, Esq., for the General Counsel.
Gerard C. Smetana, Esq., of Chicago, Illinois, for the Respondent.
Margo R. Newman, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge. This case was tried in Chicago, Illinois, on May 16 and 17, 1983. The charge was filed by United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, Local Union No. 11, of Chicago Illinois, International Union of Roofers, Waterproofers and Allied Workers, AFL–CIO (Local 11) on September 22, 1982, and the complaint issued on November 4, 1982.[1] The only issue in this case is whether Respondent unlawfully withdrew recognition from the Union on April 1, 1982, and made unilateral changes in terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

American Thoro-Clean, Ltd. is engaged in the business of industrial vacuuming and cleaning of roofs. Respondent Unico, Ltd. is engaged in the business of leasing automobiles, trucks, and other goods. At all times material, American Thoro-Clean, Ltd. and Unico, Ltd. have been affiliated business enterprises with common officers, ownership, directors, management, and supervision. They have formulated and administered a common labor policy with respect to the employees of both operations, have shared common premises and facilities, have provided services for and made sales to each other, and have interchanged personnel with each other. American Thoro-Clean, Ltd. and Unico, Ltd. constitute a single-integrated business enterprise and a single- employer. They are referred to jointly as Respondent in this decision. They provide annual services valued in excess of $50,000 for other enterprises that are themselves engaged in interstate commerce and that meet Board jurisdictional standards. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I find further that Local 11 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

This case is a sequel to *American Thoro-Clean, Ltd.*, Case 13–CA–21389 decided by Administrative Law Judge Robert A. Giannasi on December 14, 1982, and presently pending before the Board on exceptions. The facts in that case can be briefly summarized. On August 23, 1977, Respondent and the Union entered into a col-

[1] This case was later consolidated with Case 13–CA–22666 but was severed from that case after it was settled.

[2] The General Counsel has filed a motion to correct the record. As the corrections requested appear to be warranted, the General Counsel's motion is granted.

[3] Respondent attached an affidavit and three exhibits to its posthearing brief. Counsel for the General Counsel filed a motion to strike these attachments that the Charging Party joined. Respondent filed a motion for leave to file opposition to the General Counsel's motion to strike and to file a reply brief, which the General Counsel opposes. For the reasons set forth by the General Counsel in his motion to strike, that motion is granted. To the extent that Respondent's reply brief states the basis for Respondent's opposition to the General Counsel's motion to strike, Respondent's reply brief has been considered. However, Respondent's motion for leave to file a reply brief is otherwise denied for the reasons set forth in the General Counsel's response in opposition. Although Respondent contends that a reply brief is in order because it appeared to Respondent during the trial that the General Counsel did not press his contention as to the appropriate remedy for the alleged unilateral discontinuation of dues payments by Respondent, the transcript shows that on the second day of the hearing counsel for the General Counsel clearly stated the same position that he took in his posthearing brief.

lective-bargaining agreement for a unit of all employees engaged in the application and installation of roofing material and all other work in connection with or incidental to that work. With one renewal that agreement continued in effect until May 31, 1980. In February 1980 Respondent became a member of the Chicago Roofing Contractors Association (CRCA), and from June 1, 1980, until May 31, 1982, Respondent's employees were part of the Association unit under agreement between CRCA and the Union.

Under the terms of the successive agreements in effect from August 23, 1977, through May 31, 1982, Respondent's employees were required to become members of Local 11 within 7 days after the beginning of their employment or the effective date of the agreement, and Respondent was obligated to pay wage rates specified in the agreement and to make payments on behalf of all bargaining unit employees to various union trust funds, including pension, welfare, and training funds.

As found by Judge Giannasi, during the period the contracts were in effect, Respondent did not fully report to the Local 11 trust funds all hours worked by all its employees nor did it pay the contractual wage rates to its employees. Furthermore, Respondent did not require all employees to become union members, but paid for union cards for some employees and supplied them to others than the employees whose names were on them so that they could show them to union agents when they worked on union jobs. In July 1978, Local 11 learned that Respondent was not paying contractual wage rates and that some of its employees were not union members. Local 11 filed a grievance against Respondent and caused an investigation and audit to be made to determine Respondent's compliance with the contract. On a few later occasions, union agents checked Respondent's jobsites and again discovered similar practices.

On August 4, 1981, Local 11 filed the charge in Case 13–CA–21389, and the complaint issued thereafter alleging that Respondent had unilaterally changed fringe benefit contributions, wage rates, and the union-security provisions of the agreements without bargaining. Respondent contended, among other things, that it was not obligated to bargain with Local 11 because the original August 23, 1977 contract was obtained through coercion, because it did not accurately reflect the agreement of the parties, and because all the agreements were prehire agreements under Section 8(f) of the Act that were therefore cancellable at will in the absence of evidence that Local 11 had achieved majority status.

Judge Giannasi rejected these contentions. Specifically, he found that Local 11 had obtained majority status shortly after the August 23, 1977 agreement was signed and that Respondent therefore was barred from questioning the Union's representative status during the term of the agreement between Local 11 and CRCA and from repudiating that contract. Accordingly, Judge Giannasi found that the undisputed failure of Respondent to pay its employees the contractual wage rates, to make fringe benefit payments for all hours worked by its employees, and to enforce the union-security provisions of the agreement were unilateral changes that violated Section 8(a)(5) and (1) of the Act.

As a remedy Judge Giannasi recommended that Respondent be ordered to bargain with the Union as the exclusive representative of its employees and to comply with the terms and conditions of the CRCA agreement, including the payment of back wages and other monetary obligations, retroactively to a date 6 months before the filing of the charge and prospectively until such time as Respondent gave proper and timely notice of its withdrawal from the CRCA agreement.

2. Respondent's withdrawal from Association bargaining

On April 1, 1982,[4] at the hearing in Case 13–CA–21389 Respondent's counsel orally gave notice to Local 11 that Respondent intended to withdraw from CRCA effective immediately and to cancel and terminate the CRCA agreement to the extent that Respondent might be bound by it. Respondent's counsel stated that Respondent "will bargain in good faith for a new agreement individually in the event the Union represents a majority in an appropriate unit." On the same day Respondent's counsel delivered a letter to Local 11 stating that he had been instructed to notify the Union that Respondent terminated any obligation it might have under the current collective-bargaining agreement and that it wished to bargain individually for a new collective-bargaining agreement "if your labor organization represents a majority of employees employed by American Thoro-Clean, Ltd., in an appropriate bargaining unit." At its conclusion, Respondent's counsel stated, "We will, under separate cover, within the next few weeks inform you of our suggestions for a proposed agreement and appropriate times when we may be able to meet."

On April 2 the Union answered Respondent by letter stating its position that the notice of withdrawal from the Association unit was untimely.

On May 19 Respondent's counsel wrote the Union to amplify its position. In his letter, he stated Respondent's position that the April 1 letter was a timely notice of termination of any contract to which Respondent might be bound, that the CRCA contract was not applicable to Respondent because Local 11 had never represented a majority of employees, and that in any event even if it should be determined that Local 11 represented a majority of its employees Respondent had given timely notice of termination of the existing contract. The letter stated further that Respondent "is prepared to negotiate directly with Roofers Local No. 11 for a new collective bargaining agreement for its employees for the period commencing June 1, 1982." However, it concluded: "Nothing in this letter should be taken as an admission by American Thoro-Clean, Ltd., that a majority of its employees in fact desire to be represented by Roofers Local No. 11 for purposes of bargaining. Prior to sitting down with Roofers Local No. 11 for contract negotiations, we trust you will be able to furnish us with proof of your majority status in an appropriate bargaining unit."

On May 19 Respondent also posted a notice to all employees that stated that on advice of counsel, Respondent

[4] All dates that follow were in 1982 unless otherwise indicated.

would no longer make any payments for dues or initiation fee installment payments to the Union without written authorization from each employee, that employees were free to make such payments directly to the Union without reimbursement by Respondent, and that if any employee desired Respondent to withhold money from their paychecks for the payment of dues or initiation fees the employee must furnish Respondent with written authorization to do so.

On May 23 Respondent received a letter from the Congress of Independent Unions (CIU) asking Respondent to recognize CIU as the bargaining agent of its employees,[5] and on June 17 CIU filed a representation petition in Case 13–RC–16033 seeking an election in the unit of "all employees employed by the employer at its facility located at Tenley Park, Illinois," with customary exclusions.

On June 24 Local 11 sent Respondent a one-line letter enclosing the newly negotiated agreement between Local 11 and CRCA describing it as "the contract to which you are bound until May 31, 1983."

On June 30 the Regional Director for Region 13 notified CIU that the pending 8(a)(5) charge in Case 13–CA–21389 precluded finding that a question concerning representation existed and that he was therefore dismissing the CIU petition subject to Petitioner's request to reinstate it if the unfair labor practice charge was later dismissed.

On July 12 CIU again wrote Respondent stating that it had in its possession applications for membership from a majority of Respondent's employees and renewing its request for recognition of CIU as the representative of Respondent's employees. At the end of the letter, CIU stated: "Due to the unfair labor practice charge filed in the National Labor Relations Board blocking the Company from recognizing CIU on projects in the jurisdiction of Roofers Union Local No. 11, we will expect to represent your employees working out of Local No. 11's jurisdiction."

On July 23 Respondent entered into an agreement with CIU for a 1-year term. Two or three weeks later a second agreement bearing the same date was executed and substituted for the initial agreement. Both agreements purported to apply to any area outside Local 11's jurisdiction. As renegotiated, the agreement provided hourly rates of pay of $9 for journeymen, $8 for semi-journeymen, and $7 for laborers. It also provided that crew leaders would be paid 50 cents per hour above the regular rate of pay and that an insurance plan would be provided employees.

On July 26 Respondent filed a request for review of the Regional Director's dismissal of the CIU representation petition.

On August 19 Respondent's counsel wrote the manager of the Local 11 trust funds stating its position that it was not bound by the June 1, 1982 agreement between Local 11 and CRCA and that it was unlawful for Respondent to contribute to the funds until the appeal in the representation case was resolved. On the same day, Respondent replied to Local 11's June 24 letter, reminding Local 11 that Respondent terminated any collective-bargaining agreement that it might have been bound and had offered "to negotiate with you for a new agreement in the event that you in fact represented a majority of the employees employed by American Thoro-Clean, Ltd." The letter continued, "You have not responded that you do, in fact, represent a majority of the employees of American Thoro-Clean, Ltd. If you, in fact, do so, please notify us by telegram and be prepared to present proof of current union authorization cards and dues check-off requests." The letter went on to state that as a result of the representation case pending before the Board Respondent had been confronted with a demand for recognition by CIU, that Respondent had been informed that CIU had authorization cards representing a majority of its employees, and that based on discussion with CIU, Respondent had entered into a collective-bargaining agreement for all its employees working in the jurisdiction not covered by the agreement between CRCA and Local 11.

On October 26 Local 11 filed a charge in Case 13–CA–22666 alleging that Respondent had violated Section 8(a)(1) and (2) of the Act by recognizing and entering into an agreement with CIU. In settlement of that case Respondent terminated its agreements with CIU.

On December 7 Respondent's counsel by letter offered to bargain with Local 11 individually for a new contract, stating, among other things:

> We hereby inform you that we no longer predicate such bargaining request upon your demonstrating to us that you represent a majority of the employees of American Thoro-Clean, Ltd., however, it is our position as a matter of law that such prior letters asking that you demonstrate majority do not constitute a violation of Section 8(a)(5) because at the time we were also confronted with a claim of majority representation from another labor organization. To make it clear, we are now unconditionally offering to bargain with you for a new collective bargaining agreement without the need of your demonstrating to us that you represent a majority of American Thoro-Clean, Ltd.'s employees.
>
> It is our position that, had you demonstrated majority to us previously, we could have sat down to negotiate an agreement with you which was a full collective bargaining agreement under Section 9(a) of the Labor Act. We are now prepared to sit down and negotiate a collective bargaing agreement without asking whether or not you represent a majority of the employees of American Thoro-Clean, Ltd., and we understand that such agreement can be negotiated and entered into even if you do not represent a majority of employees under Section 8(f) of the Labor Act.

The letter also stated that the NLRB Regional Office had decided that Respondent's withdrawal from CRCA was timely and therefore that the letter of June 24, 1982,

[5] After receiving this letter Respondent's manager, Brian Flanagan, held a meeting with some of Respondent's employees. It is unnecessary to resolve a dispute as to what he said at this meeting because the result is the same in any event.

from the Union enclosing a copy of the Association agreement was not applicable to Respondent.

On December 22 the Board affirmed the Regional Director's dismissal of the petition filed by CIU, concluding that no substantial issues had been raised that warranted reversal of the Regional Director's action.

In February 1983, Respondent and the Union entered into a new contract applicable to Respondent's employees that was to remain in effect until May 31, 1983.

Between April and August 1982, there were no other communications from Respondent to Local 11 concerning its intention to enter into agreement with the Union.

3. Changes in terms and conditions of employment after expiration of the CRCA agreement on May 31, 1982

From June 1, 1982, until Respondent and Local 11 reached agreement in February 1983, Respondent made no payments to the various union trust funds. During that period Respondent paid the wage rates provided in the CIU agreement to all employees for doing roofing work, whether they were working inside or outside the jurisdiction of Local 11.[6]

Before April 1, 1982, Respondent had provided some hospitalization insurance for some employees. After the CIU contracts were executed, restrictions on qualifications for insurance were eased, and insurance benefits became more available to employees.

Following execution of the CIU contracts, Respondents deducted money from the pay of employees for CIU dues and initiation fees, which it remitted to CIU. It did not require its employees to become or remain members of Local 11.

B. *Concluding Findings*

For purposes of this decision, I rely on the findings and conclusions of Judge Giannasi in Case 13–CA–21389 with respect to the unfair labor practice committed by Respondent before the issues in this case arose. To be sure, if his decision should be reversed in any substantial part, the underpinnings of this case may well disappear. However, whether affirmed or reversed by the Board or a court of appeals, the decision in that case will be res judicata as to the issues decided in it, and they are not subject to relitigation in this case. Thus, that decision establishes that Local 11 was the majority representative of Respondent's employees prior to April 1, 1982, that Respondent unilaterally changed the terms provided by the collective-bargaining agreements in effect between CRCA and the Union from February 4, 1981, through April 1, 1982, by failing to make fringe benefit contributions for all its employees, by failing to pay contractual wage rates, and by supplying nonunion employees with the union cards of other employees. Further premises are that these unilateral changes violated Section 8(a)(5) of the Act, and the appropriate remedy for these violations included an order requiring Respondent to bargain with Local 11 and to comply retroactively with the terms of the CRCA agreement.

It is undisputed that from April 1, 1982, until February 1983, Respondent did not bargain with Local 11. The initial question to be decided is whether Respondent had any obligation to do so.

On April 1, 1982, at the hearing in the earlier case, Respondent took two positions as to its future relationship with Local 11. First, it announced its withdrawal from multiemployer bargaining through CRCA and, second, it announced that it would bargain with Local 11 for a new agreement in the event Local 11 represented a majority in an appropriate unit.

Although Local 11 took the position in correspondence with Respondent thereafter and at the hearing in this case that Respondent's withdrawal from CRCA was untimely, the Regional Director agreed with Respondent's position that withdrawal was timely, and Local 11's effort to raise the issue at the hearing as an alternative theory to support the complaint was rejected as an attempt by the Charging Party to amend the complaint. Thus, the only question is whether Respondent had any obligation to bargain with Local 11 for an individual agreement.

The existence of the CRCA contract, which Judge Giannasi found had become a 9(a) agreement, established a presumption during the term of that agreement that the Union was the majority representative of Respondent's employees. Respondent's timely withdrawal from CRCA did not destroy the presumption. Rather, following its withdrawal the presumption continued that the Union represented a majority in a unit of Respondent's employees with the same composition as the CRCA contract unit. *Chicago Magnesium Castings*, 256 NLRB 668, 674 (1981).

On expiration of the CRCA agreement the presumption of the Union's continuing majority became rebuttable, and Respondent lawfully could withdraw recognition anticipatorily for purpose of negotiations for a new agreement "if and only if the employer can demonstrate that, on the date of withdrawal and in a context free of unfair labor practices, the union in fact had lost its majority, or respondent's withdrawal was predicated on a reasonable doubt based on objective considerations of the union's majority status." *Abbey Medical/Abbey Rents*, 264 NLRB 969 (1982).

Respondent asserts here that it had a good-faith doubt of the Union's continuing majority which it should have been allowed to establish as a defense to the General Counsel's contention that its bargaining obligation continued. The General Counsel and the Charging Party contend that Respondent's prior unfair labor practices provided the context that deprived Respondent of that defense.

Whether committed out of animus, ignorance, or simple economic self-interest, the unfair labor practices found by Judge Giannasi were of the kind that are inherently destructive of a collective-bargaining relationship. Respondent entered into a collective-bargaining agreement with the Union and then failed to live up to its terms by denying employees the benefits it had agreed

[6] Respondent had a single homogeneous group of employees who worked at all locations. It paid these employees at lower rates for time spent at yard work and driving to and from jobs. The rates paid by Respondent were not the rates provided in the expired CRCA agreement.

to. It not only failed to enforce the union-security provision, but used subterfuge to conceal its violation from the Union. The unilateral denial of contract benefits to employees "graphically portrayed to the employees that Respondent was in a position to confer or withdraw economic benefits without regard to the presence of the Union." *Guerdon Industries*, 218 NLRB 658, 661–662 (1975). Respondent's unilateral changes in terms and conditions of employment that had been established by agreement denied the Union its rightful status as bargaining representative of the employees and "necessarily tended to undermine the Union's authority among the employees, whose interest it was obligated to represent in such matters, with erosion of majority status the probable result." Id. at 662.

Respondent contends that in order for unfair labor practices to taint a doubt of a union's majority status, there must be a showing that the unfair labor practices caused the disaffection from the union or were designed to gain time to destroy the union's majority, citing *Celanese Corp. of America*, 95 NLRB 664, 673 (1951), and *Guerdon*, above. However, as *Guerdon* itself makes clear, the required proof is that the unfair labor practices were of "a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." Id. at 661. The unfair labor practices in this case meet the *Guerdon* test and were if anything more egregious than those in *Abbey Medical*, above. I find that because of the unfair labor practices found in the earlier case, Respondent could not lawfully rely on its alleged good-faith doubt of Local 11's majority to rebut the presumption of its continuing majority on expiration of the CRCA agreement. Therefore, I find that Local 11 continued as majority representative of Respondent's employees after June 1, 1982, and that Respondent was obligated to bargain with the Union as the representative of its employees.

The question remains whether there was a refusal to bargain by Respondent. Before April 1, Respondent was a member of CRCA with which Local 11 was about to begin bargaining for a new agreement. Before Local 11 had any opportunity to request bargaining on an individual basis, Respondent simultaneously announced its withdrawal from the Association and told Local 11 that it would bargain for a new agreement "in the event the Union represents a majority in an appropriate unit." Respondent took the position that the expiring agreement was an 8(f) agreement and that Local 11 had never represented a majority of its employees. Respondent reiterated its position in later letters, specifying in May 19 and August 19 letters that before negotiating, it expected to be furnished with proof of Local 11's majority. For its part, Local 11 responded on April 2, 1982, that it regarded Respondent's withdrawal from CRCA as untimely, and on June 24 it sent Respondent a copy of the new CRCA agreement asserting that Respondent was bound by it until May 31, 1983.

Although Local 11 did not request bargaining on an individual basis after April 1, Respondent's position made such a request futile. Respondent's refusal to recognize and bargain with Local 11 preceded any indication of Local 11's position and were independent of it. Thus, the initial refusal occurred before Local 11 had an opportunity to react to Respondent's withdrawal. After Local 11 took the position that the withdrawal from Association bargaining was untimely, Respondent's only condition to bargaining remained that Local 11 prove its majority, not that the Union must make a formal request to bargain separately for Respondent's employees. Indeed, on December 7, 1982, without any request from Local 11 to bargain on an individual basis, Respondent unconditionally offered to bargain with the Union on an individual basis, and bargaining began not long thereafter.

I conclude that Respondent's obligation to bargain with Local 11 continued at all times material and that Respondent was not relieved of its obligation because of the Union's failure to request bargaining on an individual basis because such a request would have been futile before Respondent's December 7 letter. *Richardson Chemical Co.*, 222 NLRB 5, 6 (1976); *Old Town Shoe Co.*, 91 NLRB 240 (1950).

The remaining issue in this case is whether Respondent made unilateral changes in terms and conditions of employment in violation of its bargaining obligation. The Order in Case 13–CA–21389 recommended by Judge Giannasi requires Respondent to abide by its agreement with CRCA effective until May 31, 1982, and to comply with its terms and conditions prospectively until Respondent gives timely and proper notice of withdrawal. Because such notice was given, that Order governs Respondent's obligations through May 31, 1982. Although the CRCA agreement terminated on May 31, 1982, Respondent had a continuing obligation to bargain with Local 11 and as part of that obligation Respondent was required to maintain in effect the terms and conditions of the expired contract until Local 11 was given an opportunity to bargain. *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970); *Peerless Roofing Co.*, 247 NLRB 500 (1980), enfd. 641 F.2d 734 (9th Cir. 1981).

From June 1, 1982, on, Respondent did not maintain in effect the wage rates required by the expired Association contract or make contributions to Local 11 trust funds. In addition, Respondent made additional unilateral changes in insurance benefits as a result of its agreement with CIU. By failing to maintain these terms and conditions of employment, in effect Respondent unilaterally altered them in violation of its bargaining obligation.[7]

There remains for consideration Respondent's discontinuation of its practice of paying Local 11 dues and initiation fees for some of its employees. The General Counsel contends that these payments were a unilateral benefit provided by Respondent above and beyond contract requirements that, once granted, Respondent was obligated to continue until it had bargained about its termination. In the General Counsel's view, these payments

[7] The agreement creating the Local 11 pension fund specifically provides that the obligation to contribute to the fund shall continue while collective-bargaining agreements are being negotiated. The welfare trust fund agreement is silent as to the obligation to make payments during negotiation. The absence of such a provision does not relieve Respondent of the obligation to continue making the payments pending negotiation of a new contract. *Hen House Market No. 3*, above, *Peerless Roofing Co.*, above.

simply constituted an additional form of remuneration to employees.

The difficulty with this position, of course, is that Respondent did not provide these payments to the employees as additional remuneration, but provided them directly to Local 11 for Respondent's own purposes. Section 302 of the Act provides, with very limited exceptions, that it is unlawful for an employer to pay money to any labor organization representing his employees. The exception for employee dues extends only to dues deducted from the wages of employees who have given the employer written authorization to make such deductions. Although one may argue that direct payment of dues is tantamount to additional remuneration where a contract exists containing both union-security and checkoff provisions, the fact is that Congress was particular in its requirements concerning the enforcement of such provisions. Paying union dues may be made a condition of employment, but it is left to the employese to decide whether to meet that condition and how to do it. An argument similar to that made by the General Counsel here has been made by employers defending against charges of unlawful assistance, with the General Counsel successfully arguing the opposite position. *Sweater Bee by Banff*, 197 NLRB 805 (1972); *Western Auto Assn. Store*, 143 NLRB 703 (1963). The cited cases make it likely than in an appropriate proceeding, the Board would enjoin the very practice that the General Counsel now asks the Board to find was unlawfully stopped. Although employees may have had an unexpected windfall as a result of Respondent's practice, I find that it would be contrary to the policies of the Act to find its termination unlawful. Accordingly, I find that Respondent did not violate the Act when it stopped paying union dues on behalf of some of its employees.[8]

III. THE REMEDY

Respondent contends that even if it violated its bargaining obligation, no remedial order is needed because the parties negotiated an agreement in February 1983 and, Respondent asserts, entered into a 3-year renewal agreement following the close of the hearing in this case. Respondent also contends that it should not be required to make employees whole for losses they suffered as a result of unilateral changes because absent Local 11's position that Respondent was bound by the CRCA agreement, the parties would have reached a separate agreement earlier. However, I have already found that Respondent's refusal to recognize Local 11 as majority representative of its employees without a new demonstration of its majority made futile any further demand for bargaining by Local 11, and when Respondent finally changed its position with respect to recognizing Local 11, bargaining on an individual basis soon followed. I find that Respondent must bear responsibility for the interference with the bargaining process because of its unilateral changes found in the prior case, its refusal to recognize Local 11 after its withdrawal from the Association, and its failure after the expiration of the CRCA agreement to maintain its terms and conditions of employment pending negotiations.

Accordingly, I shall recommend that Respondent be ordered to cease and desist from the unfair labor practices found in this case and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall be required to make its employees whole for any losses they may have suffered between June 1, 1982, and the effective date of the February 1983 agreement between Respondent and Local 11 as a result of Respondent's failure to pay them the wages required by the expired CRCA agreement. Backpay is to be computed in accord with the Board's decision in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). In addition, Respondent shall be required to make the appropriate trust funds whole for losses suffered as a result of Respondent's failure to make payments to them on behalf of its employees during the same period and for administrative costs, other expenses, and loss of interest incurred by them as a result of their acceptance of retroactive payments, as provided in *Clerks & Checkers Local 1593 (Caldwell Shipping Co.)*, 243 NLRB 8 (1979), enfd. 644 F.2d 408 (5th Cir. 1981).

On the basis of the above findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. American Thoro-Clean, Ltd. and Unico, Ltd. constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 11 is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees performing roofing work and work incidental thereto for Respondent, excluding all office clerical employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, Local 11 has been and continues to be the exclusive representative of the employees in the unit described in paragraph 3 for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize Local 11 as the exclusive bargaining representative of its employees on and after April 1, 1982, and by unilaterally failing to maintain in effect wages and insurance as required by an expired agreement and failing to make payments to fringe benefit funds without first bargaining with Local 11 following its expiration, the Respondent has violated Section 8(a)(5) and (1) of the Act.

[Recommended Order omitted from publication.]

[8] After June 1, 1982, there was no collective-bargaining agreement in effect covering Respondent's employees. Respondent had no obligation after that date to enforce the requirements of the expired contract as the union-security or checkoff provisions. *Bethlehem Steel Co.*, 133 NLRB 1347 (1961), 136 NLRB 1500 (1962), enf. denied 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

Bates Nitewear Company *and* Central North Carolina Joint Board, Affiliated with Amalgamated Clothing and Textile Workers Union. Cases 11-CA-11785-1, 11-CA-11785-2, and 11-CA-11800

26 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 13 August 1986 Administrative Law Judge Robert A. Gritta issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

We agree with the judge that the Respondent did not violate Section 8(a)(1) by unlawfully interrogating employee Wise on 29 August 1985.[4] Although the judge failed to make specific credibility findings with respect to this incident, we find that even crediting Wise's testimony that Supervisor Hinson asked her "what we thought about the Union," to which Wise replied that she knew nothing about it, Hinson's inquiry did not violate Section 8(a)(1). Hinson's single question was unfocused, unaccompanied by coercive statements and was asked on the workroom floor instead of the more coercive management office setting. Moreover, Hinson was merely a first-line supervisor with whom Wise admittedly got along well. In all these circumstances, we find that Hinson's question did not violate Section 8(a)(1). *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

We also agree with the judge that the Respondent did not violate Section 8(a)(1) when Supervisors Hinson and Seals and Vice President Thurman Johnson questioned Wise about the Union in October or November 1985. Thus, following Wise's discipline for verbal altercations with other employees, she initiated the conversations with Hinson and Seals, requested that the discussions not take place on the workroom floor, and volunteered the information that coworkers were harassing her about the Union. After Wise told the supervisors that she was concerned about her continued employment, she willingly agreed to Seals' suggestion that she discuss the matter with Thurman Johnson. Thereafter Johnson questioned Wise about the complaints she raised and asked her to identify the employees who were harassing her. Because this information was within the scope of that which Wise freely disclosed, and was the type of information Respondent logically would seek in any disciplinary matter, whether or not it related to the subject of unions, we find that Johnson's questions did not violate the Act. Accordingly, we dismiss this 8(a)(1) allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bates Nitewear Company, Greensboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(b), (c), and (d).

"(b) Instructing or encouraging employees to report any efforts exerted on them to join a union or to report to the Respondent the identity of union supporters.

"(c) Promulgating a no-distribution rule for the purpose of discouraging employees' lawful union activities.

"(d) Suspending or otherwise discriminating against its employees because they have joined, supported, or assisted a union, or have engaged in protected concerted activities."

---

[1] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also correct the following inadvertent errors of the judge: (1) In sec. III.A, par. 3, the sentence beginning "Pursuant to his authority on 6 June 1984" is corrected to read "Pursuant to his authority on 1 June 1984"; (2) in sec. III.A, par. 3, the sentence beginning "Ruth Ayers, as a roving inspector, worked in Jean Harris' department" is corrected to reflect that Ayers worked in Jean Horne's department.

These minor corrections do not affect our decision.

[2] We agree with the judge's finding that Respondent did not violate Sec. 8(a)(1) by more closely watching employee Carolyn Johnson at work following her return from an unlawful suspension. In so doing, we read the judge's decision as holding that, although Johnson perceived that Supervisors Seals and Hinson more closely watched her following her suspension, the evidence fails to establish that heightened surveillance occurred. Absent such evidence, we agree with the judge that this 8(a)(1) allegation should be dismissed.

In adopting the judge's finding that the Respondent's discipline of employees pursuant to its unlawful "Statement on Unionism" violated Sec. 8(a)(3), we also rely on *Republic Aviation*, 324 U.S. 793, 805 (1945).

[3] We have modified pars. 1(b), (c), and (d) of the judge's recommended Order to more closely reflect the violations found.

[4] Member Cracraft, noting that the administrative law judge failed to resolve the credibility conflict as to the statement allegedly made by Supervisor Hinson to employee Wise, would not pass on the 8(a)(1) allegation regarding the 29 August 1985 conversation between Hinson and Wise.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with plant closure or loss of jobs because they want to assist the Union.

WE WILL NOT instruct or encourage employees to report any efforts exerted on them to join a union or to report to us the identity of union supporters.

WE WILL NOT promulgate a no-distribution rule for the purpose of discouraging employees' lawful union activities.

WE WILL NOT suspend or otherwise discriminate against employees because they have joined, supported, or assisted a union, or have engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Ruth Ayers, Carolyn Johnson, and Gladys Lambert whole for any loss of earnings and other benefits resulting from our discrimination, less any net interim earnings, plus interest.

WE WILL notify Ruth Ayers, Carolyn Johnson, and Gladys Lambert that we have removed from our files any reference to their suspensions and that the suspensions will not be used against them in any way.

BATES NITEWEAR COMPANY

Janet H. Branch, Esq., for the General Counsel.
Robert A. Pearlman, Esq., of Greensboro, North Carolina, for the Respondent.
Jonathan R. Harkavy, Esq., of Greensboro, North Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on 13 and 14 January 1986 in Greensboro, North Carolina, based on charges filed by Central North Carolina Joint Board, affiliated with Amalgamated Clothing and Textile Workers Union (the Union) on 12 and 30 September 1985, and a consolidated complaint issued by the Regional Director for Region of the National Labor Relations Board on 5 November 1985.[1] The complaints allege that Bates Nitewear Company (Bates or Respondent) violated Section 8(a)(1) and (3) of the Act by unlawful threats, interrogations, surveillance, imposition of new work rules and suspensions of its employees. Respondent's timely answer denied the commission of any unfair labor practices.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. A brief was submitted by the General Counsel on 10 March 1986. The brief was duly considered.

On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and on substantative, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaints allege, Respondent admits, and I find that Bates Nitewear Company is a North Carolina corporation engaged in the manufacturing of nightwear in Greensboro, North Carolina. Jurisdiction is not in issue. In the past 12 months Bates Nitewear Company, in the course and conduct of its business operations, purchased and received at its Greensboro facility goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina and shipped products from its Greensboro facility valued in excess of $50,000 to points located outside the State of North Carolina. I conclude and find that Bates Nitewear Company is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaints allege, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Bates operates several plants in North Carolina including the Bessemer Avenue plant in Greensboro, the only facility involved herein. The Bessemer plant houses offices of Robert Thurman Johnson, the vice president of manufacturing, manufacturing staff offices, the trim warehouse, the sewing and stitching department, and

[1] All dates are in 1985 unless otherwise specified.

two sewing rooms. The trim warehouse is supervised by Ron Gilbert. The sew and stitch department is supervised by Darryl Seals. One sewing room is supervised by Henry Bowman, the other by Mike McCray.

On 29 August the Union began an organizational drive to represent the plant employees. The first effort was a union leaflet distributed to employees as they left work in the afternoon. A second leaflet was distributed to employees on 5 September. This distribution was followed by the first organizational meeting of employees that evening. Union authorization cards were distributed at the meeting. Extra cards were given to employees attending the meeting for distribution to other employees. Gerald Lambert was the lead union supporter throughout the campaign.[2]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *R. Thurman Johnson*

R. Thurman Johnson testified that, as vice president of manufacturing, he is responsible for five plant operations. Johnson became aware of the union activity the first day the Union distributed leaflets to employees at Bessemer. Since the first distributions, the Union has handbilled employees just about every week. He has seen employees and union representatives distributing the leaflets.

Johnson stated that the sewing rooms are noisy and normal conversations must be conducted within 2 feet in order to hear.

Although the immediate supervisors are responsible to maintain order in their respective departments, Johnson has the final authority on all discipline and company policies. Pursuant to his authority on 6 June 1984, he had a "Statement on Unionism" posted on the bulletin board. The posting followed his acquisition of the statement at a trade show and an incident involving a recalcitrant employee who, during a verbal altercation on the plant floor, stated that the employees needed a union. The poster embodied Johnson's feelings concerning unions and after the incident he had copies made and posted in several of the plants, including Bessemer Avenue. With the advent of the Union's campaign in August 1985, Johnson had additional copies of the statement made and posted in the Bessemer Avenue plant because the union activity among employees was on the increase.

In early September, May Richardson went to Johnson's office and reported that she was being harassed at her work station by Ruth Ayers. Evelyn Overman also complained to Johnson that she was being bothered at her machine and harassed by Ayers. Overman stated that Ayers kept talking to her about the Union and wanted to know if there was anything that could be done to get her to stop. Olga Pepper also made a complaint to Johnson, but he could not remember which employee was the subject of the complaint. Johnson said there were other employees who made complaints but he could not remember who they were. He made no written record of the complaints or the specifics of the complaints. Johnson's reasons for making only mental notes was to preserve the confidentiality of the complaints.

Based on the complaints he had received, Johnson suspended Carolyn Johnson and Ruth Ayers on Friday, 6 September. Ayers was suspended early in the day and Johnson at the end of her shift at 4 p.m. Johnson called Ayers to his office and she was accompanied by Supervisor Mike McCray. Johnson did not solicit Ayers' version of the events nor allow her to tell her side of the story. He told Ayers that it had been reported to him that she was bothering people at their work stations concerning the Union and interfering with their work. Johnson told Ayers that she would be suspended for 3 days without pay. Ayers responded, "Okay," and Johnson implemented the discipline. Carolyn Johnson was suspended for taking up production time of employees and trying to force her opinion about the Union on other employees. Johnson did not ask for the employees' versions of the events nor did he allow them to give their versions. Johnson suspended Carolyn Johnson for 3 days and she responded by shrugging her shoulders and saying "Okay."

The suspensions of Ayers and Carolyn Johnson were pursuant to the "Statement on Unionism" that was posted in the plant despite the fact that the statement had not previously been enforced. The reason Johnson enforced the statement at this time was that "the Company will not allow some things. People have a right to be left alone and perform their jobs. These people are paid by production, and interference with their work takes money out of their pockets." If employees were harassed about Tupperware and half a dozen people complained about the harassment, Johnson would suspend the employees bothering people at their work station. Without regard for the posted "Statement on Unionism," there is no policy that proscribes solicitations by employees or supervisors during working hours in the plant for products such as Avon, Tupperware, peanuts, popcorn, PTA, or tickets for musical bands. Johnson himself has engaged in such retail solicitations among employees. Johnson would not consider such solicitations as interference with production or employees' worktime. Employees would be allowed up to 15 minutes to peruse catalogs or in some fashion to develop a sale among coworkers. Only if Johnson thought the selling approached harassment would he put a stop to it and consider discipline.

On 26 September, Supervisor McCray reported to Johnson that Geslia Garner, a sewing room supervisor, had disciplined Daisy, a roving inspector, for spending too much time at each machine. Daisy was talking to the operators rather than inspecting the product. Garner went to Daisy who was in the vicinity of Gladys Lambert and told Daisy, "You need to spend more time working and less time talking." Lambert, who was not involved, turned to Garner and asked, "What are you telling her that for." Whereupon Garner reported the incident to McCray. Both McCray and Johnson considered Lambert's conduct insubordination. Johnson called Lambert to his office and, without affording Lambert any chance to explain, suspended her that day. Johnson

[2] These facts are gleaned from uncontroverted testimony of several witnesses.

stated that with insubordination there is no discussion. Gladys Lambert is the spouse of Gerald Lambert.

The following day Johnson posted a memorandum prohibiting distribution of written materials in working areas of the plant. The posting was prompted by a rumor that the prounion employees intended to handbill employees inside the plant rather than outside as in the past. Johnson had observed Gerald Lambert, Helen May, and Judy Cayton distributing union literature outside the plant so he had additional copies of the memorandum printed and instructed his supervisors to personally give the memorandum to Lambert, May, and Cayton.

B. *Helen May*

Helen May testified that she has been a sewing machine operator for 8 years. May presently works in the sewing room supervised by Henry Bowman and Hilda Keiser. In late September while she was working, May overheard a conversation between Supervisor Keiser and the adjoining operator, Linda Cisson. Keiser told Cisson that if the Union got in, the plant would close down and the employees would have to look for other jobs. Sometime later Keiser came to May's work station with a clipboard containing the 27 September memorandum. Keiser gave the memo to May to read. After reading the memo, May asked Keiser what that had to do with her. Keiser replied that she was told that May had been passing out literature in the parking lot. May denied passing out literature and Keiser said, "Well, I told Henry that I didn't think you had." Later Keiser came to May's machine and said that the operators supervised by Ella Faison were the ones causing the trouble. Keiser said she did not think that her operators wanted the Union. Keiser told May that if the Union got in the plant would close down and that she was going to see if she could find another job. May did not reply and Keiser walked away.

During November, May had a telephone conversation with her sister, Jean Horne, a supervisor in the other sewing room. Horne told May that an operator had accused her of assigning the better production work to employees that were prounion and giving the nonunion employees work that was not productive of incentive pay. Horne reported the incident to McCray and he told her that she did not have to put up with that from the employees. The subject employee was not disciplined for having questioned the judgment of her supervisor, Horne.

C. *Judy Cayton*

Judy Cayton testified she worked in the trim department under the supervision of McCray and Horne for 2 years. Cayton read the memorandum prohibiting distribution of written materials when it was posted. Later she went to McCray for permission to use the phone and before he responded to her request, he held up the memorandum before her and told her she needed to read it to stay out of trouble. Later Cayton, joined by Deborah Turner, went to McCray. Cayton asked McCray if the working areas included the canteen, bathrooms, and parking lots. McCray told Cayton she knew what it meant and Cayton asked if it meant parking areas. McCray replied that was what it meant. Cayton was one of the employees who handbilled for the Union in the parking lot. She continued handbilling in the parking lot after her conversation with McCray without incident.

D. *Ruth Ayers*

Ruth Ayers testified she has worked 12 years at Bates and presently is a roving inspector under Supervisors McCray and Joe Minette. She first became aware of the union campaign when the employees were handbilled as they left work. May Robbins rode with her and they both got a leaflet as the organizers approached Ayers' car. Ayers immediately read the opening statement on the leaflet that said, "You need a union." Ayers explained aloud, "Good Lord, yes, we need a union." She then turned and saw Thurman Johnson standing 2 feet behind her. Ayers got in her car and read the rest of the leaflet. Johnson was policing the parking lot to keep the handbillers from encroaching on company property.

The following week a second leaflet was distributed and Ayers again got a leaflet. After receiving the leaflets she spoke with her coworkers in the lunchroom before work. Several employees told Ayers they wanted no part of a union. That same evening at lunchbreak she spoke with other employees about the Union. She and the employees discussed the propriety of going to the union meeting scheduled for that evening. The next day, Friday, 6 September, Ayers discussed the Union with Linda Robbins, a sewer, about 11 a.m. Robbins was sewing and Ayers was inspecting her work. Robbins brought up subject of the Union. Ayers asked Robbins if she was trying to get her to talk union so Robbins could go tell Thurman. Robbins said, "Ruth, I wouldn't do that." Robbins, "added if you all don't vote the union in, you're crazy." Ayers asked her if she would and Robbins said, "Yes." Robbins then asked Ayers if she would and Ayers responded, "yes." Ayers then moved to the next machine to inspect. The conversation with Robbins consumed 2 to 3 minutes and took place while Ayers inspected the work. Ayers' shift ended that Friday at noon.

At no time during the union campaign did Ayers distribute or solicit employee signatures on union cards. She did not possess any union cards at any time. Ayers attended the union meeting that evening and signed an authorization card for the Union. The following Monday, Ayers reported for work. At 7:15 a.m., McCray summoned Ayers to report to Johnson's office. In McCray's presence Johnson told Ayers she was suspended for 3 days for soliciting for the Union. Ayers was shocked at the suspension and said nothing. She just got up and walked out. This suspension was the first discipline Ayers had ever received. Ayers denied that she conversed about the Union with May Richardson, Evelyn Overman, or Olga Pepper during working hours. None of the three ladies work in Ayers' department nor has Ayers worked in their departments within the last year.

E. *Deborah Turner*

Deborah Turner testified she has worked at Bates for 2 years and works beside Judy Cayton. Turner was

asked by Cayton to accompany her to McCray's office for a clarification of the 27 September memo on distribution of written materials in the plant. Turner accompanied Cayton to McCray. Cayton asked McCray does the memo mean the canteen, the bathroom, and the parking lot. McCray said she knew what it meant. Cayton asked again and received the same reply from McCray. Cayton asked a third time and McCray replied, "That's what it means." The conversation then ended.

F. *Carolyn Johnson*

Carolyn Johnson testified that she has been employed for 3 years and works as a recutter under supervisors Darryl Seals and Clara Hinson. Carolyn first became aware of the union campaign on 30 August when she reported for work. Several employees in the cafeteria before work asked her if she had gotten the union leaflet the day before. She had not seen the handbilling when she left work. At this time, she and the other employees discussed the Union. The next Tuesday at lunchtime in the cafeteria Carolyn joined her usual group and during lunch they again discussed the Union. On Thursday, as she was leaving after her shift, Carolyn Johnson did receive a union leaflet. She was seen by Thurman Johnson and Bill Hemphill getting the leaflet. In the cafeteria the following morning before work, Carolyn had a discussion about the Union with her coworkers. She was asked why she had not gone to the union meeting the night before. Carolyn explained that her car was not running so she had no way to go. Sue Wise, one of the employees, told Carolyn she had a union card for her and would give it to her later. When the employees met in the cafeteria on break, Sue said that she had the union card at her work table. Carolyn followed Sue to the work table, got the card, signed it, and returned it to Sue. Sue also gave Carolyn some additional cards that Carolyn put in her purse under her table. Although she had the extra cards, Carolyn did not solicit any employees to sign. She later threw the cards into her trash at home.

With the exception of the several union conversations in the cafeteria, Carolyn did not discuss the Union with other employees in the plant. That afternoon Hinson summoned Carolyn to Seals' office who in turn took her to Johnson's office. Johnson told Carolyn he was giving her oral notice of a 3-day suspension for soliciting for the Union on company time and company property. Carolyn said she did not understand and asked Johnson to explain the situation to her. Johnson said he did not have to explain anything to her and told her to leave his office. Carolyn said, "Fine," and left Johnson's office and returned to work. Seals then came to her and informed her she had to leave the plant right away and escorted Carolyn from the plant. Monday, the next workday, Carolyn called Seals at the plant. She asked for a written explanation of her suspension. Seals said he would talk to Thurman Johnson and told Carolyn to call him back. The next day Carolyn called Seals and he told her that Thurman said the suspension was oral and could not be put in writing. Seals then asked Carolyn if she would be reporting for work on Thursday. She said she would and the conversation ended.

When Carolyn returned to work, she was consciously aware that Seals and Hinson were watching her. Carolyn stated that it was obvious after her suspension compared with the conduct of Seals and Hinson before her suspension. Seals and/or Hinson would frequently appear behind Carolyn and stay in that position. Whenever Carolyn's eyes met those of Seals or Hinson, the supervisors would turn away. This situation lasted for a period of 2 weeks after Carolyn returned from her suspension.

Carolyn could not recall any past incidents when either Seals or Hinson had to verbally reprimand her for being out of her own work area or being in a work area where she did not belong. With the exception of an aborted no-talking rule of which the supervisors tried to impose departmentwide, Carolyn could not remember being reprimanded for talking to coworkers at her table.

G. *Gladys Lambert*

Gladys Lambert testified that she has worked at Bates for 1-1/2 years. She sews shoulders and is supervised by Geslia Garner and Mike McCray. Lambert was present when the first union leaflets were passed out. She joined the Union and passed out union leaflets and cards both inside the plant and in the parking lot. Inside the plant she distributed the union cards and leaflets in the cafeteria or restroom during her breaktime. She did this about a week before her suspension. Outside the plant she distributed union cards and leaflets for about an hour after her shift. Both Thurman Johnson and Mike McCray had observed her distributing the union handouts in the parking lot about 2 weeks before her suspension.

On 25 September about 2:40 p.m. Lambert was talking to Daisy Howe who was inspecting the work of the sewer behind Lambert. The two were talking about Pennsylvania, their home State. Lambert noticed that Garner and McCray were watching she and Daisy. Howe spent about 5 minutes inspecting the work and the two talked that period of time. As Howe moved to the next machine behind Lambert, Garner came to her and talked to her. After Garner left, Lambert asked Howe what Garner had said. Howe told Lambert that Garner told her to do a little more work and less talking. Lambert then got up from her machine and went to Garner. Lambert asked Garner why Howe could not talk to her when they both were doing their work. Garner replied that it was not just her, Howe had to stop talking to everyone. Lambert said, "Okay" and went back to work. The incident was not mentioned by Lambert or Garner again.

The next day Lambert noticed that Garner was watching her more closely than before. About midmorning Garner asked Lambert to accompany her to Thurman Johnson's office. Bill Hemphill and Mike McCray were also present. Johnson told Lambert that she was suspended for 3 days for insubordination to her supervisor. Lambert asked Johnson if she could tell her husband and give him his lunch before she left. Johnson said, "she could not." Lambert asked for her timesheet and was given a photocopy of the sheet. McCray then escorted Lambert out of the plant. Lambert went to the union hall and called her husband at the plant telling him she would

meet him outside at lunchtime. Lambert did meet her husband at lunchtime and, while both were on the outside steps to the plant, Thurman Johnson and Mike McCray appeared and told Lambert she was suspended and would have to get off company property. Lambert's suspension of 26 September was the first discipline she had received during her employment.

H. *Brenda Reed*

Brenda Reed testified that she has worked at Bates for 5 years. Her mother, Helen May, and aunt, Jean Horne, also work at Bates. Reed became aware of the union activity at the plant when the Union distributed literature to employees. In mid-October, Reed was working at her machine and her supervisor, Hilda Keiser, spoke to her. Keiser asked Reed if she had found another job. Reed asked why. Keiser replied, "Because if the union got in, they would close the doors." Reed did not respond and Keiser said nothing more.

I. *Daisy Howe*

Daisy Howe testified that she has been a quality control inspector at Bates since September 1985. She is supervised by Geslia Garner and Mike McCray. Howe recalled a conversation with Gladys Lambert in late September while she was inspecting the work of the sewer behind Lambert. The two talked about Pennsylvania and the family both still have there. The conversation lasted between 5 and 10 minutes. During the conversation, Howe noticed first Garner watching her and Lambert then McCray joined Garner and both watched the two talk. After Howe finished inspecting, Garner came to her and told her to do less talking and more work. Howe told Gladys what Garner had said to her. Howe went about her work and did not see what Gladys did next. The following morning Howe told Lambert that Garner and McCray probably thought the two were talking union the day before. Garner had never admonished Howe for talking while inspecting before, however, Lambert was a more active union supporter than other employees. Lambert's union activity was known to management because they saw her distributing union cards to employees.

J. *Carla Susan Wise*

Carla Susan Wise testified that she has worked at Bates for 2 years under Supervisors Clara Hinson and Darryl Seals. Wise learned of the union campaign when handbilling of employees began. Less than a month later and following a company meeting in the cafeteria, Wise was working when Hinson came to the work area and asked the employees what they felt about the Union. Wise replied that she did not know anything about it. Sometime later, a group of employees were discussing the Union on the plant floor. Wise was in the group and felt the thrust from both prounion and antiunion employees. During the discussion, Hinson's name came up. Hinson overheard her name used and asked Wise how her name came into the discussion. Hinson and Wise had difficulty hearing each other so Hinson suggested that Wise call her on the phone. Wise did so and told Hinson that her name came up in the discussion because of her relation to Thurman Johnson. Shortly thereafter, Wise was walking through the plant and heard Seals talking to two bundle boys. Seals told the two bundle boys that if the Union got in, the plant would be closed. Wise later asked one of the bundle boys what Seals had said. He told Wise that Seals said that if the Union came in the plant would close.

Wise became troubled with her involvement in the union discussions and spoke to Hinson and Seals. She told them she did not want to quit nor did she want to be fired, and something had to be done about her problem. Without recalling how she got there she ended up in Thurman Johnson's office. Johnson asked her what the problem was and Wise said she was getting it from both sides. Thurman Johnson asked Wise if Carolyn Johnson was the employee harassing her. Several employees were mad because they thought she was giving their names to the Union. Wise told Johnson that it all started with a paper given her by the union representative. Johnson asked to see the paper and Wise retrieved the paper from her car and gave it to Johnson. The paper was the General Counsel's complaint. Johnson asked Wise for the names of any employees causing her trouble and Wise named Bertha Winstead and Jaynell Moore.

K. *Gerald Lambert*

Gerald Lambert testified that he had worked at Bates as a bundle boy under supervisor Jonell Minette and Mike McCray until the month of October. Lambert became active in the Union following the first union handout in the parking lot. He attended all the meetings, handbilled employees in the parking lot, distributed union authorization cards to employees, and engaged in discussions about the Union with employees. Three or 4 weeks after the first union distribution, Lambert and his wife Gladys passed out union authorization cards to employees in the parking lot. Several employees signed the cards on the spot and returned them to Lambert. While he and Gladys were distributing the cards, Thurman Johnson and Mike McCray came outside to observe them.

As a bundle boy, it was Lambert's job to pick up garments and move them from one department to another. He also distributed rework items mong several departments. On all occasions, his pickups and deliveries were made directly to the machine operators. Lambert was never told he could not talk to the operators while working, in fact, McCray told him to do whatever it took to keep the girls happy. Lambert stated that each time he was at a work station he engaged in conversation with the operator for 1 to 5 minutes. On only one occasion in September after the union campaign started, while he was talking to an operator in Garner's department, she came over to him and told him to move on out of her department. Lambert was not actually making a pickup or a delivery but was only passing through. That was the only time Lambert was told by a supervisor to leave any department.

When the distribution memo was about to be posted in the plant, Lambert was approached by McCray. Lambert testified:

> Q. Mr. Lambert, I will show you what has been marked and received into evidence as General Counsel's Exhibit No. 2. Have you ever seen that document,General Counsel's Exhibit 2 before?
>
> A. Yes, I have.
>
> Q. Would you tell the Court how this document, General Counsel's Two, first came to your attention?
>
> A. Yes, I was working in the side closing department and Mike McCray and JoNell Minette came up to me. Mike had it in his hand and said, "Gerry, read this and it'll save you some trouble later on."
>
> He held it up in front of me. I wanted to reach it and hold it in my hand and he wouldn't let me take it. So, I read it. He said, "Did you read it?" I said yes, and he proceeded to put it up on the bulletin board.

L. *Geslia Garner*

Geslia Garner testified that she has been a supervisor 15 years and supervises Daisy Howe, Gladys Lambert, and, until recently, Ruth Ayers. On 24 September Garner was watching Howe as she inspected the operators' work. Howe was doing too much talking to the operators. On several occasions she stayed at an operator's machine for 30 minutes. The usual time to spend inspecting each operator is about 10 minutes.

The following day Howe was still talking so Garner reported it to McCray and told him to watch it for himself. After lunch that day, Garner observed Howe continuing to talk excessively and reported it to McCray. He told Garner to tell Howe to do more work and less talking. Garner continued to watch Howe and, after the afternoon break, Howe was standing behind Gladys Lambert's machine for 30 minutes. Garner went to Howe and told her she had to do a little bit more work and a little less talking. Howe said, "Okay," and Garner went back to her desk. Within a short while Gladys Lambert came to Garner and asked, "Why did you tell Daisy not to talk to me?" in a harsh and loud voice. Garner replied that she had not told Howe not to talk to Lambert. She just told her she had a job to do and could not do that much talking. As Garner was responding to Lambert, she was returning to her work station walking in an angry way. Lambert just turned away real quick and walked out.

Garner reported the incident with Lambert to McCray who decided to suspend Lambert. Garner did not recommend suspension, although the incident with Lambert was the first time an employee questioned Garner's decision about anything. Garner stated then she was offended by Lambert's conduct. Operators have in the past become upset over something and raised their voices to Garner and she immediately took them to McCray. He would tell the employees that it should not happen again and that ended it. No employee before has been suspended for becoming upset and raising their voice to Garner.

Garner recalled the incident when she asked Gerald Lambert to leave her section. Lambert was standing and talking to one of the machine operators. After he had been there for a few minutes, Garner went to him and asked him to leave her section. Lambert was not a bundle boy for Garner's section.

M. *David Michael McCray*

David Michael McCray testified that he is a departmental supervisor and has several section supervisors who report to him. Among those reporting to him are Geslia Garner, JoNell Minette, and Jean Horne. McCray previously worked for Blue Bell and while there learned a technique known as delay study to evaluate employees' performances. Simply put, the technique involves observation of certain employees at different times of the workday from different vantage points. McCray used this technique to observe Daisy Howe on 25 September after Garner had reported Howe's excessive talking. McCray observed that Howe was talking to operators rather than inspecting the work. McCray stated even though Howe picked up garments in her hands, she was not looking at them, but did go through the motions of turning the garments over in her hands. McCray later told Garner to instruct Howe to do a little more work and a little less talking. Garner did so and that afternoon reported to McCray that Lambert had come to her desk and asked, in a rather upset fashion, why Howe could not talk to Lambert. McCray asked Garner what answer she gave to Lambert. Garner said she told Lambert it was not just her, that Howe was to limit her talking to everybody. McCray said Garner was upset that Lambert had questioned a decision not directly related to Lambert but to another employee. McCray told Garner he would take it up with Thurman Johnson the next morning. McCray did go to Johnson and in spite of the fact that Lambert was a good employee with a good work history, he recommended Lambert be suspended for insubordination. Johnson told McCray to summon Lambert to the office, which he did, and Johnson suspended her, a notation of "suspension" was placed in Lambert's personnel file.

McCray received the distribution memo of 27 September to take to the production floor. He sought out Judy Cayton. McCray held the notice up in front of her and said, "Judy, I would like for you to read this. I think it would help keep you out of trouble." Cayton looked at it, shook her head, and walked off. McCray had seen Cayton handbilling in the parking lot but only heard that she would handbill inside the plant. McCray also heard that handbilling had actually taken place inside the plant and stated that the distribution memo was shown to the employees that we knew were involved in handbilling.

Later Cayton asked McCray what the notice meant. McCray told her she knew what it meant. Cayton asked, "Does that mean cafeteria, bathrooms, and parking lot?" McCray replied, "No ma'am. In all areas in which work is done." McCray then walked off. McCray stated the roving inspector worked in all departments with the exception of Daisy Howe who was hired for the one department. Ruth Ayers, as a roving inspector, worked in

Jean Harris' department where Evelyn Overman and Olga Peppers worked.

McCray acknowledged that in the past when employees became upset, disrespectful, or raised their voices to Garner or other supervisors, he would discuss the situation with the employee and admonish them not to let it happen again. Previously only one employee had been disciplined for insubordination and that employee was terminated for refusing to do any assigned task. McCray reported the incident to Johnson who told him to do what he had to do. McCray then told the employee to perform the task and although the employee started the task he did not finish it. McCray then terminated him. McCray was aware of the circumstance couched in a rumor that Jean Horne was favoring prounion employees over antiunion employees by assigning the best work to the prounion employees. Olga Peppers had questioned Horne about the favoritism and Horne reported the incident to McCray. McCray treated Peppers' objections as a question and explained the procedure he had outlined for the department's production to Peppers. He did not discipline or reprimand Peppers for questioning her supervisor's job assignments. McCray stated, "Because it was placed as a question, I answered it as a question." An additional employee, Edward Smith, was disregarding Garner's instructions on delivery of bundles to be worked and was delivering bundles in the area with the expressed desires of the operators. Garner reported the incident to McCray and he simply told Smith that he should do what his supervisor tells him to do and not what the operators ask him to do otherwise he would get into trouble.

N. *Hilda Keiser*

Hilda Keiser testified that she supervises Helen May, Carol Reed, and Linda Cisson. Keiser denied that she had a conversation involving the Union with Reed or May. She further denied that May could have overheard a union conversation between Cisson and herself because May wears earplugs and listens to the radio all day like most of the other employees. Keiser did acknowledge that May, who normally sits six machines away from Cisson, was sitting directly across from Cisson because May's machine was broken and off the line. Reed and May have both worked for Keiser for 4 or 5 years. In September or October, Keiser did talk to May about the pay and benefits available at the Colosseum and May told her that Reed was going to apply. Keiser laughed and said she thought she might go too since they are paying that much. Keiser was then prompted to talk to Reed about the Colosseum employment. Keiser did admit to a conversation with Reed about applying for work at the Colosseum, but states that the conversation was limited to an inquiry whether Reed was going to apply for work with no mention of the Union. Keiser offered no suggestions to Reed in the conversation.

Keiser received a copy of the 27 September distribution memo from her boss, Henry Bowman. Bowman instructed Keiser to give it to Helen May because he had been told that May was distributing union literature in the parking lot and was going to start distribution inside the plant. Keiser, as instructed, presented the memo to May and told her what Bowman had said. May denied any distribution and asked, "Who told you that?" Keiser said she did not know who but it was one of Ella Faison's girls.

Keiser had seen Judy Cayton with union literature in the parking lot and reported it to Thurman Johnson several weeks after the union campaign was underway. Keiser had also received a handbill from a union organizer who was distributing them in the parking lot.

O. *Clara Hinson*

Clara Hinson testified that she has been a supervisor for 5 years. Carolyn Johnson and Sue Wise work in Hinson's department. Hinson had never disciplined Carolyn for talking, although she had told bundle boys and some operators to leave Carolyn's table. Carolyn's worktable is in the center of the department and she does recutting for any operator that needs the product recut. Hinson was not aware of any harassment in her department nor was she aware that Carolyn was soliciting for the Union. Hinson daily roams through the department checking the work of all the operators. Hinson did not know Carolyn was suspended until after it happened. Darryl Seals told Hinson that Carolyn had been suspended for 3 days for soliciting for the Union. Hinson has never suspended any employee, and Carolyn is the first employee to be suspended in her department. Carolyn has been a reliable employee and has not caused any problems.

Hinson recalled that she has had about four or five conversations with Sue Wise. The first conversation occurred the morning after the first union handbilling in the parking lot. Sue asked Hinson how she felt about the Union. Hinson replied, "Well, in my opinion, it's trash. I'm for Bates Nitewear, myself." That was all that was said. Hinson denied that she asked Wise how she felt about the Union. The second conversation occurred after the second union meeting about mid-September. Wise started the conversation by telling Hinson she had something to tell her but people were watching. Hinson suggested to Wise that the next time she goes to the bathroom to call her on the phone. Wise called Hinson on the phone. She told Hinson that she would not believe the things being said about her at the union hall. Hinson asked, "What things?" Wise said, "People are saying that because Hinson is Thurman Johnson's mother-in-law that she has no business being in management." Wise added that Hinson needed to watch herself because people were watching her. Hinson responded, "So what?" and the conversation ended.

Hinson testified about another conversation with Wise that same day:

> A. I think it was the same day she called me on the phone she told me that I wouldn't believe what one of the union men was trying to get her to do. I said, "What's he trying to get you to do?"
>
> She said, "Oh, well—," I said, "Well, what is it, Sue?" She said, he was trying to get her to get him some drugs. I said, "Well, did you?" She said no.
>
> She said that they was trying to get her to sign a paper saying that she would testify on Carolyn's

behalf and she didn't want to do it, and that herand her mother had already seeked a lawyer.

Q. Was there anything else said in that conversation?

A. Then, a couple of days later, I asked her, I said, "Has your friend called you any more?" And she said, "Oh, yes. He calls quite often."

She said that she had got a letter and some things that she needed to memorize to say when they had the hearing and that she didn't want to do it.

She also asked me if I could get her out of having to come up here and appear at the hearing.

Q. Any other conversations that you had?

A. Well, she had been into two run in's out on the floor. One was her and some girls had got into it over some work out there, which we had to call to the office.

. . . .

Q. When you were calling Sue into the office, what was going on that you had to call her into the office?

A. Well, her and this other girl had got into it over the work or something and there was some cussin' going on out on the floor, I mean, it was out there.

Q. Did you hear her doing this?

A. Yes.

Q. Did she say anything ugly to you?

A. She did not.

Q. Did she raise her voice to you?

A. No, she didn't.

Q. You took her and the other girl into the office?

A. Yes, I did.

Q. Who was the other girl?

A. Bonita Winstead.

Q. Who did the talking to them?

A. Darryl Seals.

Q. Did Darryl tell them that it had better not happen again?

A. Yes, ma'am.

Q. Then, he sent them back to work?

A. Yes, ma'am.

Q. He told them that he was not going to put up with hollering and cussing out on the floor?

A. Right.

Q. He told them that he didn't do like that and he wasn't going to put up with them doing like that. Isn't that right?

A. He just said that he wasn't going to put up with it, out on the floor.

. . . .

Q. (by Mr. Pearlman) Were you involved in any other discussions Mr. Seals had with Ms. Wise?

A. Yes, I did. At one time, Sue and the bundle boy got into it. I heard it. They were discussing it, and I went to Darryl and told him that Sue and Roy Smith had got into it out on the floor, so he told me to go get them and bring them to the office, which I did. And, Sue was upset because she said that some of the union people was harassing her.

Q. Who did she tell that to?

A. To me, and Darryl.

. . . .

Q. They were taken to the office?

A. Yes, ma'am. We took them to the office.

. . . .

Q. Did she cuss and holler that time?

A. They were having words.

Q. Did you hear the words they were having? Was she cussing?

A. Yes, ma'am.

Q. Was he cussing?

A. Yes, ma'am.

. . . .

Q. You described a conversation where Sue said the union people were harassing her. Is that right?

A. That's what she said.

Q. When did that happen?

A. It was whenever there was a hearing coming up. I don't know whether it was to this one or another hearing they had.

Q. Do you remember the circumstances of Sue complaining to you that people were harassing her? Where were you when she did that?

A. At her machine.

Q. What were you doing at her machine?

A. I check, I browse through the room all day long, checking the work.

Q. How did it come up that Sue was being harassed?

A. Well, she just told me.

Q. What did she say?

A. She just told me that a lot of people was—that she had been called up to the union hall, and I believe she said Bethel Winstead and Jaynell Moore was up there and they was wanting her to sign a paper saying that she would testify on Carolyn's behalf.

Q. You said she said she could not tell you who was harassing her. Isn't that your testimony?

A. Well, that one time, she told me that, but this was at another time.

Q. Well, let's go back to the time she told you she couldn't tell you who it was.

A. Well, she didn't want to tell me, but she did.

Q. So, we are talking about one conversation where she said that people were harassing her. She did not want to tell you, but then she did?

Q. Did you ask her who was giving her a hard time?

A. Yes, I did.

Q. Is that when she told you who it was?

A. Yes, she did.

Q. But, she did not want to tell you at first? But, you asked her to go ahead and tell you?

A. I asked her, I said, Well, who is it?

Q. How long ago has that been?

A. Oh, I imagine about three or four weeks ago.

Q. For what purpose did you want to know who was harassing her?

A. I just wanted to know who was harassing her because I didn't know nothing about harassing nobody.

Q. To your knowledge, there was no harassing going on?

A. I didn't know nothing about it, no.

Q. As far as you know, there was not any harassing going on. Nobody was harassing anyone else out there?

A. That's right.

. . . .

Q. You were not aware of any problems that Carolyn was causing prior to being suspended, were you?

A. No, I wasn't aware of any.

. . . .

Q. Who told you that she had been suspended?

A. Darryl Seals.

Q. What did Darryl tell you?

A. He told me that she had been suspended for three days.

Q. For what?

A. For soliciting for the union.

Q. You were not aware of that, were you?

A. No, I wasn't aware of it.

. . . .

Q. Is there a great deal of foul language used out on the floor?

A. No, just once in a while. There might be an outburst.

Q. Do people sometimes use cuss words in their conversations out on the floor to your knowledge?

A. I'm sure, sometimes.

Q. Most people do it, don't they?

A. Yes.

Q. You have done it, have you not?

A. Haven't you?

Q. You have to answer my questions.

A. Yes, I've done it before, yes.

Hinson denied that she began watching Carolyn when she returned to work from her suspension. Hinson did not know that union solicitation had occurred and she was not curious as to how she could have missed it occurring.

P. *Darryl Seals*

Darryl Seals testified that he supervises Clara Hinson's department. Seals stated that Carolyn Johnson had been disciplined several times for talking too much. He has told Hinson to discipline Carolyn for talking and Hinson has also done so on her own. This discipline occurred in late September. Seals has also told employees Bertha Winstead, Bonita Winstead, Sue Wise, and Frank Price to leave Carolyn's work station and get back to their own station. Seals did not know that Carolyn was going to be suspended. Thurman Johnson called him and told him to bring Carolyn up to the office. Thurman Johnson told Carolyn she was being suspended for 3 days for bothering people about the Union at their work station on the job. He did not say anything else. Carolyn said she did not understand and Thurman said that was all he had to say. Thurman told her to get out of his office and she turned around and left. After Carolyn left the office, Thurman Johnson and Seals discussed the suspension, but Seals denied that he was told to keep an eye on Carolyn when she returned to work.

Seals testified to several conversations with Sue wise as follows:

Q. Have you ever had any conversations with Sue Wise?

A. Yes, sir

Q. How many did you have?

A. Three that I can recall.

Q. Can you tell us about them, starting with the first one, and where was it?

A. The first conversation, I went to her department. Upon entering, I heard an outburst. I heard cussing. I saw arms up in the air. It was coming from her machine.

Q. Who?

A. Her machine, Sue wise and Bonita Winstead. I at that time, told the supervisor, Clara, to bring them to my office.

Q. What did you say?

A. I told Sue and Bonita both, that cussing, abusive language at the work stations would not be tolerated. They both agreed and they left, went back to work.

Q. Was there any mention of the union during that one?

A. No.

Q. What about the second discussion you had?

A. The second discussion was brought about by a complaint from Clara to me that Sue and Roy Smith, one of the bundle boys, had had an argument and created an outburst and obstruction in the work place.

At that time, I told Clara to bring them to my office. The problem at hand was that Roy supposedly told Sue to put her pictures on the buggy.

Sue told him that that was his job and she didn't have to do that. In an effort to clarify things, I told both of them what their jobs were and that creating an outburst in the work place would not be tolerated. Shortly after that, about 20 minutes went by and Sue asked to speak with me in private, so I said, "Okay, fine." She came to my office. She said that she was afraid that her job was in jeopardy because of the union.

She said that she was being harassed by employees. She was getting phone calls from the union representative and she had a lot of people against her, and she did not want to lose her job over that.

Q. Did she say what the phone calls were about?

A. She said that there was a union representative that called her numerous times at home, wanted to take her out and buy her a drink, and wanted her to buy him drugs and that he called her while she was not at home and talked to her mother and bothered her mother, and that her and her mother both, were going to seek counseling from an attorney. They

were tired and they didn't want to be bothered any more.

Q. Did you say anything to that?

A. I suggested to Sue that we sit down and talk to Thurman Johnson. She agreed. At that time, Thurman was out of town. I told her that I would speak to Thurman the next morning and we all three would sit down and talk about the problem, and of course, we did that.

Q. You had a meeting the following morning.

A. Yes, there was.

Q. Who was there?

A. Thurman, Sue Wise and myself.

Q. To the best of your recollection, tell us what happened in the meeting.

A. I tried to leave the talking up to Sue, but she was speechless. I told Thurman that Sue had come to me the previous day and that she was concerned about losing her job. I told him exactly what she had told me.

Q. What did you tell him?

A. I told him that she had a union representative following her, wanting her to buy drugs, wanting to take her out and buy her a drink, trying to get her to testify on Carolyn's behalf. I also told him that she had been counseled twice for discipline problems, that she was very simply scared of losing her job. Thurman, then, asked her if this was correct and she said yes. She reiterated basically, what I had said about a union representative calling her numerous times at home.

She ventured on to say that she had been harassed by employees in the plant and Thurman told her that that would not be tolerated. She was looking for some type of relief, either from me or Thurman or someone.

Q. (by Mr. Pearlman) Was there any mention in this conversation of a complaint? Or about some papers in her car?

A. She told Thurman that she had some papers in her car.

Q. What did Thurman say?

A. He asked her to go get them.

Q. Did she?

A. She did.

Q. Did she bring them back in?

A. She brought them back and I made a copy of them and gave them to Thurman.

Q. Did she give it to Thurman?

A. No.

Q. Can you think of anything else in that conversation?

A. Thurman left it with Sue that he would not tolerate anyone being harassed in the plant.

Seals keeps his own personal record of employee discipline that he attaches to absentee records in his office. He records the circumstances and the date of the incident for future reference. Seals has seen one of the Company's disciplinary action forms before, but he does not use them.

Q. *Analysis and Conclusions*

The General Counsel has alleged several independent counts of violations of Section 8(a)(1) including interrogation of employees, threats to close the plant, surveillance of employees' union activity, changing of work rules, and suspension of employees' abilities to carry on their union activity. Generally, an employer's conduct alleged to be violative of the Act is subjected to the test of reasonableness (i.e., does the employer's conduct tend to interfere with the free exercise of employee rights under the Act). If so, the conduct constitutes interference, restraint, or coercion of employees' rights. Several Board cases deal with specific conduct and when applicable the law of the case will determine the proper test to determine whether a violation has occurred or not.

The General Counsel has alleged coercive interrogation by two supervisors on three occasions. All the interrogations arise from a single episode with employee Wise. The employee initiated the conversations, first with her immediate supervisor, Hinson; second with her department head, Seals; and third with the vice president of manufacturing, Johnson. Wise broached the subject of union activity freely speaking of her involvement and complaining of harassment from other employees linked to her union sympathy. Wise also expressed a fear of retaliation from employees and sought some relief from supervision before the incidents became protracted requiring discipline in some form.

A companion allegation of "promise of benefits" to Wise for disclosure of employees' union activity in the plant arises from the same conversations. Wise was less than specific and on several occasions she had no recall but it was clear from her testimony that she was attempting to extract herself from what she perceived as a bad situation on the work floor. Applying the "under all of the circumstances test," of *Rossmore House* to the conversations under scrutiny leads me to conclude that no violations occurred. The factors to consider are background, nature of information sought, identity of questioner, and place and manner of interrogation. Wise's testimony shows that the background is a figment of her imagination (whether real or not is irrelevant). Wise sought out Hinson and Seals disclosing to them what she thought was a problem. Wise actually provoked the interrogation with her rendition of the various disturbances on the work floor, coupled with her expressed fear of retaliation from coworkers. Thus, the nature of the information sought by management was directly related to discipline of the work area. Had Wise's problems been unrelated to union activity, the inquiry by management would have been the same. The identity of the questioner and the place of interrogation further supports the conclusion that no violations occurred, in that the uncontroverted testimony shows that Wise asked for each audience with the three supervisors and specified that she did not want to discuss her problem on the work floor.

There is no evidence to show that Johnson, Seals, or Hinson sought any information outside of what Wise freely disclosed nor is there affirmative evidence that Johnson promised any benefit to Wise for further disclosures. Wise was seeking some relief and what Johnson

offered to Wise was freedom from further harassment based on Wise's perceptions assayed with the usual tolerances allowed on the work floor between workers during working time. I therefore conclude and find that Respondent did not coercively interrogate employee Wise nor did Respondent unlawfully promise a benefit to Wise. Accordingly, I shall dismiss paragraphs 8(a), (i), and (j) of the complaint.[3]

The General Counsel offered several witnesses to sustain her allegation that Respondent promulgated, maintained, and enforced a no-talking rule among employees to stiffle employees' union activity. The evidence shows that when Garner asked Gerald Lambert to leave her department he was talking with an operator supervised by Garner and Lambert was not in his working area. Garner's department is not on Lambert's delivery schedule. Therefore, Garner was simply clearing her department of nonworking personnel. Had Lambert been assigned to Garner's department, it may have been a different matter. The other witnesses, Howe and Gladys Lambert, recalled an incident in which Howe was inspecting an operator's work in the proximity of Gladys Lambert's machine. Garner, after observing Howe, told her to do a little more work and a little less talking. Howe did not question the admonition by Garner but Lambert did. Garner told Lambert that Howe was talking too much to all the operators. Not only does the evidence fall short of showing the establishment of a "no-talking" rule but there is no evidence to show an unlawful purpose for Garner's remark.

Rather, the evidence shows that Garner observed Howe for more than a day spending too much time inspecting at each operator's station. Howe and Lambert were engaged in idle conversation at the time that was the thrust of Garner's statement to Howe. Obviously, Garner was not attempting to proscribe talking among employees because she did not say anything to Lambert about her talking. In addition, the record evidence shows that a year before management attempted, but failed, to invoke a "no talking" while working rule among employees. As a result, employees were allowed to talk among themselves while working and within reason. I conclude and find that the General Counsel's allegation is not supported by the record evidence and shall therefore dismiss paragraph 8(b) of her complaint.

On 27 September Thurman Johnson authored and posted a no-distribution rule because of a rumor that prounion employees were about to begin handbilling employees inside the plant. Such a rule had not been posted in the plant before notwithstanding the printed rule's reference to a longstanding policy. Additionally, Johnson had the rule specifically brought to the attention of several employees known to have distributed union literature in the past. One such employee was Helen May who, when confronted by her supervisor, Keiser, pursuant to Johnson's specific instructions, denied any prior involvement with the union literature.

The General Counsel contends that Keiser's confrontation with May constitutes surveillance of employees union activity and that the rule was unlawfully promulgated. The accuracy of Johnson's information concerning May is irrelevant to the surveillance allegation. Several employees had been observed in the plant parking lot distributing union handouts to employees after the shift. The distribution was openly engaged in for all to see. Management's use of what it observed in its parking lot under these circumstances can hardly constitute unlawful surveillance of employees. The employees did not attempt to conceal the distribution nor should they. The employees have the statutory right to make such distributions to show their allegiance for the Union and the Company made no effort to stop employees from doing so in the parking lot. The subsequent printed rule was an attempt to stop distribution of *union* literature in the plant. Contrary to the express wording of the posted rule against distributions in the plant, there is no company policy proscribing the continued sales campaigns of employees including the use of catalogs of wares or price lists for Avon, Tupperware, peanuts, popcorn, PTA functions, or tickets for musical bands. As Johnson stated, he has engaged in such retail sales himself and does not consider such nonunion solicitations as interference with production or employees' worktime. Thus, Johnson's promulgation of the 27 September rule prohibiting distribution of written materials or handouts of any type was aimed specifically at the prounion employees and their efforts to publicize the organizational efforts of their Union. Such a purpose, particularly in view of the fact that all other distributions of a nonunion nature were unaffected, is unlawful, and constitutes a violation of employees' protected Section 7 rights.

Accordingly, I conclude and find that Respondent violated Section 8(a)(1) of the Act by instituting the no-distribution rule on 27 September as alleged in paragraph 8(e) of the complaint. I further conclude and find that Respondent did not create the impression of surveillance by specifically calling certain prounion employees' attention to the unlawful distribution rule in addition to its being posted in the plant, albeit, the Respondent thereby unequivocally evinced a design to attack only union literature. I shall therefore dismiss the complaint allegation of paragraph 8(f).

During the union organizational campaign, several statements were made by supervisors. The General Counsel contends that on at least two occasions the statements amount to unlawful threats. May credibly testified that she overheard Supervisor Keiser tell a coworker, Linda, that if the Union got in the plant, it would close and employees would have to look for another job. Keiser did not deny that she made such a statement to Linda Cisson, but she did deny that May could have heard any such conversation because of her radio earplugs. Keiser later learned from May that Reed (May's kinswoman) had applied for employment at the new Colosseum in town and asked Reed if she had found another job because if the Union gets in they will close the doors. Keiser admitted a conversation with Reed about the Colosseum employment, but denied any statement to Reed concerning the Union. I do not credit Keiser's terse denial of union statements to Reed, nor her

[3] *Rossmore House*, 269 NLRB 1176 (1984); see *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

pages tightly bound

ability to ascertain May's capability of overhearing proximal conversations. I do credit the testimony of May and Reed who both appeared single of heart and intent on recalling the facts as they occurred. I conclude and find that Keiser threatened employees that the plant would close if the Union came in and that employees would lose their jobs if the Union was selected to represent them.

An additional statement made by Seals was overheard by witness Wise. Wise's testimony of this incident was specific and included her confirmation of Seals' statement by her inquiry of the bundle boys that Seals spoke to. I credit Wise's uncontroverted version of the conversation she overheard and conclude and find that Seals threatened employees with closure of the plant if the Union came in.

The General Counsel has thus supported, by credible record evidence, that Respondent violated Section 8(a)(1) of the Act by unlawful threats to employees as alleged in paragraph 8(g) and (h) of her complaint.

The General Counsel contends that the suspensions of Ruth Ayers, Carolyn Johnson, and Gladys Lambert are discriminatorily motivated and therefore violate the Act.

Respondent argues that the suspensions arise from infractions of the posted "Statement on Unionism" that Thurman Johnson proclaimed to be Bates' policy on union solicitations originally prompted by one employee's assessment that Bates needed a union. As Thurman Johnson explained, the Company will not allow *some* things, however, other solicitations do not interfere with employees' worktime. Not only is the "Statement on Unionism" directed specifically to union solicitations, but Johnson's enforcement of the statement was limited to union solicitations and enforcement proceedings occurring after the Union began its organizational efforts. The operative portion of this statement,

> Also if anybody should at any time cause any of our employees any trouble at their work or put then under any sort of pressure to join a Union, our employees should let the company know about it and we will see that this is stopped. Everyone should also know that no person will be allowed to carry on Union organizing activities on the job and that anybody who does so andthereby neglects his or her own work or interferes with the work of others will be subject to serious disciplinary action.

makes it abundantly clear that Bates' objectives were to stiffle lawful union activity of its employees and to learn the identity of those employees engaged in union activity. The recent efforts to increase publication of the statement coinciding with the organizational efforts of the union establish a discriminatory timing and purpose for the promulgation of the rule. Thurman Johnson's enforcement of the rule against prounion employees for their union solicitations or union activity in the plant, as reported by antiunion employees pursuant to the statement, shows discrimination in the enforcement of the rule. Moreover, the failure to discipline employees or even consider discipline of employees for other solicitations is further evidence of discriminatory motivation in enforcement.

Additionally, the record evidence shows that the first and only disciplines under the rule were meted out to Ruth Ayers and Carolyn Johnson resulting in a 3-day suspension for each. It follows that any disciplines under a work rule that are discriminatorily promulgated and for a discriminatory purpose are themselves discriminatory and cannot be allowed to stand. Thurman Johnson's testimony clearly shows that the only motivation for the suspensions was the infractions of the "Statement" rule. His testimony further shows that he was more concerned with identifying a prounion employee for discipline rather than protecting the work place from interferance with production. Indeed, in the case of Ayers, he relied on the unsubstantiated report of three employees that she was bothering them at their work stations concerning the Union. In Carolyn Johnson's circumstance, Thurman Johnson could not recall the name of any employee who reported her union activities to him. Thurman Johnson's recall was somewhat hampered by the fact that he purposely did not record the events to protect the confidentiality of the reporting employees. I presume he extended this confidentiality by failing to investigate the reports or allow either Ayers or Carolyn Johnson to tell her side of the story.

Even without the discriminatory statement as the basis for the discipline, Thurman Johnson's failure to investigate the events before disciplining the employees would support a discriminatory motivation for the discipline. More particularly in view of the fact that neither the first line supervisor or the departmental supervisor had knowledge that Johnson was engaging in union activity while working. Thus, I conclude and find that Respondent discriminatorily promulgated its "Statement on Unionism" that encouraged its employees to report to Respondent the identity of employees engaged in union activity in violation of Section 8(a)(1) of the Act as alleged in paragraph 8(d) of the complaint. Further, I conclude and find that the suspensions of Ruth Ayers and Carolyn Johnson were discriminatorily motivated and in violation of Section 8(a)(1) and (3) of the Act as alleged in paragraph 9 of the complaint.

The General Counsel's contention that Carolyn Johnson was watched more closely because she was engaged in union activity is not supported by affirmative evidence in this record. The record evidence does show that Johnson was more aware of supervision's surveillance of the production lines for a 2-week period following her return from the suspension but there is no evidence to link the surveillance of the supervisors to Johnson's or any other employee's union activity. Accordingly, I shall dismiss the General Counsel's allegations in paragraph 8(c) of her complaint.

Gladys Lambert, an employee known to be engaged in union activity and the wife of the leading union adherent, was suspended by her departmental supervisor, McCray, for insubordination. The factual events on which the suspension is based are uncontroverted. Lambert simply questioned her supervisor, Garner, about why inspector Howe had to limit her talking. Garner re-

sponded that Howe talked too much to all the operators. Albeit, Garner took no umbrage when Lambert asked the question she did testify that she was unnerved that an employee would question her instructions to another employee. She bolstered her testimony of the otherwise peaceful incident by characterizing Lambert's tone as "harsh and loud" and her walk as "angry." However, Garner did not report "insubordination" to McCray. Rather, Garner reported only that Lambert had asked a question relating to Howe. Garner, in fact, did not know Lambert was to be disciplined for the incident until she was suspended and even then was surprised that the incident constituted "insubordination."

In the past Garner had been cursed by an employee, but all McCray did was orally counsel the employee not to repeat the conduct. Thurman Johnson and McCray, without Garner's input, made the determination that Lambert's question of Garner was insubordinate. Their determination did not include giving Lambert an opportunity to offer any defense. But, as Johnson stated, "With insubordination there is no discussion." Such a procedure predetermines the result every time and because the predicate is lacking the legitimacy of the underlying factual determination is not established. Moreover, McCray in recalling a similar incident in which another employee questioned a supervisor's instructions defined the incident as "not insubordinate" because the employee only put her remarks in the form of a question. This prior incident is not unlike that between Lambert and Garner. In my view, Johnson and McCray were searching for a reason to discipline a prounion employee, Lambert, and seized on the event reported by Garner. In addition, Lambert's suspension was the first emanating from a verbal altercation with a line supervisor such as Garner.

I therefore conclude and find that the General Counsel has presented a prima facie case of discrimination in Lambert's suspension and that Respondent has failed to present evidence to show that the suspension would have been ordered in the absence of Respondent's knowledge that Lambert was an employee engaged in union activity.[4] Thus, Respondent by suspending Lambert for 3 days over the incident with Garner has violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent, by making threats to close the plant if the Union comes in, has violated Section 8(a)(1) of the Act.

2. Respondent, by threatening employees with loss of employment if the Union comes in, has violated Section 8(a)(1) of the Act.

3. Respondent, by posting and enforcing its "Statement on Unionism" at a time coincident with the Union's organizational drive among the employees, has violated Section 8(a)(1) of the Act.

4. Respondent, by posting its rule against distribution of literature in the plant at a time coincident with the Union's organizational drive, has violated Section 8(a)(1) of the Act.

5. Respondent, by suspending its employees Ruth Ayers, Carolyn Johnson, and Gladys Lambert for discriminatory reasons, has violated Section 8(a)(1) and (3) of the Act.

6. The General Counsel has not sustained her burden of proof for any other allegations in her complaint.

7. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily suspended employees Ruth Ayers, Carolyn Johnson, and Gladys Lambert must pay them backpay for the days of suspension with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977),[5] from the date of suspension to the date the employee returned to work.

The General Counsel in her brief moved for a visitatorial provision as part of the remedy but, based on this record, I shall deny her motion.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Bates Nitewear Company, Greensboro, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure or loss of jobs if the Union comes in.

(b) Implementing its "Statement on Unionism" and disciplining employees for infractions related to their union activity.

(c) Implementing its rule prohibiting distribution of literature in the working areas of the plant.

(d) Suspending employees for engaging in union activity or for questioning instructions of supervisors.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Ruth Ayers, Carolyn Johnson, and Gladys Lambert whole for any earnings they lost, plus interest, as outlined in the remedy section of this decision.

(b) Expunge from its files any references to the suspensions of Ruth Ayers, Carolyn Johnson, and Gladys Lambert and notify them in writing that this has been done

[4] *Wright Line*, 251 NLRB 1083 (1980).

[5] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

best copy available

and that evidence of this unlawful suspension will not be used as a basis for future personnel action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Greensboro, North Carolina facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Communications Workers of America, Local 11509, AFL–CIO (Pacific Bell) *and* Joseph M. Donahue. Case 21–CB–9703

27 May 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 11 February 1987 Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Communications Workers of America, Local 11509, AFL–CIO, San Diego, California, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] We have treated the Respondent's document entitled "Request for Review" as exceptions to the judge's decision. We deny, as lacking in merit, the General Counsel's motion to strike the Respondent's exceptions.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(b)(2) and (1)(A) of the Act, we agree with his finding that International Union Representative Pearce was acting as an agent of the Respondent when he requested that the Employer terminate employee Donahue for nonpayment of dues. See *Carpenters Local 1016 (Bertram Construction)*, 272 NLRB 539, 542 (1984); *General Motors Corp.*, 237 NLRB 1509, 1518 (1978); *Carpenters Local 64 (Western Dry Wall)*, 204 NLRB 590 (1973). We note that Pearce's action was taken in response to the Respondent's 1 May 1986 memorandum to Pearce titled "Local Request to District for Termination of Employment" and that Pearce attached a copy of the 1 May memorandum to his request that the Employer discharge Donahue.

Theodore R. Scott, for the General Counsel.
Donald A. Hon, for the Respondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding in which a hearing was held on December 5, 1986, is based on an unfair labor practice charge filed August 28, 1986, by Joseph M. Donahue (Donahue) against Communications Workers of America, Local 11509, AFL–CIO (Respondent), and on a complaint issued September 16, 1986, by the General Counsel of the National Labor Relations Board (the Board), alleging that on May 1, 1986, the Respondent requested Pacific Bell to terminate its employee Donahue for failure to pay his dues to Respondent in compliance with a contractual union-security clause, and further alleges that by engaging in this conduct Respondent violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act (the Act), because prior to requesting Donahue's discharge Respondent failed to advise him of the amount of dues owed, or the method used to compute the amount of dues owed, or that discharge would result from his failure to pay the delinquent dues, nor did Respondent afford Donahue time in which to pay the dues he owed. Respondent filed a timely answer denying the commission of the alleged unfair labor practices.

On the entire record, from my observation of the demeanor of the witnesses, and having considered the parties' oral arguments, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER INVOLVED

Pacific Bell, the employer involved in this case, is a California corporation that operates a telephone and telegraph system in the State of California. During the 12-month period immediately preceding the issuance of the complaint in this case, Pacific Bell received gross revenues in excess of $1 million and purchased and received goods and supplies valued over $5000 directly from suppliers located outside the State of California. Respondent admits, and I find, that Pacific Bell is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I further find it will effectuate the purposes of the Act to assert jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

During all times material, Pacific Bell and Respondent have been parties to a collective-bargaining contract that contains, inter alia, a valid union-security clause. The Charging Party, Donahue, has been employed since 1981 by Pacific Bell in the bargaining unit covered by the contract. He is not a member of Respondent, but under the contractual union-security clause is obligated to pay Respondent the equivalent of monthly dues as a condition of employment.

Although Donahue's monthly dues payment is due by the 26th of the month, he usually does not make his monthly payment until the month following the one in which payment was due. Respondent does not treat him as being delinquent in his payments so long as he makes his monthly payment no later than the 25th of the following month. Donahue paid his dues for January 1986[1]

[1] All dates hereinafter, unless stated otherwise, refer to the year 1986.

on February 12 and for February on March 21. He did not, however, tender his payment for March until May 2 at which time he paid his March and April dues.

On May 1 Respondent's president, Douglass Woodbury, transmitted a memorandum, signed by Woodbury, to Reid Pearce, a staff representative of Respondent's International Union, which in substance "certified" that Donahue had failed to pay or tender his equivalent of membership dues for the months of March and April and as a result owed $61.10—$30.55 per month—and requested the termination of Donahue's employment with Pacific Bell in accordance with the union-security provisions of the current collective-bargaining contract between Respondent and Pacific Bell. The memorandum also noted that "a copy of this certification has been mailed to [Donahue]." No evidence was presented that in fact a copy of the memorandum was mailed or otherwise transmitted to Donahue by Respondent. Donahue credibly testified he did not receive a copy of this memorandum from Respondent.

On May 2 Respondent's International union staff representative, Pearce, transmitted to Pacific Bell's labor relations department a copy of Respondent President Woodbury's above-described May 1 memorandum and with it Pearce also transmitted a covering memorandum that requested that Pacific Bell terminate Donahue for nonpayment of dues in accordance with Woodbury's May 1 memorandum.

On a date not specified in the record, Respondent's International Staff Representative Pearce received a memorandum from Respondent President Woodbury advising Pearce that on May 2 Donahue had satisfied his dues delinquency. Although Pacific Bell did not discharge Donahue, as requested by Pearce's May 2 memorandum, there is no evidence Respondent Union ever notified Pacific Bell or Donahue that the May 2 request that Pacific Bell discharge Donahue for dues delinquency was rescinded. In fact there is no evidence that the request was rescinded.

About May 6 Donahue's supervisor notified him Pacific Bell's labor relations department had received a written request for his termination from Respondent because he was delinquent in his dues payments. Donahue replied that the request was "out of line" because he had paid his dues and asked for a copy of the request. A few days later Donahue's supervisor gave him a copy of Respondent President Woodbury's above-described May 1 memorandum to Staff Representative Pearce.

Donahue credibly testified, without contradiction, that prior to requesting that Pacific Bell terminate him for nonpayment of dues, Respondent had not given him an opportunity to satisfy his financial obligation by informing him of his obligation, or the months that the obligation was owed, or explained the method used in computing the amount owed, and had not given him notice he would be terminated unless he paid the amount owed.

B. *Discussion*

A labor organization seeking to enforce a union-security provision against an employee has a "fiduciary" duty to "deal fairly" with the employee affected. "At a minimum, this duty requires that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure." *NLRB v. Hotel & Restaurant Employees Local 568 (Philadelphia Sheraton)*, 320 F.2d 254, 258 (3d Cir. 1963); Accord: *H. C. Macaulay Foundry v. NLRB*, 533 F.2d 1198, 1201 (9th Cir. 1977). In *Teamsters Local 122 (Busch & Co.)*, 203 NLRB 1041, 1042 (1973), the Board specifically defined the union's duty as including "a statement of the precise amount and months for which dues were owed, as well as an explanation of the method used in computing such amount," plus "an adequate opportunity to make payment." In addition, the union must specify when such payments are to be made and make it clear to the employee that discharge will result from failure to pay. *Western Publishing Co.*, 263 NLRB 1110, 1112 (1982).

In the instant case when Respondent through its agent Pearce on May 2 requested Pacific Bell to comply with the contractual union-security provision and terminate Donahue for nonpayment of dues, Respondent, as I have found supra, had not given Donahue a statement of the precise amount and months for which dues were owed, or an explanation of the method used in computing his liability, nor had Respondent made it clear to Donahue that discharge would result from a failure to pay his dues. In other words, when Respondent on May 2 requested Pacific Bell to comply with the contractual union-security clause and terminate Donahue for nonpayment of dues, it had not contacted Donahue and furnished him with any of the information the Board has found necessary to a union's fiduciary duty to deal fairly with an employee in enforcing a contractual union-security clause. In view of this, I find Respondent violated Section 8(b)(2) and (1)(A) of the Act, when on May 2 it requested Pacific Bell to terminate Donahue.

In concluding that Respondent violated Section 8(b)(2) and (1)(A) of the Act by attempting to cause Pacific Bell to discharge Donahue for failure to tender periodic dues without adequately advising him of his obligations, I have considered and rejected Respondent's contention that the matter is moot and for this reason the complaint should be dismissed or no remedy imposed. In this regard, I note there is no evidence Respondent rescinded its May 2 request that Pacific Bell terminate Donahue's employment for nonpayment of dues, nor that it ever informed Donahue that the request was rescinded. Moreover, Respondent's failure to meet its "minimum" obligation in enforcing the union-security agreement, does not appear to be an isolated occurrence. Thus, in 1984 Respondent requested Donahue's discharge for dues delinquency. Thereafter, in response to Donahue's unfair labor practice charge, Respondent rescinded this request and entered into a Board settlement that provided that Respondent would notify Donahue in a timely manner of his union-security obligations before requesting his termination (Tr. 16–17, 19–20). In view of all these circumstances and considering the seriousness of Respondent's misconduct, I have rejected Respondent's argument that Respondent's misconduct has become moot.

CONCLUSIONS OF LAW

1. Pacific Bell, the Employer, is now, and has been at all times material, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Communications Workers of America, Local 11509, AFL–CIO is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By attempting to cause Pacific Bell to discharge Joseph M. Donahue for failure to tender periodic dues without adequately advising him of his obligations, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(2) and (1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Communications Workers of America, Local 11509, AFL–CIO, San Diego, California, its officers, representatives, and agents, shall

1. Cease and desist from

(a) Attempting to cause Pacific Bell to discharge or to otherwise discriminate against Joseph M. Donahue, or any other employee, for failure to tender periodic dues without adequately advising him of his obligations, in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify Pacific Bell, in writing, and advise Joseph M. Donahue, in writing, that it rescinds its May 2, 1986 request that the employee be discharged or not allowed to work and that it has no objection to his continued employment with unimpaired rights and privileges.

(b) Post at its business office copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 21 for posting by the Employer at its place of business in San Diego, California, in places where notices to employees are customarily posted, if the Employer is willing to do so.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT attempt to cause Pacific Bell to discharge or to otherwise discriminate against Joseph M. Donahue, or any other employee, for failure to tender periodic dues without adequately advising him or her of their obligations, in violation of Section 8(a)(3) of the National Labor Relations Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify, in writing, Pacific Bell and Joseph M. Donahue that we rescind our May 2, 1986 request that he be discharged or not allowed to work and that we have no objection to his continued employment with unimpaired rights and privileges.

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 11509, AFL–CIO

Hudson Valley Hotels, Ltd. d/b/a Quality Inn Albany *and* Bonita Powers. Case 3–CA–12955

27 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 2 December 1986 Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hudson Valley Hotels, Ltd. d/b/a Quality Inn Albany, Albany, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Alfred M. Norek, Esq., for the General Counsel.
Mary Helen Moses, Esq. (O'Connell & Aronowitz), of Albany, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Albany, New York, on 5 and 6 February 1986. The complaint alleges that Respondent, in violation of Section 8(a)(1), (3), and (4), issued a warning notice to its employee Bonita Powers and discharged Powers because she engaged in concerted activities and because she gave an affidavit in Cases 3–CA–12773–1, 3–CA–12773–2, and 3–CA–12872, and was subpoenaed to testify in the hearing in Case 3–CA–12773–2. Respondent admits that it issued the warning notice and terminated Powers, but alleges that its actions were for lawful business purposes.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with a place of business in Albany, New York, operates a hotel providing food and lodging for guests. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Hotel, Motel and Bartenders Union, Local 471, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

---

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Even assuming arguendo that the Respondent established that it discharged Powers because of its good-faith belief that while engaged in protected concerted activities she engaged in misconduct (harassment of employees), we find an 8(a)(1) violation because the General Counsel proved that Powers did not, in fact, engage in such misconduct. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *Rubin Bros. Footwear*, 99 NLRB 610 (1952). Thus, although Allison told Franks that Powers was harassing other employees, this testimony does not establish that Powers' conduct constituted harassment, and the record contains no evidence that Powers actually harassed any of these employees. With respect to Powers' conduct toward Allison, we see nothing which would warrant a finding that Powers acted in such a way that her conduct lost the protection normally afforded under the Act.

We find it unnecessary to address the hearsay nature of Powers' testimony that Allison told her that a number of employees were upset over the Respondent's treatment of Powers and wished to disassociate themselves from Powers' efforts to enforce her rights. Whether Powers' coworkers were upset over the Respondent's treatment of Powers is irrelevant to the judge's conclusion that the nature of Powers' activities was concerted and protected.

We find that under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel sustained her burden of proving that Powers' protected concerted activities were a motivating factor in Powers' discharge. Powers' actions in requesting coworkers to write statements regarding whether they reported their tips and were granted vacation leave precipitated her discharge. Powers testified that these statements would be used in preparation for the filing of NLRB charges and a contract grievance and Franks admitted that he knew the purpose for these statements.

Further, the General Counsel established by a preponderance of the evidence that the reasons given by the Respondent for firing Powers were pretextual. In so doing, we agree with the judge's finding that the evaluations and counseling slips issued to Powers were pretextual. All the counseling slips issued to Powers except the slip for the failure to report tips were for relatively minor infractions compared to the counseling slips issued to other employees. Thus, other employees were issued counseling slips for tardiness (anywhere from 50 minutes to 1-1/2 hours late); reporting a $25.60 shortage in deposit; failing to report absence from work; failing to give signature sheets to the accounting department, resulting in a possible loss to the hotel of $80 worth of meals; and failing to fill out a van report and to sign out the van. In addition, Powers was the first employee issued a counseling slip for failure to report tips on her timecard. Although three other employees were issued counseling slips, these slips were not issued until 17, 18, and 19 September 1985, 1 week after Powers received hers and began questioning employees about disparate treatment. Even assuming arguendo that the counseling slips and evaluations issued to Powers were not pretextual, and that the Respondent's firing of Powers was in part based on her attitude towards her job and management, the Respondent did not prove by a preponderance of the evidence that absent Powers' protected concerted activities, it would have fired Powers. Accordingly, we find that Powers was unlawfully terminated for engaging in protected concerted activities in violation of Sec. 8(a)(1), (3), and (4) of the Act.

[1] Due to an error by the official stenographer portions of the record for 5 February were lost. The parties stipulated to certain matters to cover the untranscribed portion of the proceedings. The stipulation is received into evidence as Jt. Exh. 1.

II. ALLEGED UNFAIR LABOR PRACTICES

This proceeding concerns certain events at the Quality Inn in Albany, New York. Respondent purchased this hotel on 23 May 1985 and continued its operations in substantially the same manner as it had been operated previously from that date. Respondent's managers include:

Gordon Weiss	President
David Franks	General Manager
Barbara Crafton	Food and Beverage Manager
Chris Riani	Assistant Food and Beverage Manager (for the earlier part of the relevant period)
Kevin King	Assistant Food and Beverage Manager (for the latter part of the relevant period)

The Union represented the employees when Respondent purchased the hotel. Respondent recognized the Union and the parties eventually entered into a collective-bargaining agreement effective retroactive to 24 May 1985.

The contract provides that "permanent employees will be evaluated on a quarterly basis," an unsatisfactory evaluation may be followed by an evaluation within 6 weeks, and "two consecutive unsatisfactory evaluations will constitute grounds for dismissal." The contract provides for employee vacations and it contains a grievance and arbitration mechanism.

Bonita Powers was the senior waitress on the night crew of Respondent.[2] The night crew worked from 4:30 p.m. to closing. Generally, there were three waitresses and one bartender working at night; however, occasionally Powers was called on to fill in as a bartender.[3] On some occasions, if business was slow, a waitress might be sent home early; usually this was the waitress who had reported earliest that day.

Barbara Crafton, the food and beverage manager of Respondent, reports to General Manager David Franks.[4] Crafton's hours are 7:45 a.m. to 5:45 p.m. weekdays; on Saturdays, Crafton and Powers worked essentially identical hours. An assistant food and beverage manager works during the afternoon and evening shifts. Crafton's duties include preparation of work schedules for waitresses and completion of their evaluation forms.

Powers was evaluated three times after Respondent purchased the hotel. A summary of her evaluations is set forth for reference. The evaluation forms permit a choice of five ratings: excellent, good, average, needs improvement (NI), and not acceptable (NA).

Category	*7/30*	*9/4*	*11/4*
1. Job attitude	NI/NA	NI	NA
2. Attendance	good	good	average
3. Ability to learn	good	good	average
4. Appearance and dress code	NA	average	average
5. Quality of work	NI	average	NI
6. Quantity of work	good	good	good
7. Initiative	NI	NI	average
8. Cleanliness of work area	average	average	average
9. Ability to get along with fellow workers	NI	NI	NA
10. Total average score	NI	average	NI

A. *Powers' First Termination and Reinstatement*

Powers testified that before Respondent purchased the hotel she had acted as a spokesperson for the employees. After Respondent's purchase, some of her coworkers asked her if Respondent was going to continue the same insurance plan as the previous owners of the hotel had offered to the employees. On 10 June 1985 Powers told General Manager Franks that the employees wanted to maintain the same insurance policy. Franks asked Powers to give him a list of employees who wanted the insurance by 10:30 a.m. the next day. Powers did this, and about 5 p.m. on 11 June Powers met with Franks and Weiss. Weiss told Powers that the Union was insisting that the employees be covered by a union insurance plan. Powers said, "All right." Then Weiss suggested that if the employees signed a petition "that they did not wish to be union anymore" he would "take it under advisement." Weiss continued that the employees would get a better deal if they were nonunion. He said, "The union had given him a list of people that they wanted fired and he said [Powers was] second on the list." Weiss said he had already fired Rich-Miller and that he would have to fire Powers.[5] Powers replied that she had a young son to support and she asked for a few days to think about the subject.

On 13 June 1985 Powers approached Weiss in the lobby and asked if she could discuss the matter further. Powers, Weiss, and Franks then went into the office; after some discussion Powers asked for more time to think and Weiss agreed.

On 18 June 1985 Powers had a conversation wtih Weiss and Franks. The parties stipulated that Powers tape recorded the conversation and that on 18 June Weiss repeated his remarks of 11 and 13 June to Powers. After this conversation Powers filed a charge with the Board in Case 3–CA–12773–1 on 20 June; Miller also filed a charge the same day in Case 3–CA–12773–2.[6]

[2] Powers had been employed by Respondent's predecessor.

[3] The other waitresses were Julie Vecere and Eleanor Gahran. The bartender was Barbara (or Betty Ann) Bennett.

[4] Crafton had served in the same position with the former owner of the hotel. Franks was a member of the new management team.

[5] Miller had been the banquet captain of the hotel. Miller and Powers had campaigned vigorously but unsuccessfully against the union business agent in February 1985. Miller was not hired when Respondent purchased the hotel in May 1985.

[6] The parties also stipulated that before Respondent terminated Powers in November 1985 it was aware that Powers had provided the tape to the Board and was prepared to testify in Case 3–CA–12773–2, and further that Respondent was aware that the tape was damaging to its case.

Powers' charge was withdrawn, as will be seen below. Miller's case was settled with the posting of a notice by Respondent stating, inter alia, that it would not threaten employees with termination or refuse to hire them because of their protected activities and that it would not encourage employees to decertify the Union. On 19 August when Miller's case was to be heard, Powers was present to testify pursuant to a subpoena.

Powers testified that on 24 June 1985 Franks called her into his office. Weiss was there and he told Powers, "You got me." Powers told Weiss that she did not feel it to be that way and that she had not filed the charges to harm him. Powers said she had wanted to expose what the business agent was up to. Weiss said, "Nevertheless, we are gong to have to terminate you." When Powers asked what grounds he had, Weiss replied, "Poor attitude towards management." Powers was discharged and given a final paycheck. She filed amended charges with the Board in Case 3–CA–12773–1 on 25 June 1985. On 28 June 1985 Powers met with Franks, Weiss, and Union Business Agent Hammer to negotiate her return to work. Weiss was willing to reinstate Powers if she withdrew the charge. Weiss asked Powers what she wanted, and Powers replied, "I just want to be happy in my job and be left alone and be able to do it." Powers then asked for $200 backpay. Eventually, this sum was agreed to by the parties; Powers was reinstated and she withdrew the charges in Case 3–CA–12773–1. Powers testified that between 19 August and 7 September she encountered Weiss at the hotel and said, "Good evening." Weiss replied through clenched teeth "Don't talk to me." Weiss did not testify in this proceeding.

B. *The Evaluation of 30 July 1985*

David Franks has been general manager of the hotel since its purchase by Respondent. He resided in the facility from 23 May until 6 September 1985. During those months there was no night manager and Franks actively supervised both the day and night operations. Even after he ceased residing in the hotel, Franks continued to spend time at the hotel at night after eating his dinner at home.

Franks testified that Respondent gives its employees forms entitled "warning notice"; however, these are really counseling forms. According to Franks, these forms are not part of a progressive disciplinary system. The purpose of the counseling forms is to provide the basis for a discussion between the employees and management. The counseling forms are part of an employee's personnel record and are retained because, "it begins to show patterns after a year or two."

Franks performed Powers' first evaluation, although he did not evaluate the other night waitresses. He marked Powers between "needs improvement" and "not acceptable" in "job attitude" because she had asked to leave early three or four times. Franks acknowledged that night waitresses would be sent home early on occasions when management anticipated that they would not be needed. Franks testified that waitresses may tell him or another managerial employee that if they were not needed they would like to leave early. However, he blamed Powers for asking too often and said this was "indicative of an attitude." Franks rated Powers "good" in attendance because she was punctual. He testified that he had no particular incident in mind for this rating and that it was a "subjective judgment." He could give no reason for not rating her "excellent." He rated her "good" in "ability to learn." He rated her "not acceptable" in "appearance and dress code" because she wore an inappropriate outfit to tend bar. Franks rated Powers "needs improvement" in "quality of work" because she worked too fast and did not spend enough time with customers. Powers was rated "good" in "quantity of work" because she was able to keep up with rush periods in the dining room. Franks rated her as "needing improvement" in "initiative" because she did not use slow periods to catch up on cleaning. Under "cleanliness of work area," Powers was rated "average." Franks rated Powers as "needing improvement" in "ability to get along with co-workers" because she spent too much time socializing with fellow employees. He gave her an overall rating of "needs improvement." He believed that Powers resisted his decisions to change procedures when Respondent took over the hotel and that she argued with him and questioned his judgment. In her testimony about this evaluation, Powers stated that Franks told her that she needed a "new attitude of cooperation" and that her strong point was her "ability to keep up with [a] large volume of business."

C. *The Evaluation of 4 September 1985*

Crafton testified that she evaluated Powers on 4 September 1985 at Franks' request. She filled in a blank evaluation form and then discussed it with Franks item by item. She completed the nine specific areas of evaluation and decided that Powers deserved an "average" overall rating. However, she did not compute the results of the nine specific areas in order to reach the overall "average" result; she merely used her subjective judgment.

Crafton testified that she rated Powers "needs improvement" in "job attitude" because she needed to stop "going against company policy." Crafton rated Powers "good" in "attendance." She did not check Powers' attendance records and she had no recollection that Powers failed to report to work during the evaluation period. Crafton rated Powers as "good" in "ability to learn." Powers was rated "average" in "appearance and dress code"; at first Crafton said this was because Powers had been in an improper uiform when she filled in as a bartender or banquet waitress, but then she acknowledged that she did not recall if this incident occurred during the evaluation period. Finally, Crafton testified that whenever the incident occurred Powers was warned about her uniform and did not repeat the infraction. Crafton rated Powers "good" under "quantity of work" because Powers was able to handle "a great many people." Crafton could not recall what she had rated Powers under "initiative," but she recalled that she and Franks eventually agreed to rate Powers "needs improvement" because she had failed to put away the dessert tray on one occasion. Crafton initially rated Powers "average" in "ability to get along with fellow workers,"

but Franks told her to change this to "needs improvement" because Powers spent too much time in the lounge. Crafton did not testify that she had ever observed this behavior.

After Crafton changed the evaluation to comport with Franks' instructions, she discussed the items with Powers in her office. Crafton told Powers that a major area for improvement for Powers was "to realize that company policy is aimed at everyone working toward the same goal."

Powers' account of this evaluation was consistent with Crafton's testimony. Powers testified that Crafton said she was happy with Powers' performance because it had improved since the last evaluation. Powers' "total average score" was now up to "average."

Crafton testified that so long as Powers continued to work for Respondent after the September evaluation she believed that Powers remained an average employee. Powers had excellent attendance, she had the ability to sell products, and she got along well with fellow employees.[7] However, Powers did not "have much use for company policy." She disobeyed rules if she thought they were "dumb." Other waitresses did not do this. Crafton told Powers to abide by Respondent's employee meals policy, but she never issued a written warning to Powers for eating improper food. Other employees were also warned orally by Crafton; none were discharged for infractions of the food policy.

Crafton evaluated 10 other employees at the same time she evaluated Powers. They were all rated "Good," with the exception of Fran Di Trapano. On 21 August 1985 Di Trapano was rated overall as "Needs Improvement" and on 5 September 1985 she was rated "Not Acceptable." At that time she was discharged at Crafton's suggestion and with the concurrence of Franks. Di Trapano's evaluations show that when Crafton rated her overall evaluation as "needs improvement" she wrote on the evaluation that "Fran has to improve on the following items within 30 days—attendance, appearance of guest checks, attitude toward co-workers, tardiness, observe 4 hour calling time for illness." On 5 September Crafton rated Di Trapano "not acceptable" and specific comments from Crafton on the evaluation sheet show that the employee continued to make the same errors that she had been warned about before.

D. *The Warning Slips*

On 10 August 1985 Christopher Riani, the assistant food and beverage manager, gave Powers a warning slip for failing to replace the dessert tray in the refrigerator. In June or July 1985 a new dessert tray procedure had been instituted by Respondent. According to Franks, many employees were counseled about the policy orally, but only Powers was issued a written counseling form.

On 25 August 1985 Riani gave Powers a warning slip for eating food that was not on the approved employee meal plan for the day. Powers explained that she was unwilling to eat pasta 3 days in a row as specified on the meal plan; instead she took a piece of broccoli and ate that.

On 26 August 1985 Franks wrote a warning slip to Powers for "parking car in non-employee parking area." Although the slip bears Franks' notation that it was "discussed with employee and refused to sign," Powers testified that Franks had never discussed the warning with her nor attempted to give her the slip. Powers recalled an incident when she and Franks drove into the parking lot at the same time. Powers parked in her usual place and Franks asked her to move saying there was a memorandum describing permitted employee parking areas. Powers and Franks discussed their differing interpretation of the memo for a moment and Powers moved her car to the area indicated by Franks.

On 11 September 1985 Franks gave Powers a warning slip for "not accurately reporting tips according to law."[8] Franks told Powers she had not reported tips on eight separate timecards. Powers asked Franks if any other staff members had failed to report their tips and he said none of them had. The record shows that at least three other employees were issued counseling slips for failing to report their tips. They are still employed by Respondent.

On 18 September 1985, Weiss gave Powers a warning slip for "parking inguest area second warning for same offense." Powers had attended an employee fire education program at the hotel during the day. Because she was not on her regular working time she had parked in an impermissible zone.

E. *Powers' Third Evaluation and Second Discharge*

On 11 September Powers asked some of her coworkers if they had failed to report tips on occasion. Some employees said they had not reported tips and had not received a counseling slip for the omission.

That evening, a bit after 9 p.m., Powers telephoned day waitress Pat Allison at home. According to Powers, Allison was the spokesperson for the day waitresses and bartenders. In the past, Powers and Allison had discussed problems relating to management and the Union that were of concern to both shifts. Powers had called Allison at home two or three times and Allison had also called Powers at home on occasion. In response to Powers' questions on 11 September, Allison said she had not been warned for failing to report tips. Allison asked Powers what she could do to help; Powers asked her to put in writing "the fact that you were told that some of your tips were missing and that you were not asked to make them up and that you have not received a counsel form." Allison agreed to do this.

On 12 September 1985 Powers filed a charge in Case 3–CA–12872 alleging that Respondent warned and harassed her because of her concerted activities and because she filed charges under the Act. On 2 October 1985 the

[7] Indeed, in mid-October 1985, Crafton furnished Powers with a letter of recommendation that stated "whether it is as a banquet waitress, hostess, bartending or clerical position, Bonnie is a professional with a natural ability to sell. She has an excellent attendance record and works well with her fellow employees."

[8] For tax purposes, waitresses were required to report their tips to Respondent once a week by entering the total on the back of their timecard.

Regional Director dismissed the charge; the General Counsel denied the appeal on 30 October 1985.

On 11 October 1985 Union Agent Pete Jenson told Powers that they were going to meet with Franks in the latter's office.[9] At this meeting, Franks said he was counseling Powers for "harassing the employees." When Powers denied that she harassed employees, Franks said, "I have a waitress that says you are harassing her." Franks refused to tell Powers who the waitress was despite Powers' repeated requests that he reveal her name. He repeated, "I have a witness that will come in and testify to the fact that she told me this." When Jenson said that Powers had a right to the information, Franks revealed that the waitress was Allison. Franks added that Powers had "gotten a bunch of statments from employees . . . to take this to the NLRB." Powers denied that she had done that.

Patricia Allison testified that she has been employed as a waitress by Respondent since 1979. She works from 5:30 a.m. to 2 p.m. In her testimony, Allison said, "I speak to everyone. . . . Everyone comes to me if they have a problem. I'm not afraid to open my mouth and speak up." She stated that she "kept up with what's going on" in union affairs. The other employees view her as a spokesperson and as a person who keeps them informed about what is going on between the Union and the Employer. In September 1985, at Powers' request, Allison helped pass around a petition to protest the Union's change in the method of choosing the shop steward. Allison thought the change was not fair. Allison testified that she has called Powers at home about "union business" and the sale of the hotel.

Allison testified that one night she received a phone call from Powers after she had gotten into bed. Allison told Powers she would see what she could do about giving Powers a statement concerning counseling slips. Powers did not call Allison at home again but she called her once at work and spoke to her once at a meeting at the hotel; on that occasion Allison said she had no time to prepare a statement. Powers also asked a group of waitresses for a statement about vacations.[10] When Powers asked Allison if the other waitresses would give her statements, Allison said, she "had no idea. You know, that's none of my business." Allison told Franks 3 days later that, "if I weren't left alone I was going to quit. I don't want to be bothered with problems that do not pertain to my shift or anything that doesn't pertain to me." She told Franks that Powers wanted a letter about employee vacations. By this time, according to Allison, she had heard other people tell Powers they did not want to be involved and she felt "let everybody start speaking for themselves." Allison testified that the first time she told Powers she did not want to be bothered with her problems was at a grievance meeting attended by Powers, Jenson, Franks, and employee Barbara Thornton. This meeting took place on 15 October 1985. Before the meeting began, Allison told Powers, "I have been approached by several employees that because they see the way that you are being treated they do not want to be involved with the matter."

At the 15 October grievance meeting Allison said Powers had called her at home. Powers asked Allison, "Do you feel that I am personally harassing you?" Allison replied, "No, but I am tired of other people coming to me because of your problems." In reply to Powers' question concerning what constituted harassment, Franks said, "Asking someone to do something more than once." Powers then stated that she had not asked any employees to do something more than once. She had asked several employees if they would provide her with statements about disparate treatment relating to nonreported tips and the refusal to grant her vacation after she was reinstated. Powers wanted the letters so she could file a grievance under the contract. Franks mentioned that Powers had gotten some letters to take to the NLRB. At the close of the meeting Jenson asked that the counseling be withdrawn and when Franks refused, Jenson told him the Union would file a grievance.

On 5 November 1985 Powers and Union Representative Wolfgang Hammer met with Franks in the latter's office. Franks destroyed the counseling form he had previously prepared concerning Powers' alleged harassment of other employees. He showed Powers and Hammer a new warning notice. The notice read:

> Bonnie is requested not to bother other employee [sic] by calling them late at night, after other employees haved [sic] asked not to be bothered.

Powers said she did not agree with it and wanted to file a grievance but Hammer said the Union would drop the grievance.

Franks then handed Hammer Powers' third evaluation and said that Powers was terminated. Franks said, "We tried to be fair. The contract with the Union calls for two bad evaluations as grounds for dismissal."

Franks testified that about 27 September 1985 Allison came to see him in his office. She told him that she was being harassed or bothered and she was upset about a call she had received about 10 p.m. one night. Allison said Powers wanted to get "things together against management." Allison told Franks that if he did not fix this problem she would quit. Franks acknowledge that Allison mentioned that Powers was collecting letters for the NLRB. He wrote a counseling form about Powers' conduct in "harassing other employees." After the meeting with Powers and Jenson on 15 October, he destroyed that form and issued a new one that referred to a late-night phone call. Before he gave this counseling form to Powers, he prepared her third evaluation dated 4 November and he decided to discharge her.

Franks testified that there was only a limited discussion with Powers of her final evaluation on 5 November 1985. Franks told Powers and Hammer that Powers' "biggest single problem was the attitude and the fact that she just consistently . . . broke rules when she's a very bright girl and she knows better and I felt we were being flaunted [sic] and there was just no way . . . we could work it out." Franks marked Powers "not acceptable"

[9] At some point, Powers had asked that a union representative be present whenever she was counseled by management.

[10] Powers believed that Franks has discriminatorily refused to grant her vacation time after she was reinstated in June 1985.

under "attitude" partly because of the number of counseling slips she had received. Powers received six slips during her employment. He marked "attendance" "average," but he did not review her timecards and he did not know if her attendance had changed from the time of the last evaluation. He marked her "average" on "ability to learn" based on his intuition. He marked "average" for "appearance and dress code"; this was a "subjective score" and not based on any occasion when she was in improper attire. On "initiative," Franks graded Powers "average" based on his "subjective observations." He stated that her initiative had not changed from other evaluations.[11] Franks graded her "average" on "cleanliness of work area." He stated that Powers needed to be reminded to clean her work station more than the other waitresses. He rated Powers "not acceptable" in "ability to get along with fellow workers." Overall, Franks rated Powers as "needs improvement." Franks based his decision to discharge Powers on her three evaluations. He stated that he was required to show a "series of at least two evaluations that we're having a problem before we can terminate."[12] Franks testified that a major problem was reflected in the "not acceptable" rating under "ability to get along with fellow workers." This was due to Powers' penchant for chatting with other employees off her work station.

Franks did not consult Food and Beverage Director Crafton in deciding to discharge Powers, nor did Franks consult Crafton about the two evaluations he performed of Powers' work. Crafton testified that she could not recall any other instances when she was not consulted about the discipline or discharge of an employee under her jurisdiction. The parties stipulated that in response to a subpoena duces tecum issued by the General Counsel for all evaluations performed by Franks from 23 May to 5 November 1985, Respondent produced records that showed that Crafton evaluated all the food and beverage employees. The only exceptions were Franks' two evaluations of Powers dated 30 July and 4 November 1985.

Kevin King became assistant director of food and beverage on 30 September 1985. His duties are performed primarily on the night shift. Crafton is his superior. King testified that he came on duty at 1 p.m., 6 days per week. King "pretty much ran things" at night and when none of his superiors was on the premises. He stated that Franks usually went home for dinner between 6 and 7 p.m. and then returned briefly to observe the operation and see that everything was running smoothly. Franks and King touched base during that time. About 1 week after he began working for Respondent, King talked to Franks about the employees on the night shift. He asked Franks if there was a problem with Powers, and Franks replied that Respondent had issued several counseling forms to her. King said that Powers did not seem happy but he testified that he could not relate any specific incidents. "There was never a problem with any disrespect to a guest or anything like that, but it was just very workman like, not smiling." He believed that Powers felt disdain for management.

King never evaluated Powers nor did he issue her any counseling slips although he issued counseling slips to other employees before Powers was discharged. King acknowledged that if something was done wrong it was his practice to talk to the employee and issue a counseling slip. King testified that Powers "was a very competent waitress."

King testified that he saw Franks' final evaluation of Powers before it was given to Powers and that he agreed with it "completely." He thought the decision to discharge Powers was a "good one," but stated that his reason "was kind of hard to explain." All he could say was that Powers "brought down the attitude of the staff." On cross-examination, when King was asked to give an example of how Powers affected the attitude of other employees, King said that while Powers was there the night-shift waitress who had worked the longest shift would go home earlier than the others. King said this was not against company policy. He repeated that he could not give any examples of Powers' attitude because there were "really no specific instances," but he thought that Powers was not happy working for Respondent.

F. *Discussion and Conclusions*

I find that, with one exception, the witnesses testified truthfully. Certain minor inconsistencies are present in the testimony, doubtless due to the passage of time. I credit the testimony of Powers, Crafton, King, and Allison. I find that Franks was not a candid or forthright witnesses. I shall not credit Franks where his testimony is inconsistent with that of other witnesses.

By the time of Franks' first evaluation of Powers, Weiss had suggested to Powers that the employees would be better off without a union; Weiss had told Powers he would fire her at the Union's behest, Weiss had found out that Powers had taped his remarks and provided them to the Board; and Weiss fired Powers and then reinstated her in exchange for the withdrawal of the charges she had filed. Clearly, Respondent had identified Powers as a spokesperson for employees and one who asserted her rights under the Act by filing charges.

Franks performed Powers' first evaluation even though he evaluated none of the other night waitresses; these were evaluated by Crafton, their immediate supervisor. Franks' rating of Powers was not good; he concluded she "needs improvement."

Crafton's evaluation of Powers on 4 September was unstructured and not based on any set of criteria. As Powers' immediate supervisor, she rated Powers "average" and she thought the evaluation was an improvement over the previous one carried out by Franks. Before this evaluation was given to Powers, Franks told Crafton to downgrade Powers for talking with other employees even though Crafton had never observed Powers doing this. Respondent urges that Crafton's evaluation of Powers on 4 September 1985 was unsatisfactory. However, I do not find that this is the fact. Crafton told Powers that she was pleased with the evaluation because it was an improvement over the last one. Powers' total rating

[11] In fact, Franks had seen to it that Powers was graded "needs improvement" for "initiative" on the two prior evaluations.

[12] In fact, the contract provides that "two consecutive unsatisfactory evaluations will constitute grounds for dismissal."

was "average" and there is no evidence in the record before me to support the proposition that the word "average" bears any other than its common meaning. I do not find that the evaluation of 4 September was unsatisfactory.

Franks' testimony about Powers' evaluation dated 4 November shows that this evaluation was performed with a lack of standards and structure. Franks downgraded Powers' rating for "attendance" from "good" to "average" without consulting Powers' attendance records; he admitted that he did not know if her attendance had declined from the time of the last evaluation. He marked Powers in several categories based on "intuition" and "subjective judgment." There was no attempt on his part to compare Powers to other employees or even to her own past performance. Franks admitted that he marked Powers "not acceptable" under "attitude" because of the number of counseling slips she had received. This included the counseling slip issued on 5 November to replace the slip he had attempted to give her in October for asking her fellow employees to give her written statements.

The facts surrounding the last warning slip are highly significant. It is clear that Allison told Franks that Powers had been asking employees for statements concerning disparate issuance of counseling slips for unreported tips and for statements about the disparate granting of vacations. Franks understood the statements were going to be given to the NLRB. The evidence shows that until Franks called a meeting with Powers and asked Allison to attend no employee had told Powers to stop asking for written statements. Further, from Allison's comment to Powers before the meeting of 15 October began, the record is clear that a number of employees were upset over Respondent's treatment of Powers and they wished to disassociate themselves from Powers' efforts to enforce her rights under the collective-bargaining agreement and under the Act. But instead of informing Powers of this, they informed Franks. Then Franks used this information as a pretext to charge Powers with harassing employees after they had asked her not to. Franks had no proof that Powers had done anything improper. Certainly, after the meeting of 15 October, he knew that Allison had never before asked Powers not to call her, yet he issued a warning slip for this on 5 November when he discharged Powers. Franks also knew that Allison was a spokesperson for the staff and that she had been active in employee affairs. Under these circumstances, he had no basis for reprimanding Powers forcalling to discuss working conditions with Allison. The warning slip of 5 November was issued because Franks found out that Powers was collecting statements to enforce her rights under the contract and the Act and "getting things together against management." It was, therefore, unlawful.[13]

With respect to the warning or counseling slips issued to Powers, I find that Powers was singled out for harsh treatment. Beginning with Powers' exercise of her rights in June 1985, Respondent was trying to build a case against her and it issued counseling slips to her in circumstances in which other employees would not have received them. Crafton testified that she had warned employees orally about eating food not authorized for employee meals but that she had never issued a written warning for this conduct. Powers testified credibly that Franks had never given her the warning slip dated 26 August 1985 for improper parking. Finally, the last warning slip for calling employees at home after they have asked not to be called was undeserved. The record shows that Allison did not ask Powers not to call her at home until Franks told Allison to attend the grievance meeting.

Significantly, Franks did not consult Crafton, Powers' immediate supervisor, about the decision to fire Powers. He did consult King, Crafton's newly hired assistant. Both Crafton and King testified that Powers was a very competent waitress and neither could give an example of behavior engaged in by Powers for which Powers should have been discharged. Neither Crafton nor King testified that they saw Powers engage in the acts cited by Franks in his evaluations of Powers: Neither of them saw her spending too much time talking to other employees, nor failing to use free time to clean the workplace, nor failing to spend enough time with patrons. Franks testified that Powers did not show "initiative" in cleaning her work area, yet Powers' supervisors did not find that this was the case. Indeed, Powers was consistently rated "average" by Franks on "cleanliness of work area."

In view of the fact that Franks singled out Powers for evaluation although he evaluated none of the other food and beverage employees, and in view of the fact that Powers' direct supervisors did not see any of the failings Franks cited, I do not believe that Franks in fact observed Powers engage in the acts for which Franks gave her a bad evaluation on 5 November 1985. It is clear that Franks singled out Powers for harsher evaluation than the other employees in order to develop a pretext for discharging her. After Franks' unfavorable evaluation of Powers on 30 July, Crafton had given Powers an improved evaluation; subsequently, Franks again took over the task of evaluating Powers so that Respondent would have a pretext for discharging her.[14]

Although both Crafton and King testified that they agreed with Franks' decision to discharge Powers, it is obvious that they tailored their testimony with respect to their opinions as a courtesy to Franks; they could give no specific reasons to support the discharge and both of them expressed the conviction that Powers was a good employee who did her job well.

Respondent urges that Powers' discharge is comparable to that of Di Trapano, but the facts belie this assertion. Di Trapano received two evaluations from Crafton:

[13] *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Meyers Industries*, 281 NLRB 882 (1986).

[14] Respondent's actions were based on pretexts. I do not find any evidence to support a dual motivation such as was discussed in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Even if a dual-motive analysis were performed, however, discharge would be unlawful. Respondent has not shown that any other employees were discharged, nor that Powers would have been discharged, for failing to report tips, parking in the wrong space, eating one piece of broccoli, or failing to replace the dessert tray.

"needs improvement" and "not acceptable." The first evaluation clearly informed Di Trapano that she had 30 days to improve specific areas.[15] Powers did not have two consecutive unsatisfactory evaluations. Thus, Respondent's reliance on the collective-bargaining agreement is a pretext.

I note further that Franks testified inconsistently about the purpose of the counseling slips. He stated that they were not warnings and were meant only to provide a basis for discussion between management and the employee. He stated that the slips were not part of a system of progressive discipline. But he also stated that Powers' bad evaluation was based in part on the number of counseling slips she had received.

I find that Respondent pursued a course of conduct with respect to Powers so that it could discharge her in retaliation for her actions in providing evidence to the Board and seeking to enforce her rights under the collective-bargaining agreement and under the Act. In furtherance of Respondent's aims, I find that Respondent disparately issued counseling slips to Powers and disparately evaluated her. It is clear that a major factor in Respondent's final discharge of Powers was the warning notice issued to Powers on 5 November 1985. That notice was based on Powers' actions in seeking to collect statements from other employees to enforce her rights under the Act and under the contract. The warning notice was pretextual in that Powers had not engaged in the conduct cited therein, namely, calling employees late at night after they had asked not to be called. Although Respondent urges that Powers was fired because of bad evaluations, I find that those evaluations were also unfair in that they were based on pretextual misdeeds and on disparate and arbitrary standards. Respondent has thus violated Section 8(a)(1), (3), and (4) of the Act. *NLRB v. City Disposal Systems*, supra; *NLRB v. Scrivener*, 405 U.S. 117 (1972).

CONCLUSION OF LAW

By warning and discharging its employee Bonita Powers because she engaged in concerted activities and because she gave an affidavit and other evidence to the Board, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily discharged Bonita Powers, must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[16]

Respondent must remove from its records any mention of Powers' discharge on 5 November 1985. In addition, Respondent must remove from its files the evaluation of 4 November 1985 on which the discharge was based and the warning notice of 5 November 1985 that was unlawfully issued to Powers.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Hudson Valley Hotels, Ltd. d/b/a Quality Inn Albany, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning and discharging its employees because they engage in concerted activities and provide affidavits and evidence to the Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Bonita Powers immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge of 5 November 1985, the evaluation of 4 November 1985, and the warning notice of 5 November 1985, and notify Bonita Powers in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Albany facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in

[15] Di Trapano had problems with attendance, tardiness, appearance of guest checks, and conflicts with coworkers. She was warned about this. She was fired because she continued to come in late, she continued to write illegible guest checks, and she continued conflicts with her fellow workers.

[16] The General Counsel's request for a visitatorial order is denied.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT warn or discharge our employees for engaging in concerted activities.

WE WILL NOT warn or discharge our employees for giving affidavits and other evidence to the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Bonita Powers immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL remove from our records any mention of the unlawful warning, evaluation, and discharge of Bonita Powers.

HUDSON VALLEY HOTELS, LTD. D/B/A
QUALITY INN ALBANY

Cedar Rapids Building and Construction Trades Council, AFL–CIO, and Five Rivers District Council of Carpenters *and* Siebke-Hoyt and Company. Case 18–CC–1116

27 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 13 August 1986 Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent Unions filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cedar Rapids Building and Construction Trades Council, AFL–CIO, and Five Rivers District Council of Carpenters, Cedar Rapids, Iowa, their officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Picketing or picketing and handbilling at or near the Siebke-Hoyt and Company Jewelry Store where an object thereof is to force or require Siebke-Hoyt and Company or any other person to cease doing business with Technical Specialty Systems Corporation or RTP Corporation."

2. Substitute the following for paragraph 2(b).

"(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

3. Substitute the attached notice for that of the administrative law judge.

[1] In agreeing with the judge's conclusion that the Respondent Unions engaged in conduct violative of Sec. 8(b)(4)(ii)(B) of the Act, we find it unnecessary to pass on the legality of the handbilling alone. See *Nashville Building Trades Council (Casner-Knott)*, 188 NLRB 470, 473 (1971); *Building Trades Council of Fond du Lac (Peters Construction)*, 168 NLRB 606 fn. 1 (1967).

[2] The judge included in his recommended Order a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondents under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Board's Order. In the circumstances of this case, we find it unnecessary to include such a clause.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT picket or picket and handbill at or near the Siebke-Hoyt and Company Jewelry Store where an object thereof is to force or require Siebke-Hoyt and Company or any other person to cease doing business with Technical Specialty Systems Corporation or RTP Corporation.

WE WILL NOT in any like or related manner restrain or coerce Siebke-Hoyt and Company or any other person engaged in commerce with an object of forcing them to cease doing business with Technical Specialty Systems Corporation or RTP Corporation.

CEDAR RAPIDS BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL–CIO, AND FIVE RIVERS DISTRICT COUNCIL OF CARPENTERS

Robert V. Johnson, Esq., for the General Counsel.
Robert F. Wilson, Esq., of Cedar Rapids, Iowa, for the Respondent.
Kevin Visser, Esq., of Cedar Rapids, Iowa, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On 8 and 14 April 1986 Siebke-Hoyt and Company filed a charge and first amended charge, respectively, against Cedar Rapids Building and Construction Trades Council AFL–CIO (Respondent Trades Council), and Five Rivers District Council of Carpenters (Respondent Carpenters). Following an investigation the National Labor Relations Board, by the Regional Director for Region 18, issued a complaint and notice of hearing in Case 18–CC–1116 alleging that Respondent Trades Council and Respondent Carpenters violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (the Act) when it picketed and handbilled in front of the Siebke-Hoyt and Company Jewelry Store, which is located in a building in Cedar Rapids, Iowa, in another part of which building Hoyt Real Estate and contracted with two nonunion contractors, i.e., Technical Specialty Systems Corporation (Technical Specialty) and RTP Corporation (RTP) to do construction work. Respondent filed an answer in which they denied that they violated the Act in any way.

A hearing was held in Cedar Rapids, Iowa, on 29 May 1986.

On the entire record in this case to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Siebke-Hoyt and Company is an Iowa corporation, with an office and place of business in Cedar Rapids, Iowa, where it is engaged in the wholesale and retail sale and distribution of jewerly.

Technical Specialty Systems Corporation is an Iowa corporation with an office and place of business in Cedar Rapids, Iowa, where it is engaged in the reconstruction, repair, and renovation of building exteriors.

RTP Corporation is an Iowa corporation with an office and place of business in Cedar Rapids, Iowa, where it is engaged in the renovation and remodeling of interiors of commercial and residential buildings.

Respondents admit, and I find, that Siebke-Hoyt and Company, Technical Specialty, and RTP are now, and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent Trades Council and Respondent Carpenters admit, and I find, that they are now, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The statute Respondents are alleged to have violated is Section 8(b)(4)(i) and (ii)(B) of the Act, which provides as follows:

> [8(b)] It shall be an unfair labor practice for a labor organization or its agents—
>
> (4)(i) to engage in, or to induce or encourage any individual employed by an person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof if—
>
> . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Siebke-Hoyt and Company owns a building in downtown Cedar Rapids, Iowa. Part of the building is occupied by a jewelry store, which is owned by Siekbe-Hoyt and Company and is known as the Siebke-Hoyt Jewelry Store. The owners of Siebke-Hoyt and Company are two brothers each of whom has 50-percent interest in Siebke-Hoyt and Company. The two brothers, one of whom, Joseph J. Hoyt, testified at the hearing, also are equal owners of JMH Properties, Inc., which does business as Hoyt Real Estate. Hoyt Real Estate manages some properties, to include the building owned by Siebke-Hoyt and Company. In addition to the Siebke-Hoyt Jewelry Store, the building contains a health food store and a travel agency. The travel agency wanted to expand its operation and this required renovation of the interior and exterior of that part of the building in which the travel agency was located. No work was required to be done in that part of the building—inside or outside—where the Siebke-Hoyt Jewelry Store was located.

Joseph J. Hoyt, on behalf of Hoyt Real Estate, contracted with Technical Specialty to do some exterior work on the building and he contracted with RTP to do some interior work on the building. Both Technical Specialty and RTP are nonunion contractors whose employees make less in wages and fringe benefits than their union counterparts who are represented by Respondent Trades Council and Respondent Carpenters.

On several days between 31 March and 9 April 1986, picketing and handbilling occurred, on occasion at the same time, at the building in which the work was being done by the nonunion contractors. Sometimes the picketing and handbilling took place in front of the Siebke-Hoyt Jewelry Store and sometimes it took place down the block from the jewelry store where there was an entrance into the construction area large enough for vehicles to go.

The picketing consisted of the carrying of two signs. On one of the signs was some writing, but no witness at the hearing was able to testify about what it said. The other sign was identified in the record as a "rat busters" sign, i.e., a sign with a picture of a rat with a red circle around it with a red line draw through it. No writing appeared on the "rat buster" sign.

The handbilling consisted of persons, including James Christiansen, business agent for Respondent Carpenters, handing out two different handbills.[1]

---

[1] Over vigorous objection from Respondents' counsel, I permitted the General Counsel to reopen his case after the General Counsel, the Charging Party, and Respondents (neither the Charging Party nor Respondents had put on any evidence) had all rested. I did so after I brought to the General Counsel's attention that he had introduced no evidence that Respondent Carpenters was involved in any way with the picketing and handbilling. The General Counsel promptly moved to reopen his case, called Respondent Carpenters Business Agent Christiansen to the stand, and established Respondent Carpenters participation. Respondents object

Continued

One of the handbills was as follows:

> Cedar Rapids Building and Construction Trades Council Wants you to know:
>
> That *SIEBKE & HOYT* has contracted some of the reconstruction and renovation of their building at the corner of Third Street and Second Avenue S.E. to *TECHNICAL SPECIALTY SYSTEMS, INC.* They are not signatory to any local bargaining agreements and are jeopardizing wages and standards in this area that have been established by Collective Bargaining."

The other handbill was as follows:

> Cedar Rapids Building and Construction Trades Council Wants you to know:
>
> That *SIEBKE & HOYT* has contracted some of the reconstruction and renovation of their building at the corner of Third Street and Second Avenue S.E. to *TECHNICAL SPECIALTY SYSTEMS, INC.* AND *RTP CORPORATION*. They are not signatory to any local bargaining agreements and are jeopardizing wages and standards in this area that have been established by Collective Bargaining."

A number of employees and customers of Siebke-Hoyt Jewelry Store brought copies of the handbills into the jewelry store and gave them to Joseph J. Hoyt. There is no evidence that work in the jewelry store was interrupted and no evidence that the jewelry store lost any business. The picketing and handbilling ceased after 9 April 1986 (although Joseph J. Hoyt had requested that it cease earlier than this in requests to Clair Scott, president of Respondent Trades Council). No injunctive relief was ever sought by the General Counsel.

It is the contention of the General Counsel that Respondents had a primary labor dispute with the two nonunion contractors and not with Siebke-Hoyt Jewelry Store or Hoyt Real Estate. Therefore, Respondents' picketing and handbilling of Siebke-Hoyt Jewelry Store violated the statute laid out above that prohibits this type of secondary activity, i.e., activity aimed not at the party or parties Respondents have their primary dispute with but at a secondary or neutral target—in this case the jewelry store.

Respondents contend that the law was not violated because what they did constituted lawful truthful informational picketing and was protected by the first amendment to the U.S. Constitution. The information on the handbills was not entirely accurate, however, because it was Hoyt Real Estate and *not* Siebke-Hoyt and Company that contracted with Technical Specialty and RTP.[2]

Common sense and the drawing of obvious inferences from the handbills and that "rat busters" sign establish that the handbilling and picketing had a "cease-doing-business with" objective, namely, to get jewelry store customers to pressure Siebke-Hoyt and Company Jewelry Store to cease doing business with Technical Specialty and RTP.

The primary labor dispute was between Respondents, Technical Specialty, and RTP and *not* between Respondents and Siebke-Hoyt and Company or Hoyt Real Estate. The cases cited by the General Counsel establish that quite clearly [3]

Although an argument based on logic could be made that Respondents' real or primary dispute was with Hoyt Real Estate because they contracted with nonunion contractors to do the work, it is clear beyond all doubt that Respondents primary dispute was not with Siebke-Hoyt and Company Jewelry Store as a entity. If Respondents' argument had been that "we don't care if Technical Specialty and RTP are non-union we just don't want Hoyt Real Estate to contract with non-union contractors" that argument will fall on deaf ears. A reading of the cases, principally the Supreme Court decision in *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983), and the Board decision following remand in *Florida Building Trades Council (DeBartolo Corp.)*, 273 NLRB 1431 (1985), establish that the primary dispute as a matter of law was not with Siebke-Hoyt and Company or Hoyt Real Estate, but with Technical Specialty and RTP. In that case the Supreme Court and the Board concluded that the Florida Building Trades Council had a primary dispute with H. J. High Construction Company that had contracted a store at a shopping mall for H. J. Wilson Company and had no labor dispute with H. J. Wilson Company.

Accordingly, Respondents violated the Act, specifically Section 8(b)(4)(ii)(B), in picketing and handbilling Siebke-Hoyt and Company Jewelry Store with the purpose of getting Siebke-Hoyt and Company to cease doing business with Technical Specialty and RTP.

With respect to Respondents' argument that the picketing and handbilling in this case are protected by the first admendment, I can only state and do state that in the absence of authoritative case law making Section (8)(4)(ii)(B) of the Act unconstitutional, I will presume, as the Board recently did as regards the same part of the Act, that it is constitutional. *Florida Building Trades Council (DeBartolo Corp.)*, supra.

I have not considered against Respondents a letter, dated 27 March 1986, which the executive secretary of the Hawkeye Labor Council sent to Joseph J. Hoyt complaining about Hoyt's use of nonunion contractors and threating a consumer boycott against the jewelry store. The Hawkeye Labor Council is not a respondent in this case and, although Respondent Carpenters in a member of the Hawkeye Labor Council, there is no evidence that Respondent Carpenters participated in the preparation of this letter or caused it to be prepared and sent. There was hearsay evidence that the letter was sent at the request of the president of Respondent Trades Council, but

in their brief to this exercise of discretion on my part but I am confident that in doing what I did to correct an obvious oversight by the General Counsel I did not deprive Respondents of their right to a fair hearing.

[2] There is no evidence that either Siebke-Hoyt and Company or Hoyt Real Estate were general contractors.

[3] *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983); *Hospital & Service Employees Local 399 v. NLRB*, 743 F.2d 1417 (9th Cir. 1984); *NLRB v. Denver Building Trades Council*, 341 U.S. 675 (1951); *Electrical Workers IBEW Local 501 v. NLRB*, 341 U.S. 694 (1951).

I need not and do not rely on the letter to reach the conclusion that the Act was violated.

REMEDY

The remedy in this case should be a cease-and-desist order directing Respondents not to engage in this or similar violations of the law and Respondents should each be directed to post an appropriate notice.[4]

CONCLUSIONS OF LAW

1. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

2. Siebke-Hoyt and Company, Technical Specialty, and RTP are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. By picketing and handbilling in front of Siebke-Hoyt and Company Jewelry Store and attempting to coerce and restrain customers of Siebke-Hoyt and Company Jewelry Store to cease doing business with the jewelry store in order to force Siebke-Hoyt and Company, who owns the jewelry store, to cease doing business with Technical Specialty and RTP, Respondents engaged in an unfair labor practice affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondents, Cedar Rapids Building and Construction Trades Council, AFL–CIO, and Five Rivers District Council of Carpenters, Cedar Rapids, Iowa, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Picketing or handbilling at or near the Siebke-Hoyt and Company Jewelry Store when an object thereof is to force or require Siebke-Hoyt and Company or any other persons to cease doing business with Technical Specialty Systems Corporation or RTP Corporation.

(b) Threatening, coercing, or restraining Siebke-Hoyt and Company or any other person engaged in commerce where an object thereof is to force or require Siebke-Hoyt and Company or any other person to cease doing business with Technical Specialty Systems Corporation or RTP Corporation.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply therewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, or representatives, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States court of appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the court.

---

[4] I do not find a violation of Sec. 8(b)(4)(i) because I do not find that Respondents in doing what they did had as an object to encourage any person to strike or refuse in their employment to handle goods of Siebke-Hoyt and Company.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Show Lang Cheng and Ko Cheng Cheng d/b/a Northern Star Realty Co. *and* Local 32B–32J, Service Employees International Union, AFL–CIO, Petitioner. Case 29–RC–6731

27 May 1987

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 12 January 1987 and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows one vote for and no votes against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations only to the extent consistent with this decision, and finds that a certification of representative should be issued.

Of the two eligible voters for the 12 January election, only one voted. The Employer filed timely objections to the election, arguing not only that the Petitioner could not be certified on the basis of the single vote cast but also that a certification of election results finding that no bargaining representative was selected should be issued, thus barring another election for a year. The Regional Director found merit in the Employer's objection only to the extent that then-current Board precedent held that the single vote cast could not be considered "representative" of unit employee desires,[1] and recommended that a second election be directed.

[1] E.g., *Kit Mfg. Co.*, 198 NLRB 1 (1971); *Gold & Baker*, 54 NLRB 869 (1944).

Subsequent to the Regional Director's report the Board issued its decision in *Lemco Construction*, 283 NLRB No. 68 (Mar. 31, 1987), in which it stated (slip op. at 5–6):

> [W]e have decided to abandon any analysis dependent on a numerical test to determine the validity of a representation election. Rather, we will issue certifications where there is adequate notice and opportunity to vote and employees are not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election. Precedent such as *Kit Mfg.* and *Gold & Baker* are inconsistent with this approach and are, accordingly, overruled.

In the present case, only one of two eligible employees voted. The Employer alleges that both were present at the polling place immediately prior to the election. Pursuant to *Lemco*, in the absence of any claim or evidence that the nonvoting employee lacked adequate notice and opportunity to vote and was not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election, the results of the election will stand. Accordingly, we will certify the Petitioner.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 32B–32J, Service Employees International Union, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All regular full-time and part-time building service employees employed by the Employer at 147–25 Northern Boulevard, Flushing, New York, but excluding all other employees, including guards and supervisors as defined in the Act.

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 162, AFL–CIO–CLC (Tibbetts Mechanical Contractors, a Division of Natkin & Company) *and* Daniel O'Hearn *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 166, AFL–CIO–CLC, Party in Interest. Case 9–CB–6470–4

27 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 9 December 1986 Administrative Law Judge Marion C. Ladwig issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 162, AFL–CIO–CLC, Dayton, Ohio, its officers, agents, and representatives, shall take the action set forth in the Order.

David L. Ness, Esq., for the General Counsel.
Gary A. Snyder, Esq., of Dayton, Ohio, for Local 162.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried at Dayton, Ohio, on 15 September 1986.[1] The charge was filed 16 April and the complaint was issued 30 May.

On 12 and 14 February the Fort Wayne Local 166 requested the Union (Local 162) to refer seven of its Dayton Journeymen, five of whom the Union had named on 20 January at Local 166's request. The Union referred them under its established procedure of referring persons requested by name for work *outside* its jurisdictional area.

The primary issues are whether the Union, the Respondent (a) "arbitrarily failed to follow its established system for referrals" when it referred the requested journeymen instead of seven other members who were higher on the out-of-work list, which is used for referrals *inside* its jurisdictional area, and (b) unlawfully used the word "member" instead of "person" in its hiring hall rules, in violation of Section 8(b)(1)(A) and (2) of the National Labor Relations Act.

On the entire record, including my obervation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Tibbetts Mechanical Corporation, a Division of Natkin & Company is an Indiana corporation that engages as a mechanical contractor in the building and construction industry at Anderson, Indiana, and annually performs services valued over $50,000 outside the State. The Union admits that Tibbetts is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Out-of-Town referrals*

1. "Exclusive" hiring halls

The Union and Local 166 are stipulated to be "the sole and exclusive source of referrals of employees . . . *within their respective geographical jurisdictions*" (Tr. 7, par. 7(a) of the complaint) (emphasis added).

The Union has a collective-bargaining agreement with the employer association in the Dayton area (G.C. Exh. 2). Its hiring hall rules (G.C. Exh. 5) require it to follow its out-of-work list when making referrals *within that geographic area*, with certain exceptions (recalls, supervisors, and persons with special skills) (Tr. 15–16, 95, 122–123).

Local 166's referral procedure is set out in its working agreement with the employer association in the Fort Wayne area (G.C. Exh. 4, art. X). The agreement requires (sec. 10.15) that all applicants be registered on Local 166's out-of-work list. It further provides (sec. 10.16) that "If the registration list is exhausted" and if Local 166 "is unable to refer" a sufficient number of applicants within 48 hours, "the Employer is free to secure applicants without using the Referral Procedure." It does not set out what obligation if any Local 166 has to furnish workers—through the hiring hall or from other sources—after its right-of-work list is exhausted. The only applicable provisions are those (sec. 10.14) prohibiting discriminatory referrals based on union membership, race, etc. The agreement does not restrict Local 166's referring nonmembers, or members with or without travel cards. It does not restrict Local 166's requesting persons by name when seeking referrals from other locals, and does not restrict the manner in which other locals select

[1] All dates are in 1986 unless otherwise indicated.

persons to be referred, whether from an out-of-work list, on the basis of financial hardship, or otherwise.

The National Construction Agreement (G.C. Exh. 3, art. V, par. 25) contains a procedure for the International to obtain additional journeymen from other locals:

> In the event the local union is unable to supply sufficient qualified and competent journeymen, the Employer may request the United Association to furnish such additional employees it requires and the United Association agrees to notify its local unions of the availability of work and request the local unions to refer journeymen to the Employer.

The national agreement, to which both Local 166 and Tibbetts are bound, therefore provides an alternative procedure for supplying workmen—through the International and other locals—if Local 166 is unable to furnish a sufficient number of journeymen.

Thus, the "exclusive" hiring halls are limited. The Union's hiring hall rules require referrals from its out-of-work list only for work *inside* its jurisdictional area. Local 166's referral procedure requires referrals from its out-of-work list *until* the list is exhausted.

2. Procedure for out-of-town referrals

It is undisputed that when making "out-of-town" referrals (for work outside its jurisdictional area) to Local 166 and other locals, the Union has an established procedure of referring journeymen requested by name, without regard to their position on the Union's out-of-work list (Tr. 90–91, 95–96, 104–108, 116–117, 139). The only time the Union follows the out-of-work list in making out-of-town referrals is when another local requests it to supply a number of persons without naming them (Tr. 95, 116, 139). I note that this exception does not exist at Local 776 in Lima, Ohio. Local 776 Business Manager Ronald Bowen credibly testified (Tr. 105–106) that he never follows the out-of-work list when making referrals "out of our jurisdiction." He refers persons who "inform me that they would travel."

The Union's policy is to permit its members to solicit their own work in other jurisdictions. All the member "has to do is pick up a travel card, and he can travel to any of our local unions within the United States or Canada, and secure employment on his own" (Tr. 116, 121). (As found below, Local 166 did not require a travel card.) The Union permits other locals to call its members directly to perform out-of-town work (Tr. 93). If an unemployed journeymen hears about available work in another local's jurisdiction, the Union calls the local and, if requested, refers the journeyman for the available work, without his being at the top of the out-of-work list (Tr. 92, 115). As Union Business Manager Enix testified, the unemployment was high (Tr. 37) and "we check out even rumors, to try to secure job opportunities for our people" (Tr. 123). When Enix learns that out-of-town work is available but he has no request for referrals, he often tells unemployed journeymen that if they go there and "happen to be" in the hiring hall when a call comes in, the local "might put you to work" (Tr. 125).

Registrants *retain* their position on the out-of-work list when working out of town. As explained by Business Manager Enix, "We do not remove them from the list" because "they are still considered unemployed as far as Local 162 is concerned. . . . We try to work them within our geographical jurisdiction" (Tr. 117–118). If a registrant is working out of town, that information is noted (with his temporary telephone number) beside his name on the list, and "If I would get a call from a local contractor, that man would be called to his home area to work." If the individual refuses to return and wants to stay on the out-of-town job, "he retains his place on top of the list." (Tr. 32, G.C. Exh. 5, rule 1.)

3. Local 166's request for names

The Union was making continuing efforts to find employment in Local 166's area and in other jurisdictions (Tr. 18,37). One of the Union's business representatives telephoned and asked Local 166 Business Manager William Darnell twice about any available work, but Darnell gave him negative responses (Tr. 139–140). On 20 January Business Manager Enix telephoned Darnell again. This time Darnell stated that he may be able to help some of Enix's unemployed members in "six weeks to two months" (without stating where). He said that two of Enix's members, Dean Brill and Howard Mercer, had already been over there seeking employment and told Enix to call back with five other names. (Tr. 19–20.)

As Business Manager Enix credibly testified, "I've been in office 17 years, and I have never had a call like this" before. Darnell was not asking for referrals, but was asking for names of unemployed members for possible work in 6 weeks to 2 months. "It kind of threw me off base." He suspected that it was a ploy to get him off the phone, or a brush-off, but he did not know. (Tr. 119–120.) He obviously had no choice. He must submit the names as Darnell requested or run the risk, during the high unemployment, of losing the possible job opportunities.

Enix had made no preparations for such and unexpected call. He looked at the out-of-work list, but decided that he could not follow it. In all probability "the top names on that list would have been already working locally" by the time Local 166 needed the extra journeymen. If Local 166 did call for them by name and they were not available, the job opportunities could be lost for the Union. (Tr. 23–24, 119.)

Enix recalled individuals who had contacted him personally, telling him "Jim, I'm in dire straits. I need to go to work . . . . they needed to go to work someplace. . . . one of the gentlemen on there, his wife had called me. She said, 'My husband doesn't even know I'm calling you. . . . Jim, we're losing our home, and they're getting ready to take our car.'" He selected five of them and "sneaked in an additional one" from among those who were low enough on the long out-of-work list that they probably would not be working locally *if* Local 166 did call for men. He then called one of Darnell's agents and gave him the six names, in addition to the names of the two members whom Darnell had already chosen. (Tr. 22, 24–25, 131.)

4. The February out-of-town referrals

The Local 166 jobs became available earlier than expected. After about 3 weeks, on 12 and 14 February, Local 166 called the Union for the referral of the eight journeymen to work in the Fort Wayne area (for an undisclosed employer). Local 166 requested them by name and stated that travel cards and referrals were not required and would not be accepted. Following the Union's established procedure of referring persons requested by name to work outside its jurisdiction, the Union's business representatives routinely relayed the requests to the eight individuals: Brill and Mercer (the two chosen 20 January by Local 166) and David Drake, Duane Greene, Donald Hines, Herbert Starry, Martin Stieger, and John Weaver (the six suggested then by Enix). All of them except Drake reported to Local 166, which referred them to Tibbetts Mechanical Contractors on 17 February. Local 166 did not request anyone to replace Drake. (Tr. 120–121, 135–138, 141–144.)

Journeyman Daniel O'Hearn, the Charging Party, spoke to Business Manager Enix on 17 February about these referrals (that were properly noted on the out-of-work list). O'Hearn asked how these people got requested and Enix said he had previously given their names to the business agent in Fort Wayne because (in O'Hearn's words) "they was out of unemployment or was running out of unemployment. . . . Mr. Enix told me that he was just trying to be fair, and asked me how he could be fair about it. And I asked him if he would get myself and my brother, Michael O'Hearn, over there because we was both out of work and needed a job at the time." (Tr. 35, 77, 80–82.) Enix credibly testified that he responded that if O'Hearn and his brother "would happen to be in [Local 166's] office, and they have a call for help they might put you to work." (Tr. 125.)

I note that although O'Hearn and his brother were not at the top of the out-of-work-list the Union had earlier referred O'Hearn to Local 776 in Lima, Ohio, when Local 776 requested him by name. (Tr. 90, R. Exh. 4.) His brother, Michael, had worked out of town in the Lima area without a referral from the Union when he was contracted directly by Local 776. (Tr. 93.)

I also note that although O'Hearn and the other six members listed in the complaint were higher on the the out-of-work list than those referred, Business Manager Enix would not have given their names to Local 166 on 20 January. Local 166 had asked for only five names (besides Brill and Mercer). Two of those listed in the complaint (John Skaggs and Willis Williamson) were then working (Tr. 26, 130); two of them (Daniel Spicer and Ted Woodburry) had been on sick leave (Tr. 26, 132, R. Exh. 1); and one (Kevin Shiveley) had advised Enix that he wanted only in-town work. (Tr. 110.) (Shiveley credibly testified (Tr. 111–112) that he would not have accepted a referral to Local 166 and that he had "no idea" why his name was included in the list of persons discriminated against.) The other two members listed in the complaint (Warren Giles and O'Hearn) had been working out of town. (Tr. 87–88, 130.)

5. The General Counsel's contentions

The complaint alleges that in mid-February the Union "arbitrarily failed to follow its established system for referrals" when, as requested by Local 166, it referred employees to work for Tibbetts within Local 166's jurisdiction and failed to refer seven employees, violating Section 8(b)(1)(A) and (2). Thus the litigated issue is whether the Union violated the Act in mid-February by arbitrarily failing to follow "its established system for referrals" and failing to refer seven members who were higher on the Union's out-of-work list than the seven journeymen referred.

Recognizing this to be the issue, the General Counsel contends in her brief that the Union "violated Section 8(b)(1)(A) and (2) of the Act in mid-February when it arbitrarily failed to follow its established system for referral." She does not, however, dispute the fact that (a) the Union had an established procedure of referring journeymen requested by other locals by name, regardless of their position on the out-of-town list and (b) in mid-February (on 12 and 14 February) when Local 166 requested the journeymen by name, the Union followed this established procedure. She admits that the Union "honored other locals' requests for specific individuals," and she does not dispute that the Union acted in good faith.

In the absence of proof of the allegation that the Union violated the Act in mid-February by not following "its established system for referrals," the General Counsel relies on two principal theories for contending that the Union acted unlawfully. One is that the Union, in effect, violated the Act on 20 January when Business Manager Enix gave Local 166 the names of available unemployed members. She contends (a) that Enix deviated from the out-of-work list in selecting referrals for the Tibbetts job, (b) that his method of selecting referrals was "haphazard," (c) that reliance on the financial plight of members in making referrals is wholly subjective and indicative of the unlawful operation of an exclusive hiring hall system, and (d) that he lacked any justifiable reason for deviating from the Union's referral procedure. There were no referrals on 20 January and the complaint does not allege any unlawful conduct in January.

The General Counsel's other theory is based on the Board's agency rationale in *Plumbers Local 513 (Master Plumbers)*, 264 NLRB 415, 416–417 (1982). In that case the Board found that the respondent local, when requested by two other locals to refer *unnamed* applicants, was acting as an agent of those locals under their hiring halls when it *failed to follow* its "well-established procedure for referrals." Here, in contrast, when the Union was asked on 12 and 14 February to refer *named* employees, it *followed* its established referral procedure.

In expounding this theory, the General Counsel contends that Business Manager Enix "referred members of the Tibbetts job within Local 166's geographic jurisdiction" (even though Enix was not aware of the identity of the employer). Local 116 "had an exclusive hiring hall arrangement with Tibbetts and "was contractually obligated to furnish workers for Tibbetts from the hiring hall" (by making referrals from the Local 166 out-of-work list). "When Enix inquired with Local 166 [on 20

January about] the availability of jobs within its area, Local 166 authorized Enix to secure the needed employees." (To the contrary, Enix was authorized merely to suggest five of seven applicants that might be needed in 6 weeks to 2 months.)

The General Counsel theorizes that when the Union made the referrals (on 12 and 14 February), "Enix was authorized by Local 166 to fulfill its contractual obligation to furnish workers to Tibbetts from the [Local 166] hiring hall," and therefore the Union was acting pursuant to an exclusive hiring hall. I do not agree.

First, Enix was never authorized to furnish workers for the Local 166 hiring hall. The Union's unemployed members were registered on the Union's Dayton out-of-work list, not on Local 166's Fort Wayne out-of-work list. There was no way the Union could refer its members from the Local 166 hiring hall's out-of-work list.

Second, the Union was not acting pursuant to its own exclusive hiring hall when it made the 12 and 14 February referrals outside its jurisdictional area. As stipulated, the Union was "the sole and exclusive source of referrals" within its geographic jurisdiction. As interpreted by its executive board (Tr. 95), the hiring hall rules governing referrals from the Dayton out-of-work list cover only the Dayton jurisdictional area. The Union was not obligated to follow its out-of-work list when referring the requested journeymen to work outside its jurisdiction.

I therefore find, contrary to the General Counsel's argument, that the mid-February referrals were not made pursuant to either Local 166's exclusive hiring hall or the Union's exclusive hiring hall. They were made pursuant to the Union's established procedure of referring journeymen requested by other locals by name, for employment outside the geographic area.

6. The Union's contentions

The Union contends that it acted lawfully. It argues that "there was no allegation or proof of breach of a contractual obligation by officers" of the Union because "the situs of work was outside the contractual jurisdiction" of the Union.

The Union contends that when Business Manager Enix placed a call to the Fort Wayne Local about 20 January to see if any work was available, there was no request for the Union to furnish manpower because of an immediate need. "There was only a *potential* for work opportunities in the future with a request made to provide names of those who might be unemployed at some future, unspecified time." Enix "could not have been an agent fulfilling Local 166's contractual requirements" when he supplied the names of unemployed persons "because in fact there were no employees required by Fort Wayne." Enix could not follow the Union's out-of-work list at that time because "had Enix named only those at the top of the list" and "if they were working when" Local 166 called for them, "Local 162 would lose out in its attempt to get work for its personnel."

Then when Local 166 did call (on 12 and 14 February) and asked for the individuals by name, the Union "followed its established policy of filling the request in that manner." There was "no proof whatsoever of unlawful motive," and "No evidence was offered to show hostility toward anyone."

The Union cites many reasons for distinguishing *Plumbers Local 513*, which it criticizes as the "lone case" extending liability to a local union as an agent.

> To extend even further the liability of a local union seeking to secure work for unemployed members, beyond the once-believed limitations confined to the local's own contractual hiring hall and beyond the aberration created in *Plumbers Local 513*, would be a serious if not devastating blow to those local unions seeking to attain full employment in these difficult times faced by building trades unions. To further shackle business managers who in good faith make such efforts, would be intolerable. Such a quantum leap in the law of agency would be unsupported and unjustified.

Although conceding that "there are obviously some slight differences between this case" and *Plumbers Local 513* (Tr. 101), the General Counsel argues in her brief that the Board's decision in *Plumbers Local 513* is controlling. I disagree and find that it is clearly distinguishable. I therefore do not rule on the Union's opposition to extending that decision.

7. Concluding findings

On 20 January, when Business Manager Enix sought information about available jobs in Local 166's Fort Wayne area, Local 166 Business Manager Darnell confronted him with a unique situation. Contrary to the facts in *Plumbers Local 513*, 264 NLRB at 416, Darnell did not authorize Enix to act as an agent to secure emplyees. Darnell merely stated that he *may* be able to help some of Enix's unemployed members in 6 weeks to 2 months. Darnell said that two of Enix's Dayton members had already been there seeking employment and told Enix to call back with five other names. Instead of being authorized to make referrals for employment, Enix was authorized only to suggest names of unemployed persons that Darnell might or might not call for in the future, depending on whether Darnell decided he needed them. As found, Enix obviously had no choice but to suggest names as Darnell requested. Otherwise he would run the risk of losing the possible job opportunities.

Faced with such a request (the first time in his 17 years in office), Enix decided that he could not use the Union's out-of-work list. Persons at the top of the list would probably be working locally in 6 weeks to 2 months. If he gave Local 166 their names and they were not available for out-of-town work when (and if) Local 166 called, the job opportunities because of the high unemployment could be lost to the Dayton local.

Not having anticipated the request for names of possible future employment, Enix had no list of unemployed journeymen facing particularly great financial hardship. He recalled some who had contacted him personally about their dire financial straits and gave their names to Local 166.

Contrary to the General Counsel's contentions, Local 166 did not on 20 January "authorize Enix to secure the

needed employees" and did not authorize him to furnish workers from the Local 166 hiring hall. Enix was therefore not an agent of Local 166 when suggesting names for possible future employment.

There was also no violation of the Act on 12 and 14 February when the Union routinely followed its established procedure and referred the journeymen whom Local 166 requested by name. The Union made the referrals in good faith. It had no motive to circumvent the out-of-work list by suggesting five of the names over 3 weeks earlier for possible jobs in 6 weeks to 2 months, as a way of protecting possible job opportunities. Moreover, the Union's hiring hall rules are limited to referrals within its jurisdictional area. The Union had no obligation to follow its out-of-work list when referring the requested journeymen outside its geographic area.

I therefore find that the Union did not in mid-February arbitrarily fail to follow its established system for referrals and did not unlawfully fail to refer seven employees as alleged in the complaint. Accordingly, I find that these 8(b)(1)(A) and (2) allegations must be dismissed.

B. *Hiring Hall Rules*

The complaint alleges that the Union adopted hiring hall rules providing for the referral of only members to position of employment. These rules (G.C. Exh. 5) do use the word "member" throughout to refer to persons signing the out-of-work list.

At the trial the Union took the position that the word is of historical use and not a word of art. "We can and will change that provision. . . . We think the word 'person' would be appropriate to insert in all those places where the word 'member' is now listed." (Tr. 11–12.)

I find a technical violation of Section 8(b)(1)(A) and (2).

CONCLUSIONS OF LAW

1. By using the word "member" in its hiring hall rules to refer to persons signing the out-of-work list, the Union engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the Act.

2. The Union did not arbitrarily fail to follow its established system for referrals or unlawfully fail to refer employees.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 162, AFL–CIO–CLC, Dayton, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Using the word "member" in its hiring hall rules to refer to persons signing the out-of-work list.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its office and hiring hall copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT use the word "member" in our hiring hall rules to refer to persons signing the out-of-work list.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 162, AFL–CIO–CLC

Wisconsin Bell, Inc. *and* Deborah Hollis *and* Local 4603, Communications Workers of America, AFL–CIO. Case 30–RD–858

27 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 17 June 1986 the Regional Director for Region 30 of the National Labor Relations Board issued an order withdrawing notice of representation hearing and dismissing petition in the above-titled proceeding. The Regional Director found that Wisconsin Bell, the Employer, and Communications Workers of America, Local 4603, the Union, had entered into an agreement on 24 September 1984 to amend their then current collective-bargaining agreement to merge the newly certified unit of Public Service Center employees at the Kossow Road location into a larger unit of employees,[1] and that therefore the unit petitioned for in this proceeding was not appropriate for purposes of a decertification election. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's dismissal. By order dated 17 December 1986, the Board granted the request for review, as it raised substantial issues with respect to whether there had been a merger of the originally certified unit sought here into a larger unit that could best be resolved on the basis of record evidence. On 20 January 1987 a hearing was held before Hearing Officer Gary Prochnow. Thereafter, on 21 January 1987, the case was transferred to the Board for decision in accordance with its 17 December 1986 order.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the entire record in this proceeding, including the briefs of the parties, and has decided to affirm the Regional Director's dismissal.

The Employer and the Union have had an ongoing collective-bargaining relationship for many years. The first contract covering a unit of commercial employees was effective either in 1974 or 1977.[2] Since that time, there have been a series of successive 3-year contracts, the most current of which is effective 10 August 1986 through 12 August 1989. Each of the contracts has consisted of a main body with common clauses and four separate appendices. Historically, appendix D has covered commercial employees. Prior to the 1983 agreement, each of the commercial units was listed separately in the appendix by geographic area and was considered a separate bargaining unit. During bargaining for the 1983 agreement, however, the Union and the Employer agreed that all existing units in appendix D would be combined into one overall unit represented by the Union. The parties further agreed that any newly certified groups of commercial employees in the future would be included in the overall commercial unit described in appendix D. These changes were reflected in the 1983 agreement by the deletion of the phrase "separate bargaining units," which appeared in the 1980 contract.

On 13 September 1984 the Union was certified as the collective-bargaining representative for a group of eight commercial employees who worked at the Employer's Public Service Center on Kossow Road in Waukesha, Wisconsin. The 1983 contract was then amended by letter dated 24 September 1984 to include the Kossow Road employees in the overall commercial workers unit set forth in appendix D. This change was later incorporated into the 1986 collective-bargaining agreement between the parties. It is undisputed that the Kossow Road employees have been paid in accordance with wage rates listed in appendix D and that other contractual benefits and provisions have been applied to them. The instant petition was filed on 22 May 1986, requesting a decertification election in a unit limited to all Public Service Center employees at the Kossow Road location.

The Board has long recognized the "merger doctrine" under which an employer and union can agree to merge separately certified or recognized units into one overall unit.[3] This doctrine was recently affirmed in our decision in *Gibbs & Cox*, 280 NLRB 953 (1986). Where such an agreement has been reached, the larger, merged unit is the only unit appropriate for purposes of a representation election. Here, the Employer and the Union reached an agreement that merged the Kossow Road employees into the larger unit set forth in appendix D of the 1983 and 1986 collective-bargain-

[1] The Union maintains that the agreement between the parties merged the Public Service Center employees at the Kossow Road location into an overall unit of employees, comprising all 4000 Wisconsin Bell employees represented by the Union. In the alternative, the Union claims that the Kossow Road unit merged into a single unit of all commercial employees set forth in appendix D of the collective-bargaining agreement. We find that the evidence establishes at least that the Kossow Road employees were merged into a unit with the employees in appendix D of the collective-bargaining agreement, and find it unnecessary to pass on whether the unit in appendix D was merged into a larger unit of all Wisconsin Bell employees.

[2] Commercial work generally encompasses such duties as sales, service, marketing, and bill collecting.

[3] See, e.g., *White-Westinghouse Corp.*, 229 NLRB 667 (1977); *General Electric Co.*, 180 NLRB 1094 (1970).

ing agreements. Accordingly, as the petitioned-for unit is not coextensive with the currently recognized and established bargaining unit, the petition shall be dismissed.[4]

ORDER

The petition is dismissed.

CHAIRMAN DOTSON, dissenting.

Contrary to my colleagues, I would reverse the Regional Director's dismissal of the petition, and would instead reinstate the petition and remand the case to the Region for further appropriate action, including the scheduling of an election in the petitioned-for unit. The Board determined that the employees in the Public Service Center at the Kossow Road location constituted a separate appropriate unit for bargaining when it directed a representation election and thereafter certified the Union as the collective-bargaining representative on 13 September 1986 in that unit. The Regional Director found, and the majority agrees, that this unit is now inappropriate for purposes of a decertification election because of the Employer and the Union's agreement to merge this eight-person unit into the much larger unit set forth in appendix D to the 1986 collective-bargaining agreement. I disagree.

The employees in the Kossow Road unit expressed an interest in union representation in mid-1984. At no time was there any mention of the fact that their small unit of approximately eight employees would be merged into a larger unit of Wisconsin Bell employees. At an organizational meeting prior to the election in September 1984, the employees specifically asked if they would be able to decertify the Union "if it ever came to that point." The response was that they would be able to have a decertification election at any time through proper procedures and filing a petition. The Kossow Road employees were not given a copy of the then-current collective-bargaining agreement prior to the election. Neither were they informed at any time of the 24 September 1984 letter of agreement between the Employer and the Union that purported to merge them into the larger overall unit.

As set forth in former Member Dennis' and my dissent in *Gibbs & Cox*, I cannot adhere to a policy that so callously ignores the specific right of employees to reject or change their bargaining representative. The situation here clearly illustrates the inherent unfairness of placing the employees' collective-bargaining fate in the hands of the Employer and the Union. These employees, who have not been represented by counsel, cautiously inquired as to their rights. They received a Delphic response. I cannot state strongly enough my view that the only proper accommodation of employees' Section 7 rights with the policy of stability in labor relations requires that "any unit that was appropriate for the purpose of selecting a bargaining representative remains appropriate for the purpose of rejecting that representative or obtaining a new one."[1] Accordingly, I dissent.

[4] See *Green-Wood Cemetery*, 280 NLRB 1359 (1986); *Westinghouse Electric Corp.*, 227 NLRB 1932 (1977).

[1] *Gibbs & Cox*, 280 NLRB 953 (1986).

Best Plumbing & Supply Co. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 741, AFL–CIO. Case 28–CA–5703–3

27 May 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 24 July 1981 Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to the judge's failure to rule on the General Counsel's motion to correct the record, dated 30 March 1981. The Respondent, in its answering brief, stipulates to the granting of this motion. Accordingly, we grant the General Counsel's motion to correct the record.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In agreeing with the judge that the General Counsel has failed to establish that the Respondent ever indicated a clear and unequivocal intent to join the multiemployer bargaining unit, we do not rely on two factual findings made by him that are not supported by the record. The judge found that there was no evidence that the Respondent was given copies of the multiemployer association bylaws. The multiemployer association's executive secretary for the Tucson chapter, however, testified that among the materials he gave the Respondent on the date its membership application was submitted were copies of the bylaws of the statewide multiemployer association, as well as those of the Tucson chapter. This evidence was not specifically contradicted. Nevertheless, we agree with the judge's analysis that, even taking into consideration these bylaws, the nature of the Respondent's knowledge of the purpose of the multiemployer association and its Tucson chapter remains murky. We further find that the evidence is insufficient to support the judge's statement that it is likely that the 13 multiemployer members in the Tucson chapter were larger than the 43 contractors who had executed only the memorandum agreement to be bound by the terms of the Union's contract with the multiemployer association. The record is silent on the relative size of these contractors.

Michael J. Karlson, for the General Counsel.
Daniel H. Parks (Parks & Parks), of Tucson, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me at Tucson, Arizona, on February 31, 1981, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 28 on August 1, 1980, and which is based on a charge filed by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 741, AFL–CIO (the Union) on February 6, 1980. The complaint alleges that Best Plumbing & Supply Co. (the Respondent) has engaged in certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

Issues

Whether the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Union during the term of a collective-bargaining contract. The General Counsel alleges that the Respondent was part of a multiemployer bargaining unit and not privileged to do so. The Respondent defends contending it never joined the multiemployer unit and that the General Counsel has neither proven it to be an employer that meets the Board's jurisdictional standards, nor proven that the Union ever represented a majority of its employees.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

A. *Background and Contentions*

The Respondent is a plumbing contractor, principally engaged in home repair work and solar accessory installation in Tucson, Arizona. It is the sole proprietorship of James R. Jaster. Jaster formed his Company in October 1978 when he obtained his contractor's license and began working as an independent contractor for Sears, Roebuck & Co. Originally he operated the business from his home though he later opened an office elsewhere in the city. The General Counsel has made no effort to show that the Respondent, by virtue of its own volume of business, meets any interstate commerce standard for the assertion of jurisdiction by the Board. Instead, she relies on the Respondent's purported membership in a multiemployer collective-bargaining association known as Plumbing and Air Conditioning Contractors Association of Arizona (PAC-State). PAC-State has two divisions: PAC-Phoenix, which negotiates with Local Union 469 for the

northern Arizona counties, and PAC-Tucson, which negotiates with the Union herein, Local 741, for the southern Arizona counties and a portion of New Mexico. Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act. It further admits that the Board has jurisdiction over PAC-State and its multiemployer members, but denies that the Respondent is or ever has been a member of the multiemployer bargaining unit.

B. *Facts Relating to Recognition*

According to the Union's business manager, Kenneth Phillips, sometime in August 1978, Jaster came to the Union's office saying that because he had been a "union man," always working union, he was interested in becoming signatory to the Union's contract.[1] Phillips remembers Jaster's stating he intended to work as a "one man operation," but hoped to expand as soon as possible into housing, apartment, and light commercial work. He gave Jaster a blank copy of the memorandum agreement, a 4-by-6 inch card (G.C. Exh. 7) that binds the signer to the master PAC-State agreement. Phillips says he also gave Jaster printed copies of the recently expired master contract together with some supplements. He explained that a new master agreement had recently been negotiated but had not yet been printed for distribution, so he gave Jaster what he had. He says he also told Jaster that in the event Jaster chose to sign the memorandum agreement and hired employees, he would have to obtain an employee bond guaranteeing payments to the collective-bargaining contract's fringe benefit funds. He remembers Jaster asked how he could become a member of PAC. Phillips told him he would have to see PAC-Tucson executive secretary Manly Traylor. Jaster does not recall having gone to the Union in August, but admits his memory is poor.

Even so, in mid-October, Jaster did visit the union office. There is some confusion about the date. Jaster is convinced that he first went to the union office and later the same day went to the PAC-Tucson office. The dates shown on the documents he signed are not consistent with his recollection. He signed an application for membership in PAC-Tucson on October 18, 1978. There appears to be little doubt about the accuracy of that date because he both signed and dated that document. However, he also signed the Union's memorandum agreement, the postcard-size compliance contract. One side contains blanks for the employer's name, signature, address, phone number, and license type, while the other side contains a date blank and the contract terms, literally in "fine print." Phillips printed everything on the first side of the card although Jaster signed it. The date on the other side, October 20, 1978, appears to have been printed by Phillips. In view of the fact that the date is on the side opposite the signature, it is quite possible that the date would be omitted and not filled in until the omission was noticed. None of this is particularly significant to the issues except to credit Jaster's testimony that he first went to the union hall and then to PAC-Tucson. Indeed, PAC-Tucson's Traylor recalled Jaster saying that he had come from the union hall. Traylor also says that as a condition for the Respondent's joining PAC-Tucson, it had to have been signatory to a union contract. Thus, I conclude that Jaster actually signed both documents on October 18, 1978. I also credit his testimony that the Union never gave him a copy of the memorandum agreement.[2]

It appears from Phillips' testimony that the Union has on file memorandum agreements signed by 43 contractors in southern Arizona. Traylor testified that there are 13 members of PAC-Tucson. Although the record is not clear on the point, it is likely that the 13 PAC-Tucson members are larger contractors, while the 43 memorandum contractors are significantly smaller.

The memorandum agreement itself recites "[t]he employer recognizes the unions [the Phoenix and Tucson Locals] as the collective-bargaining representatives of the employer's employees performing work within the recognized work jurisdiction of the undersigned union." It also states that the purpose of the agreement is to eliminate multiplicity of collective bargaining in the industry. Furthermore, a contractor signing the memorandum agreement "agree[s] to comply with and be bound by all the terms of that certain collective-bargaining agreement between [PAC-State] and Local Unions 469 and 741 . . . including all trust agreements referred to and incorporated therein and including all amendments, extensions and renewals." It also acknowledges receipt of a copy of the Association master agreement. Finally, although it states that the duration of the agreement shall be "for so long as the Employer remains in business in Arizona but not to exceed 50 years from the date hereof," it provides for a 30-day written notice to the Union for termination.[3] And, it provides for "economic action" to be taken against the signatory in the event that the Association agreement has expired or terminated or if a separate termination notice has been sent.

Regarding the Respondent's joining PAC-Tucson, curiously there is no evidence in the record that Traylor ever gave Jaster copies of either the PAC-Tucson or PAC-State bylaws at the time Jaster applied for membership, when his membership was approved, or when he began participating in PAC-Tucson affairs.[4] Further, Traylor testified, "PAC-Tucson is an association of plumbing and air conditioning contractors who are signatory with the Local Unions 741 and 469, and as the contractor association members, they assign their bargaining rights . . . to PAC-Tucson." Yet, Traylor readily admit-

[1] Jaster had previously been involved in the plumbing and pipe fitting apprenticeship program in Phoenix where he had worked for various Local 469 contractors. He suffered some personal reverses, including a house fire, and subsequently moved to Tucson. There he worked as an employee for Sears, later deciding it would be more lucrative to form his own business and become an independent contractor for Sears, doing its plumbing repair work. He did not, however, intend to limit himself to work obtained through Sears.

[2] He did, however, receive copies of the master contract and southern Arizona supplements.

[3] "Termination" here means "reopen."

[4] Jaster attended four or five luncheons. He was also appointed to a solar energy subcommittee. There is no evidence that the subcommittee had a collective-bargaining purpose or that collective bargaining was a luncheon topic.

ted there was no document that Jaster or any other contractor actually signed giving PAC-Tucson those bargaining rights. In addition, Traylor said his job included "administer[ing] the functions of the Association . . . I handle their bookwork. We also handle promotional work for them. We gather educational manuals and we sponsor seminars. We deal with the registrar of contractors on contractor complaints and public complaints. There is a myriad of duties I perform."

As I have found above, there is no evidence that Traylor even gave Jaster copies of the bylwas of either PAC-Tucson or PAC-State, so Jaster's knowledge about the purpose of those two groups is unclear. But had Traylor done so, the nature of Jaster's knowledge would still remain murky.

The PAC-Tucson and PAC-State bylaws contain very few references to collective bargaining. Indeed the PAC-Tucson bylaws contain no specific references whatsoever. There is a tangential reference in article II, section 5. It states associate members shall be contractors "signed to National Labor agreements with the United Association [of Journeymen, Apprentices, etc.]. Such associate members shall have all the rights and duties of active members, except that they shall not participate in labor negotiations nor arbitration proceedings nor vote on labor agreements insofar as any of those matters are covered by their national contracts." It can hardly be said that such language would clearly inform an applicant that one of PAC-Tucson's functions was to engage in collective bargaining for its active members.

Article XI, section 1 of the PAC-State bylaws contains other unclear references to collective bargaining. There it states "the Association traditionally has engaged in collective bargaining on behalf of all plumbing contractors in the State of Arizona contracting with United Association, Locals 469 and 741." Unfortunately that statement is not 100 percent true. It may be that PAC-State "traditionally engages" in collective bargaining, but it is no doubt demonstrable that it does not do so on behalf of "all plumbing contractors" in Arizona. First, there are the nonunion contractors for which the Association can lay no claim and, second, there are those memorandum agreement signers who have reached agreement without the Association's assistance. One cannot rely on this clause for the conclusion that the Respondent had notice it would become bound to the multiemployer unit.

That same section also discusses possible needs that may arise from time to time to adopt policies regarding negotiating committee actions including responses to strikes, such as lockouts. Section 2 of that same article refers to "nonmembers for whom the Association bargains," saying that as a condition of being represented by the Association, the Association expects such nonmembers to abide by Association decisions during negotiations. Section 3 allows for the discipline of both members and "represented nonmembers" in the event that they choose not to follow Association policy.

Jaster denies either the Union or PAC-Tucson ever gave him copies of the expired or current collective-bargaining contracts and supplements at the time he signed the memorandum agreement or at the time that he signed the application for PAC-Tucson membership. He says when he joined PAC he thought he was joining a service organization "like the Lions Club." He remembers leaving the PAC-Tucson office with an armload of publicity materials, PIPE logos,[5] educational materials, and such.[6]

I recognize that Jaster testified that as an apprentice in Phoenix he had worked under predecessor contracts and undoubtedly had some idea of PAC-State's role in collective bargaining. Nonetheless, his testimony that he thought the PAC organizations to be voluntary industry promotion groups is not without believability. Clearly the PAC organizations do carry out that function; they provide much promotional material including logos for hardhats and trucks. It seems probable to me that Jaster believed the logs would enhance his image as a new contractor and would assist him in developing his own business. Considering that there is no evidence that he was actually given copies of the PAC bylaws, the fact that the PAC-Tucson bylaws contain no forceful reference to collective bargaining, and that the PAC-State bylaw references to collective bargaining are vague and to some extent misleading, I credit his testimony that he did not understand that one of PAC-Tucson's functions was collective bargaining. Even if he did understand PAC's bargaining purpose, due to his past experience in Phoenix, there is still a serious question about what sort of collective bargaining service PAC-Tucson was to perform for him. Was it offering him multiemployer bargaining unit membership or some form of "me-tooism"?

An analysis of the PAC-Tucson and PAC-State bylaws shows that there are different categories of membership. PAC-Tucson's bylaws set forth three classes of members: active, associate, and honorary.[7] It defines an active member as "any individual who is a duly licensed contractor . . . credibly conducting business in the mechanical field using pipe or tubing" in certain southern Arizona counties. It then describes the manner or membership application for that class, which is consistent with the action Jaster took except that the $25 initiation fee was never required of him. It also requires an active member to take an oath of membership, but that oath does not mention collective bargaining;[8] neither does the membership certificate.

Associate membership may be granted under article II, section 5A "to any person associated with or employed by a duly licensed contractor" upon a vote of two-thirds of the members present in any regular meeting. Associate members are entitled to attend meetings but not to hold office or to have any voice or vote unless given a proxy by an active member.

---

[5] PIPE is an acronym for "Piping Industry Progress and Education" programs, an industry promotion gorup. It is funded through collective bargaining, but that fact would not be immediately apparent to someone outside the industry or unfamiliar with the contract.

[6] I do not credit Jaster's denial insofar as the Union is concerned. See fn. 2, supra. It is possible that Traylor included contracts in the package given Jaster, but that they were buried or not seen. It is unnecessary to decide the question, however.

[7] Honorary membership is not pertinent here and shall not be discussed.

[8] Despite the bylaw, it appears that the oath itself has not been required for the past 10–12 years.

The PAC-State bylaws with respect to active members are quite similar to those of PAC-Tucson, except that a condition precedent to PAC-State membership is either PAC-Tucson or PAC-Phoenix membership, or a waiver from the local PAC. Being an active member of a local PAC "automatically entitles such member to membership" in PAC-State. The use of the verb "entitle" is curious for it implies that one may become a member of the local PAC and not become a member of PAC-State unless one chooses to. That appears to have significance as there is a third category of contractors somehow involved with the PAC organizations, but for whom there is no definition in the bylaws. These are plumbing and air-conditioning contractors who are not members of PAC, but who allow PAC to bargain for them. Whether those individuals join the local PAC but not the state PAC or whether they allow PAC-State to bargain for them through some other means is not clear on this record.

In this context, then, what is it that the Respondent actually did when it signed the application for membership in PAC-Tucson on October 18? Its application somewhat deviates from the PAC-State entitlement language by saying "I understand that this membership will also include membership in [PAC-State]." Second, what is it that Union Business Manager Phillips thought Respondent was doing when Jaster executed the memorandum agreement after he said he was going to be a one-man operation until he got on his feet while simultaneously asking about joining PAC? Phillips remembers thinking Jaster's desire to join PAC was "unusual" in view of the fact that Jaster's operation did not seem appropriate for PAC.

C. *Later Events; the Withdrawal of Recognition*

Jaster testified that he wrote a letter dated February 21, 1979 (G.C. Exh. 18 and R. Exh. 1) canceling the memorandum agreement. The Union denies the letter was ever received. Whatever the truth is here, it is undisputed that the Respondent did not hire any employees until June 21, 1979, 5 months later; it did not then follow the terms of the master agreement. The Respondent did not hire through the Union's hiring hall, pay contract wages or fringe benefits, or post a fringe benefit bond as required by that agreement.

In September 1979, Etheredge, one of the Respondent's employees, told Union Business Agent Shaw that he had been working for the Respondent. That triggered an inquiry into the Respondent's circumstances. The inquiry drew a September 24 letter from Jaster claiming he had canceled the memorandum agreement on February 21 and had no further obligations to the Union. On October 5, the Union wrote Jaster by certified mail accusing Respondent of violating the collective-bargaining agreement in certain respects and asking him to resolve those matters. By mailgram received by the Union on October 12, Jaster denied any contract violations claiming, inter alia, that he had no agreement. On October 15 Shaw filed a grievance with the labor management committee established by the collective-bargaining contract to deal with such matters. On October 22 the committee held a hearing and on November 19 found Respondent to have violated the contract as the Union alleged. The decision also stated that legal collection proceedings would be instituted if within 10 days corrective action was not begun.

Instead of enforcing that decision, the Union, on February 6, 1980, filed the instant charge. The record is not clear regarding the number of employees Respondent has had since June 21, 1979, showing only that Etheredge was employed from August 9 to September 24, 1979, although apparently at least one other employee had worked prior to that.

Analysis and Conclusions

It seems to me that the threshold question here is whether the Respondent at any time ever joined the PAC-State multiemployer bargaining unit. If it did, then the General Counsel can responsibly rely on PAC-State's commerce data for the assertion of jurisdiction over the Respondent and may also rely on the unrebuttable presumption of majority that normally flows from a current collective-bargaining contract. See *Tragniew, Inc.*, 185 NLRB 962 (1970), enf. denied on other grounds 470 F.2d 669 (9th Cir. 1972).[9] If not, the General Counsel's case must fail for she has adduced no evidence whatsoever with respect to the volume of business actually performed by the Respondent during that portion of the business year that preceded the admitted withdrawal of recognition on June 21, 1979.

Both parties agree that the test of whether the Respondent joined a multiemployer bargaining unit depends on whether "the employer unequivocally intended to be bound in collective bargaining by group, rather than individual, action. The Respondent cites *York Transfer & Storage Co.*, 107 NLRB 139, 142 (1953), and the General Counsel cites *Ruan Transport Corp.*, 234 NLRB 241, 242 (1978), for that proposition. This rule was also relied on by the Board in *Bagel Bakers Council of Greater New York*, 174 NLRB 622, 628 (1969). The Second Circuit Court of Appeals in enforcing *Bagel Bakers* observed, however, that the Board has also followed another, somewhat different test: "whether the union 'has been notified of the formation of the group and the delegation of bargaining authority to it, and has assented and entered upon negotiations with the group representative.'" 434 F.2d 884, 886 (2d Cir. 1970).[10] The court implicitly accepted the proposition that the validity of a multiemployer bargaining unit depends not only on the intent of the employers but the acceptance of a group unit by the union. This is no doubt due to the consensual nature of multiemployer bargaining. *Retail Associates*, 120 NLRB 388 (1958). The two tests are to some extent inconsistent, although as a practical matter they usually reach the same result. Here, too, I think that under either test the result is the same.

[9] Sec. 8(f) of the Act may impact this presumption in the construction industry but it is unnecessary to consider that question here. See *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), and *NLRB v. Iron Workers Local 103 (Higdon Contracting)*, 434 U.S. 335 (1978).

[10] The court cited *Weyerhaeuser Co.*, 166 NLRB 299 (1967), which in turn cited *Kroger Co.*, 148 NLRB 569 (1964), and *Van Eerden Co.*, 154 NLRB 496 (1965).

I do not think that the proof here reaches the "clear and unequivocal" level with regard to what the Respondent's intent was when it joined PAC-Tucson. First, there is Jaster's somewhat tenuous testimony that he thought he was joining an industry-promotion group and that he could avail himself of its beneficial advertising (i.e., the PIPE logos). I have no doubt that the latter was a consideration, but in view of his work experience in Phoenix, I am not certain that he can be believed without reservation regarding his claim that he had no idea that PAC-State was a multiemployer collective-bargaining unit. Even so, he did not specifically join PAC-State, although that was the apparent result of joining PAC-Tucson. However, PAC-Tucson's bylaws do not in any way reflect that its own purpose is to engage in collective bargaining. Indeed, it does not.[11] The multiemployer collective bargaining is conducted by PAC-State, although PAC-Tucson officials and committee members participate in that parent body. Instead, as PAC-Tucson's executive secretary Traylor said, "PAC-Tucson engages in promotional work for its membership, gathers educational manuals, sponsors seminars, and deals with the registrar of contractors on contractor and public complaints." Thus, despite the facially tenuous nature of Jaster's testimony, the weight of the evidence favors crediting it.

Furthermore, one may legitimately ask why Jaster would seek to have a collective-bargaining representative if he had already signed the memorandum agreement and was satisfied with it. If it was to engage in collective bargaining with the Union, he certainly did not need to join PAC, for he had already signed the memorandum agreement and had become bound to the master by it. Is the answer that he simply wished "to join the Lions Club"? Traylor's testimony that a contractor could not become a member of PAC-Tucson until he signed a contract with the Union sets forth a curious requirement not found in the bylaws. When a contractor joins a multiemployer bargaining unit, his act of joining is sufficient to bind him to the master collective-bargaining contract. Why then does PAC-Tucson require an applicant to sign a separate agreement with the Union? Is it actually a requirement or is it testimony designed to keep the Union happy with PAC during this litigation? If the separate contract requirement exists, it is totally unnecessary and, rather than persuading me that a PAC-Tucson applicant is joining a multiemployer bargaining unit, leads me to believe that he is doing nothing of the kind.

Moreover, while I am well aware that forming or joining a multiemployer collective-bargaining unit does not require an express agreement, *Bagel Bakers*, supra, nonetheless the lack of an express agreement is a factor to be considered. Here, the Respondent was not asked to and never did specifically give PAC-State or PAC-Tucson any document giving them its bargaining rights. It may be true that none of the 13 PAC-Tucson members did either, but by the same token, I must assume that neither did the 43 contractors who signed compliance agreements. Yet, some of those must be the "represented nonmember" contractors referred to in the PAC-State bylaws. There is no evidence that those contractors belong to the multiemployer bargaining unit, only that they appear to be contractors who have separately adopted the master agreement, just as the Respondent did.

But, the General Counsel observes that the Respondent specifically applied to be an active member of PAC-Tucson and that the application form stated he understood his PAC-Tucson memberhip would "also include membership" in PAC-State. First, while PAC-State's bylaws permit an individual contractor to elect whether or not he wishes to join, there is no evidence that Jaster had the opportunity actually to choose. The application language is not "clear and unequivocal." Second, I note that even though Jaster applied for active membership in PAC-Tucson, it did not charge him an initiation fee and he never paid any periodic dues.[12]

Frankly, I do not believe that Jaster's conduct here amounts to a "clear and unequivocal intent" to join a multiemployer collective-bargaining unit. At best he appears instead, consistent with his testimony, to have intended to join an industry-promotion group.

If the foregoing observations are not sufficient to warrant the conclusion that he did not join the multiemployer bargaining unit, the second test may still be applied. Was the Union ever notified that Respondent had joined the multiemployer collective-bargaining unit? Did it ever consent? There is absolutely no evidence Traylor ever notified the Union that Respondent had been accepted into the multiemployer bargaining unit. In fact, Business Manager Phillips thought it was odd that Jaster wanted to join PAC-Tucson at all. He knew Jaster was a minnow in the sea and thought it queer that he would wish to join with the larger contractors. Furthermore, Respondent signed the memorandum agreement, which by its own terms speaks to separate bargaining.

That compliance agreement recites a number of options available to the signing contractor indicative of a separate bargaining unit. Although it obligates him to comply with "all" the master agreement's terms, it is of much longer duration, permitting the master to be modified without consulting the memorandum signer. Yet, it gives the memorandum signer the right to avoid that occurrence by allowing a separate contract opening[13] and the right to engage in separate economic action on such an opening. In that circumstance I think the Union intended memorandum signers, such as the Respondent, to be separate bargaining units. Thus, the circumstances here are very similar to those in *Ted Hicks & Associates*, 232 NLRB 712, 713 fn. 3 (1977), in which the Board found that a contractor who signed a similar memorandum agreement did not become a member of the Associated General Contractors multiemployer unit. The Board "deem[ed] the memorandum agreement to be a separate

[11] Local supplements are signed by the appropriate Local Union and PAC-State, not PAC-Tucson.

[12] PAC-Tucson claims to have waived the initiation fee and to have remitted a certain portion of his expected dues to PAC-State, giving him a credit while awaiting payment.

[13] Indeed, Jaster testified, without contradiction, that Phillips told him he could cancel the agreement by simply writing the Union a letter to that effect.

contract between Respondent and the Union." Likewise, I do not believe that the Union here had any realistic expectation that the Respondent was doing anything other than what its other 43 memorandum signatories had done (i.e., agreed to be bound in separate bargaining units to the terms set forth in the master agreement between the two local unions and PAC-State).

Accordingly, I conclude that the Respondent's conduct did not constitute a clear and unequivocal intent to join the multiemployer bargaining unit. Neither did the Union ever consent to its joining or even expect or think that it had. The fact that the Union later resorted to the master agreement's disputes resolution clause does not lead me to think otherwise.[14] The memorandum agreement did not specifically exclude dispute coverage and in any event those individuals signing the memorandum agreement apparently desired to be treated similarly to those actually belonging to the multiemployer unit.

Thus, I conclude that the General Counsel has failed to prove that the Respondent ever joined the multiemployer collective-bargaining unit. In that circumstance, it cannot be deemed to be engaged in interstate commerce as there is no proof of that fact. I therefore shall recommend that the complaint be dismissed.

On the foregoing findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. The General Counsel has not proven that the Respondent, Best Plumbing & Supply Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The complaint is dismissed in its entirety.

[14] The Union may yet seek enforcement of the labor management committee's award in an appropriate forum.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

New Horizons for the Retarded, Inc. *and* Professional and Commercial Employees Union, a/w the International Ladies' Garment Workers' Union, AFL–CIO. Cases 3–CA–12852, 3–CA–12852–2, and 3–CA–12965

28 May 1987

SUPPLEMENTAL DECISION

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN, BABSON, STEPHENS, AND CRACRAFT

On 14 January 1987 the Board issued its decision in this case.[1] On 25 February 1987 the General Counsel filed a "Motion for Clarification."

The National Labor Relations Board has considered the motion and its earlier decision in light of the Tax Reform Act of 1986[2] and has decided to grant the General Counsel's motion. The General Counsel asserts that clarification of the method used by the Board to compute interest on backpay is required because of the recent change in the method used by the Internal Revenue Service (IRS) to compute interest charged or paid on the underpayment or overpayment of Federal taxes. We agree that the current method of computing interest on backpay is no longer appropriate and for the reasons set out below we adopt the method currently used by the IRS to compute interest charged on the underpayment of Federal taxes.

In order to keep in line with current economic conditions, the Board in *Florida Steel Corp.*, 231 NLRB 651 (1977), abandoned the 6-percent interest rate it had established in *Isis Plumbing Co.*[3] and adopted the sliding interest scale charged or paid by the IRS on the underpayment or overpayment of Federal taxes. This sliding rate was embodied in § 6621 of the Internal Revenue Code.[4] The rate was fixed at the adjusted prime rate[5] recalculated periodically by the Secretary of the Treasury to reflect changes in the money market. The Board chose a rate keyed to the private sector money market in order to encourage timely compliance with Board orders, discourage the commission of unfair labor practices, and more fully compensate discriminatees for their economic losses.

A number of factors led to the selection of the IRS "adjusted prime rate" as the Board's interest rate. First, it was directly tied to interest rates in the private money market. It also was subject to periodic semiautomatic adjustment and, finally, it was easy to administer.[6]

The Tax Reform Act of 1986 changes the method by which the interest rate is calculated under § 6621.[7] As of 1 January 1987, the IRS no longer calculates interest on tax underpayments and overpayments based on the adjusted prime rate, but rather uses the "short-term Federal rate."[8] The Secretary of the Treasury determines the short-term Federal rate on a monthly basis; however, the IRS applies the rate quarterly.[9] Thus, the short-term Federal rate for any quarter is the rate determined by the Secretary of the Treasury for the first month of the previous calendar quarter. Any such rate so determined by the Secretary must be rounded to the nearest full percent.[10] The Tax Reform Act also imposes different rates for the underpayment and overpayment of Federal taxes. The overpayment rate (paid by the IRS on refunds) is the short-term Federal rate plus 2 percent, while the underpayment rate (paid by the taxpayer on additional taxes) is the short-term Federal rate plus 3 percent.[11]

The General Counsel urges that we adopt the method for computing interest set out in the amendments to § 6621 and that we select the underpayment rate for calculating interest on backpay awards. We agree with the General Counsel. The short-term Federal rate has many of the characteristics that prompted the Board in *Florida Steel* to adopt the adjusted prime rate as used by the IRS pursuant to 26 U.S.C. § 6621. Thus, while it is not directly linked to interest rates in the private money market, the short-term Federal rate is based on average market yields on marketable Federal obligations and is influenced by private economic market forces. Further, it is subject to periodic adjustment and is relatively easy to administer. Under the method used in *Florida Steel*, the adjusted prime rate was determined semiannually, for the 6-month periods ending on September 30 and March 31, with the rate for September 30 determinations taking effect on the following January 1, and for

[1] 282 NLRB 760.

[2] Pub. L. 99–514, 100 Stat. 2085 (1986).

[3] 138 NLRB 716 (1962).

[4] 26 U.S.C. § 6621, added 3 Jan. 1975 (Pub. L. 93–625 § 7(a)(1), 88 Stat. 2114).

[5] The adjusted prime rate was defined as "90 percent of the average predominant prime rate quoted by commercial banks to large businesses as determined by the Board of Governors of the Federal Reserve System" rounded to the nearest full percent. 26 U.S.C. § 6621(c). After the *Florida Steel* decision issued, § 6621 was amended to require the adjusted prime rate to be changed every 6 months, instead of every 2 years, and to eliminate the 10-percent reduction.

[6] *Florida Steel*, 231 NLRB at 651–652.

[7] Pub. L. 99–514 § 1511, 100 Stat. 2744 (1986).

[8] The short-term rate is determined by the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of 3 years or less. 26 U.S.C. § 1274 (d)(1)(C)(i) (Supp. 1985).

[9] Pub. L. 99–514 § 1511(b)(2)(A), 100 Stat. 2744 (to be codified at 26 U.S.C. § 6621(b)(2)(A)).

[10] Id. at § 1511(b)(3) (to be codified at § 6621(b)(3)).

[11] Id. at § 1511(a)(1) and (2) (to be codified at § 6621(a)(1) and (2)).

March 31 determinations the following July 1. By contrast, the short-term Federal rate is determined quarterly, with the rate for any calendar quarter being the rate determined by the Secretary of the Treasury on the first month of the previous calendar quarter (e.g., the rate determined in January would be effective for the following April through June). While the interest rate may change four times a year rather than twice a year, this does not pose any greater administrative burden for the Board because backpay is usually computed quarterly.[12] As in *Florida Steel*, any adjustment in the rate will be known well ahead of the effective date (in the short-term Federal rate case, 2 months, rather than 3 months in *Florida Steel*); and the rate is rounded to the nearest whole percent. As noted, we find that the underpayment rate is the appropriate one to use in computing interest on backpay awards.[13]

Therefore, on the backpay due in this case, we shall require that the Respondent pay interest to accrue commencing with the last day of each calendar quarter of the backpay period for the amount due and owing for each quarterly period and continuing until compliance with the Order is achieved, such interest to be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.[14]

[12] *F. W. Woolworth Co.*, 90 NLRB 289 (1950). In *Ogle Protection Service*, 183 NLRB 682, 683 (1970), however, the Board held that backpay owing from the repudiation and failure to apply the terms of a collective-bargaining agreement will not be computed using the *Woolworth* formula because cessation of the employment status and interim earnings are not involved. We shall, nevertheless, use the quarterly method for computing interest on backpay due in all backpay situations, because the determination of the rate of interest to be applied in any given backpay period is not affected by the methods used to compute backpay.

[13] We note that at the present time, adoption of the underpayment rate will result in no change from the interest computed under the *Florida Steel* formula, which was 9 percent through March 1987. The underpayment rate for the first quarter of 1987 was 9 percent and it has remained so through the current quarter. See Rev. Rul. 86-146, 1986-50 Internal Revenue Bulletin 5 (Dec. 15, 1986) (first quarter rate); and Rev. Rul. 87-23, 1987-13 Internal Revenue Bulletin 46 (Mar. 30, 1987) (second quarter rate).

[14] Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Local No. 128, International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (Hobart Corporation) *and* **David W. Ferguson.** Case 8–CB–5197

29 May 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, STEPHENS, AND CRACRAFT

Upon a charge filed on 20 April 1984 by David W. Ferguson, an individual, the General Counsel of the National Labor Relations Board issued a complaint on 4 June 1984. The complaint alleges that about 13 December 1983, Local No. 128, International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, the Respondent, has unlawfully refused to accept the resignation of David W. Ferguson, the Charging Party; has continued to demand that Hobart Corporation, Ferguson's employer, continue to deduct dues from Ferguson's pay; and has continued to receive such dues. The complaint further alleges that by the acts and conduct described above, and by each of these acts, the Respondent has restrained and coerced, and is restraining and coercing, employees in the exercise of the rights guaranteed them by Section 7 of the Act, and that the Respondent has been engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

On 2 September 1986 the Respondent, the Charging Party, and the General Counsel filed a motion to transfer the proceeding to the Board and a stipulation of facts, with exhibits attached. The parties agreed that the charge, the complaint and notice of hearing, the answer, and the stipulation of facts with attached exhibits constitute the entire record in the case, and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing before an administrative law judge, the making of findings of facts and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision. The parties submitted this case for findings of facts, conclusions of law, and order directly by the Board.

On 12 November 1986 the Board issued an order granting the parties' motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter the General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Hobart Corporation, an Ohio corporation with an office and place of business in Troy, Ohio, has been engaged in the manufacture of home appliances. Annually, Hobart Corporation, in the course and conduct of its business operations, sells and ships from its Troy, Ohio facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Ohio. We find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

We find that the Respondent Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

The Respondent and the Hobart Corporation had a collective-bargaining agreement in effect on 13 December 1983, which was effective by its terms from 5 February 1981—31 December 1983. This collective-bargaining agreement (the Hobart Agreement) provides, inter alia, that:

ARTICLE II

Maintenance of Union Membership

> 1. All employees who on the date of the signing of this Agreement are members of the Union in good standing in accordance with its Constitution and By-Laws, and those employees who may thereafter become members shall, during the life of this Agreement as a condition of employment, remain members of the Union in good standing; provided, however, that during the period stated in the Memorandum of Understanding attached hereto as Appendix E any employee may resign from the Union should he so desire. Any such resignation must be in writing and be mailed during the period stated in the said Memorandum of Understanding *by registered mail* to the Union, addressed to Local No. 128, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Troy,Ohio, attention to the Finance Secretary [emphasis added].

Article III, section 10, of the constitution and bylaws of the Hobart unit of the Respondent pro-

vides that "No member shall terminate his membership except at such time as set forth in the current contract between the Hobart Corp. and this unit of Local No. 128, and according to the procedure set forth therein."

David W. Ferguson has been an employee of the Hobart Corporation at least since 1 January 1980. He currently holds the position of millwright. On 13 December 1983 the Respondent received from Ferguson a letter of resignation from membership in the Respondent. This letter was mailed by certified mail. The letter is addressed to the Respondent, attention of the finance secretary, and states that "I David W. Ferguson do hereby submit notice of resignation" from the Respondent. Since 13 December 1983 the Respondent has refused to accept Ferguson's resignation from union membership. Further, since 13 December 1983 the Respondent has continued to demand that Hobart Corporation continue to deduct dues from Ferguson's pay, and has continued to receive such dues.

Ferguson's applicable authorization for dues checkoff, dated 24 November 1981, provides for the withholding from Ferguson's pay of "such sums as the Financial Officer of said Local No. 128 may certify as due and owing from me as membership dues, including an initiation or reinstatement fee and monthly dues in such sum as may be established from time to time as union dues in accordance with the Constitution of the International Union, UAW." The authorization is irrevocable for 1 year from the date of delivery or until the termination of the Hobart Agreement, whichever occurs sooner, unless the employee gives written notice to the Hobart Corporation and the Union not more than 20 or less than 10 days before either the 1-year period or the Hobart Agreement expires, whichever occurs sooner. There is no indication in the record that Ferguson has given such notice.

B. *Contentions of the Parties*

The General Counsel contends that the Respondent violated Section 8(b)(1)(A) by refusing to accept Ferguson's resignation. She argues that in *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), the Board held that a union's imposition of restriction on a member's right to resign, as well as any other restrictions a union may impose on resignations from membership, violated the Act. She argues that although *Neufeld* directly concerned restrictions on resignation during a strike or lockout, under *Neufeld*'s language, *any* restrictions on resignation are invalid. The General Counsel cites several cases dealing specifically with restrictions on the times during which union members may resign, and argues that the Board's language in these cases militates against any restrictions on the manner of withdrawal, so long as the resignation is clear and unequivocal. See *Electrical Workers IUE Local 441 (Phelps Dodge)*, 281 NLRB 1006 (1986); *Sheet Metal Workers Local 73 (Safe Air)*, 274 NLRB 374 (1985); *Newspaper Guild Local 3 (New York News)*, 271 NLRB 1251 (1984); and *Bricklayers Local 17 (California Tile)*, 271 NLRB 1571.

She further argues that Ferguson's resignation letter manifests a clear intention to resign and, moreover, the Respondent admits to having received Ferguson's resignation. She contends that in *Telephone Traffic Union Local 212 (New York Telephone)*, 278 NLRB 988 (1986), the Board found that a union violated Section 8(b)(1)(A) by refusing to accept a member's resignation that had been mailed by regular rather than registered mail, as the union required, when the union did not dispute receipt of the resignation. Finally, the General Counsel argues that even if the restrictions in the Hobart Agreement are lawful, the Respondent failed to fulfill its fiduciary obligations to Ferguson, because the record contains no evidence that the Respondent notified him that he was required to remit his resignation by registered, rather than certified, mail. See *Phelps Dodge*, supra.

The Respondent argues that the Board should give full effect to the intent of the parties regarding the procedure for resigning from the Union as manifested in the collective-bargaining agreement, in keeping with the Board's policy of giving full effect to contract language that does not violate the Act. The Respondent argues that the parties agreed that union members must send their resignation to the Union by registered mail and that because Ferguson failed to do so, his resignation was ineffective. Moreover, it argues, the procedure for resignation upon which the parties have agreed is not illegal.[1]

C. *Discussion*

We find that the Respondent has violated the Act by refusing to accept Ferguson's resignation and by persisting in demanding that his Employer continue to deduct and remit dues after the resignation. In *Neufeld Porsche-Audi* the Board held that "a union may not lawfully restrict the rights of its members to resign from membership." 270 NLRB at 1336. In *Phelps Dodge*, supra, the Board applied the rule enunciated in *Neufeld* to restrictions contained in a collective-bargaining agreement. In

[1] The question of the lawfulness of the temporal restriction on resignations was not put in issue by either party and is thus not before us for resolution in this case. See *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330, 1333 (1984).

Phelps Dodge, the Board specifically declined to make an exception to the *Neufeld* rule in such cases, and we again decline to do so. Under the facts of this case, however, it is unnecessary to pass on the legality of the requirement that resignations be sent by registered mail. Thus, even assuming arguendo that the collective-bargaining agreement's restrictions on the manner of resignation are lawful under *Neufeld*, Ferguson's resignation was effective notwithstanding his failure to comply with the procedural requirement. In *New York Telephone*, supra, the Board gave effect to a resignation sent to the union by regular mail in contravention of the union's requirement that resignations be sent by registered mail. In *New York Telephone*, as here, the union did not dispute that it had received the resignation letter. Therefore, in view of the Respondent's admitted receipt of his letter, Ferguson's resignation by certified mail from the Respondent was valid, and the Respondent's refusal to accept his resignation violates Section 8(b)(1)(A). *Typographical Union (Register Publishing)*, 270 NLRB 1386 (1984); *Operating Engineers Local 12 (Associated Engineers)*, 282 NLRB 1337 (1987).[2]

Further, we find that the Respondent has violated the Act by continuing to demand that dues be withheld from Ferguson's paycheck and by continuing to accept those dues. In *Eagle Signal*, supra, the Board reiterated its well-settled rule concerning the effect of resignations from union membership on dues-checkoff authorizations:

> It is established Board law that a dues-checkoff authorization . . . is a contract between an employee and his employer and that a resignation of union membership ordinarily does not revoke a checkoff authorization. However, a resignation will, by operation of law, revoke a checkoff authorization, even absent a revocation request, where the authorization itself makes payment of dues a quid pro quo for union membership. This is so whether or not the resignation is made during the period for revocation set forth in the authorization itself.

268 NLRB at 637 (footnotes omitted). Accordingly, the issue here is whether the terms of Ferguson's written assignment make payment of dues a quid pro quo for union membership. If they do, then Ferguson's valid resignation will operate to revoke his dues-checkoff authorization, "whether or not the resignation is made during the period for revocation set forth in the authorization itself." *Eagle Signal*, supra at 637.

As noted above, the assignment executed by Ferguson specifically assigns to the Respondent "such sums . . . as are due and owing from me as membership dues, including an initiation or reinstatement fee in such sum as may be established from time to time as union dues." The terms of this assignment are virtually indistinguishable in pertinent respects fom the assignment in *Eagle Signal*, which authorized the deduction of "*regular monthly Union dues . . . in accordance with regular membership dues*," 268 NLRB at 638, and from that in *Postal Service*, 279 NLRB 40 (1986), which directed the deduction of "such regular and periodic membership dues as the Union may certify as due and owing from me." In both *Eagle Signal* and *Postal Service*, the Board concluded that the authorizations clearly conveyed that the employees paid dues as a quid pro quo for union membership and not to cover other financial obligations, such as "financial core" payments in lieu of membership. In light of the similarity of Ferguson's authorization to those in *Eagle Signal* and *Postal Service*, we find that Ferguson's authorization also clearly provides for the payment of dues as quid pro quo for union membership. Therefore, when Ferguson effectively resigned his union membership, the financial obligation he undertook when he assigned membership dues to the Respondent ceased, for purposes of dues checkoff.[3]

Accordingly, we conclude that the Respondent, by continuing to demand that Hobart Corporation continue to deduct dues from Ferguson's pay, and by continuing to receive his dues, further violated Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. Hobart Corporation is an employer engaged in commerce within Section 2(6) and (7) of the Act.

[2] We find inapposite *KCB Furniture Co.*, 247 NLRB 541 (1980), enfd. 634 F.2d 436 (9th Cir. 1980), which the Respondent cites for the principle that where the parties have agreed to unambiguous contractual language that does not violate the Act the Board should respect the agreement. That case concerned the operation of an automatic renewal clause in a collective-bargaining agreement and not the right of members to resign union membership, or any other comparable issue involving the exercise of Sec. 7 rights. The Respondent also cites *Machinists Local 2045 (Eagle Signal)*, 268 NLRB 635 at 637 (1984), solely for the proposition that where the parties have agreed on a procedure for resignation from a union, that procedure will be given full effect. Without passing on the accuracy of the Respondent's interpretation of that portion of *Eagle Signal*, we point out that, as noted above, the Board subsequently in *Phelps Dodge*, supra at fn. 1, did not give full effect to a restriction on resignation from union membership contained in a collective-bargaining agreement. Further, as noted above, in *New York Telephone*, supra, the Board found that even assuming that the union's procedural requirements concerning the manner in which resignations were to be submitted were lawful, the failure of the member seeking resignation to follow such requirements was not a valid defense to an 8(b)(1)(A) violation where the union in fact received his resignation letter.

[3] Member Johansen notes that the same result is reached if we construe the authorization to continue but that, as the amount of dues owed is zero, zero is the amount to be deducted and remitted.

2. The Respondent, Local No. 128, International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to accept the resignation from membership of David W. Ferguson, the Respondent violated Section 8(b)(1)(A) of the Act.

4. By continuing to demand that Hobart Corporation continue to deduct dues from David W. Ferguson's pay, and by continuing to receive such dues after Ferguson's effective resignation, the Respondent violated Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. In addition, we shall order that the Respondent make David W. Ferguson whole for any monetary loss he may have suffered by reason of the Respondent's unlawful conduct by refunding to him all dues withheld from his pay after he had effectively resigned from membership in the Respondent, with interest to be computed in the manner as prescribed in *New Horizons for the Retarded*.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Local No. 128, International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, Troy, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to accept David W. Ferguson's resignation from membership.

(b) Continuing to demand that Hobart Corporation continue to deduct dues from Ferguson's pay and continuing to receive such dues.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Accept David W. Ferguson's resignation from membership, and inform both him and his Employer, Hobart Corporation, in writing of that acceptance.

(b) Refund to David W. Ferguson the dues unlawfully deducted from his paycheck following his valid resignation, as set forth in the remedy section of the decision.

(c) Post at its business office and other places where notices to its members are customarily posted copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to accept David W. Ferguson's resignation from membership in our organization.

WE WILL NOT continue to demand that Hobart Corporation continue to deduct dues from David W. Ferguson's pay.

WE WILL NOT continue to accept dues unlawfully deducted from Ferguson's pay.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT accept the resignation of David W. Ferguson and inform him and the Hobart Corporation in writing that we have done so.

WE WILL refund to David W. Ferguson dues unlawfully withheld from his pay, with interest.

LOCAL NO. 128, INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

*U.S. G.P.O. 1989-241-524:00003